1923

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Exchequer Court of Canada

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1923

Memorandum

The Honourable Sir Walter G. P. Cassels, President of the Exchequer Court of Canada, departed this life on the 1st day of March, 1923, having held the position of Judge of the Court from the date of his appointment, 2nd March, 1908, till 1920, when he became President of the said Court. His decisions, which are regarded by the whole Bar of Canada as of high authority, are published in the Exchequer Court Reports, volumes 11 to 21, inclusive, and in the first volume of the Canada Law Reports, 1923, Exchequer.

68208—B1½

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE SIR WALTER G. P. CASSELS.
(Died on the 1st March, 1923)

THE HONOURABLE ALEXANDER K. MACLEAN.
(Appointed 2nd November, 1923)

PUISNE JUDGE:

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

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA:

The Honourable ARCHER MARTIN, appointed 4th March, 1902—British Columbia Admiralty District.

do CHARLES D. MACAULAY, appointed 6th January, 1916—Yukon Admiralty District.

do F. E. HODGINS, appointed 14th November, 1916—Toronto Admiralty District.

do W. S. STEWART, appointed 26th July, 1917—Prince Edward Island Admiralty District.

do SIR J. DOUGLAS HAZEN, appointed 9th November, 1917—New Brunswick Admiralty District.

do HUMPHREY MELLISH, appointed 25th November, 1921—Nova Scotia Admiralty District.

do F. S. MACLENNAN, formerly Deputy Local Judge, appointed Local Judge 21st December, 1921—Quebec Admiralty District.

DEPUTY LOCAL JUDGES:

do W. A. Galliher—British Columbia Admiralty District.

do T. S. Rogers—Nova Scotia Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE SIR LOMER GOUIN, K.C.M.G., K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA

THE HONOURABLE D. D. MCKENZIE, K.C.

THE HONOURABLE E. J. MCMURRAY, K.C.

CORRIGENDA

P. 6. Foot note (1) [1910] 19 Man. R. 300 should be on p. 5 referring to *Robinson* v. *C.N.R.*

P. 108. Foot note (2) should read [1851] 7 Moore's P.C. 267.

P. 117. Foot note (3) should read [1919] 88 L.J.P.C. 204; 48 D.L.R. 151; 1920 A.C. 208.

P. 159. Line 6 reads "the port side" should read "the west side."
line 12—The words "another and" should read "a more."

ERRATUM

Errors in cases cited in the text are corrected in the Table of Names of Cases Cited.

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MEMORANDA

Appeal was taken to the Supreme Court of Canada in the following cases, and

(*a*) Judgment rendered in:—

1. *Ontario Minnesota Power Co.* v. *The King*, 20 Ex. C.R. 279. Judgment of this Court varied. Leave to appeal to Privy Council granted.
2. *The Home Appliances Mfg. Co.* v. *Oneida Community*, 1923 Ex. C.R. 44. (Affirmed, 1923 S.C.R. 570).
3. *George Hall Coal Co. of Canada* v. *SS. Maplehurst*, 1923 Ex. C.R. 167. (Affirmed, 1923 S.C.R. 507).
4. *The King* v. *The City of Hull*, 1923 Ex. C.R. 27. (Appeal allowed, 9th October, 1923).

(*b*) Pending:—

1. *The King* v. *Nashwaak Pulp & Paper Co.*, 21 Ex. C.R. 434.
2. *American Druggists Syndicate* v. *Bayer & Co.*, 1923 Ex. C.R. 65.
3. *Hurlbut Shoe Co.* v. *Hurlburt Shoe Co.*, 1923 Ex. C.R. 136.
4. *Montreal Transportation Co.* v. *The King*, 1923 Ex. C.R. 139.
5. *Warner Quinlan Asphalt Co.* v. *The King*, 1923 Ex. C.R. 195.

Appeal was taken to the Exchequer Court of Canada from the decisions of the Local Judges in Admiralty in following cases

1. *McDonald* v. *SS. Seneca*, 1923 Ex. C.R. 13. (Affirmed 1923 Ex. C.R. 177).
2. *SS. Hamonic et al* v. *Ship Robert L. Fryer*, 1923 Ex. C.R. 155.
3. *SS. Westmount et al* v. *Ship Robert L. Fryer*, 1923 Ex. C.R. 161.
4. *Canadian Dredging Co.* v. *The Northern Navigation Co.* et al, 1923 Ex. C.R. 189.
5. *The Lakes & St. Lawrence Transit Co.* v. *Niagara, St. Catharines & Toronto Ry. Co.*, 1923 Ex. C.R. 202.

(Nos. 2 and 3 are still pending.)

(No. 4. Appeal dismissed; No. 5. Appeal allowed, on Dec. 1, 1923).

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

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OF THE

NAMES OF CASES CITED

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

HIS MAJESTY THE KING.....PLAINTIFF;

AND

1922
Nov. 7.

FRANK A. GILLIS COMPANY LIMITED..DEFENDANT.

Government Railways—Canadian Car Demurrage Rules—Conditions under which demurrage is recoverable.

Under the Canadian Car Demurrage Rules, authorized by the Board of Railway Commissioners for Canada, and approved by Order in Council of the 12th July, 1918, for use on Canadian Government Railways, where a railway has given notice to the consignee of the arrival of his car, the consignee has 24 hours free time within which to direct the placement of such car. Thereafter he is allowed 48 hours to take delivery of his goods, provided the car has been placed "in a reasonably accessible position for unloading" during such 48 hours. If the consignee fails to take delivery under such conditions within the 48 hours, demurrage begins to run whether or not the car is kept on a suitable delivery track after the 48 hours, or is thereafter placed on a storage track.

Quaere: Having in view the provisions of section 1 of 9-10 Geo. V, c. 13, does the Railway Act, 1919, become applicable to the Canadian National Railways before the appointment of directors is made in conformity with the enactment first mentioned?

INFORMATION by the Attorney General of Canada seeking to recover the sum of $5,011.00 for demurrage charges alleged to be due by the defendant by reason of his failure to unload goods consigned to him, within the statutory delays (1).

June the 21st and 22nd, 1922.

(1) Reporter's note: Railway demurrage was considered by the English Court of Appeal in the *Great Western Railway Company* v. *John Laing & Company,* (1922) 39 T.L.R. 93.

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THE KING v. F. A. GILLIS CO.

Case now heard before the Honourable Mr. Justice Audette, at Fredericton.

W. C. MacDonald, for plaintiff.

W. L. Hall, K.C., for defendant.

AUDETTE, J. now (November 7th, 1922) delivered judgment.

This is an information exhibited by the Attorney General of Canada, whereby it is sought to recover (by amendment) the sum of $5,011.00, for demurrage charges alleged to be due, by the defendant, for cars placed for unloading in Willow Park yard, in the city of Halifax, in the province of Nova Scotia, during the year 1920.

The defendant, who carries on, at Halifax, the business of builders' and contractors' supplies, was, in the year 1920, acting as agent for the Pictou County Construction Supply Co., selling and delivering sand and gravel shipped mostly from Seaforth beach. He was the consignee of such commodity in all cases.

Under the provisions of the Canadian Car Demurrage Rules, on the arrival of these cars at Rockingham yard, which is considered as a sorting terminus for the whole of Halifax, the railway company issued advice notes which were promptly delivered by messenger to the (defendant) consignee who gave receipt therefor and who had then 24 hours (Rule 3) to order his car to any point. In all cases, except in respect to five cars, he ordered them to be placed at what he termed Cotton Factory Siding.

"Car placed" or "placement" has a well understood meaning in railway vernacular, and it is defined in the demurrage rule as "a reasonably accessible position for loading or unloading."

After the car is placed the consignee is allowed 48 hours (2 days) free time for unloading.

These regulations are to be found in "The Canadian Car Demurrage Rules" authorized by the Board of Railway Commissioners for Canada and approved by an order in council, of the 12th July, 1918, for use on the Canadian Government Railways. See Exhibit No. 1.

The controversy in the present case arises from the charges made by the Canadian National Railways for demurrage after these 48 hours had elapsed.

The defendant contends that the cars in question were either placed on storage sidings or on sidings other than those assigned or named by him, or on sidings unfit to be used for unloading.

The Crown, on the other hand, contends that as the defendant had no place to take the sand and gravel and store it before delivering to a purchaser, it became of great advantage to him to keep it in the railway yard until he found a customer, and that he was negligent and dilatory in taking delivery when the sand and gravel was not wanted.

The consignee has no right to delay unduly taking delivery when the sand and gravel was not wanted.

The consignee has no right to delay unduly taking delivery of his cars with the object of serving his own purposes, at the expense of the carrier. Yet the carrier has no right to expect to be entitled to collect demurrage when he cannot give ready delivery

without delay and without furnishing adequate and suitable accommodation,

that is,

without placing the car in a reasonably accessible position for unloading.

Nor has the carrier any justification for delaying teams sent by the consignee for unloading, for a full morning, as was proved in this case, these teams being paid by the hour by the consignee.

Is there not an implied warranty that before demurrage can be charged that the carrier has in all respects the goods ready for delivery? And does not the law look with a jealous eye upon any effort of the carrier to lessen his contractional obligations, either express or implied? Yet the primary duty of a carrier is to carry; it is not his duty as such to furnish storage beyond a reasonable time necessary for unloading and removal. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach* (1) *Southern Ry. Co.* v. *Prescott* (2) *American Paper and Pulp Association* v. *Baltimore & Ohio Ry. Co. et al* (3).

(1) [1915] 239 U.S. 588 (2) [1916] 240 U.S. 632.
(3) [1916] 41 I.C.C. 506 at p. 512.

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Diligence is expected from both parties respectively.

In arriving at the determination of the present controversy we must bear in mind that no one has a right to unduly enrich himself at the expense of others. That is, on the one hand it would appear that the railway company could hardly ask demurrage upon a car which is not placed "in a reasonably accessible position for unloading", and on the other hand the defendant after his car has been duly placed on a proper siding for unloading during 48 hours, after the 24 hours following the advice notice, has no right to expect that the railway will keep his car indefinitely either on that siding or even on storage siding without making charges therefor, in the nature of demurrage. The defence set up at bar was, inter alia, that demurrage did not run unless the cars were continuously kept standing on "a reasonably accessible position for unloading",—or as more especially put by counsel, on the main line and on the long and short team tracks. This is a view with which I am unable to agree having due regard to the course and natural exigencies of the carrier's trade and business. Hence the cars after they have been kept accessible for unloading during 48 hours, after the 24 hours notice, need not be kept upon team tracks but may be kept on storage tracks, kept accessible for delivery within shortest practicable time, on demand by the dilatory consignee.

In other words I find a railway company is entitled to recover demurrage only after the car has been for these 48 hours, available for unloading by the consignee from a proper and reasonable team track. That it is not necessary thereafter for the railway company to keep the car on a team track to entitle it to claim demurrage and the consignee has no right to ask the railway to keep his car indefinitely upon a team track, thus paralyzing the business of the railway company. After the expiry of the 48 hours, the railway company may place the cars on storage tracks, charge demurrage or storage therefor and when the consignee thereafter comes to unload, the railway company is to be taken as if the cars had at all times been accessible on

team track for unloading, provided the carrier is always ready to deliver within shortest practical time. Once the carrier has placed the cars during 48 hours upon a reasonable position for unloading, on a team track, he can charge demurrage thereafter.

Counsel on behalf of the plaintiff cited at bar the case of *Miller & Co.* v. *The Georgia Railroad and Banking Co.* (1) and relied upon the same. Canadian courts, like the English courts, are accustomed to treat the decisions of the American courts with great respect, although they are in no manner bound by them. That case, however, must be distinguished from the present one in very many respects. Indeed the rules of demurrage had there been made by the carrier himself and it was a question whether they were reasonable or not and the most important point in that decision which comes within the range of appositeness is to be found at p. 576, under par. 5, wherein it appears that the point was there narrowed as to whether "the time required to place cars in position should not be included in computing demurrage."

That American case must be distinguished. The question submitted for determination in the present case is much wider and comes within the scope of rules that have the force of law and not rules made by the carrier itself. Indeed under our Canadian rules, it is provided by Rule 4 that

> (*c*) On cars held for unloading, time shall be computed from the first 7 a.m. following placement on public delivery tracks, * * *

There is no ambiguity. The time for reckoning or counting demurrage runs only from the placement on public delivery tracks. The rules direct that no demurrage can be reckoned before complying with this requirement.

Moreover, under sub-par. (*h*) of the same rule, there is a further general clause which embodies the principle of justice and rectitude with which such computation is to be made, by further stating that

> time lost to the consignor or consignee through switching cars or through any other cause for which the railway company is responsible, shall be added to the free time allowance.

See also *Hals.* 26, 120; *Robinson* v. *C.N.R.* (1).

(1) [1891] 88 Ga. R. 563.

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Audette J.

This provision brings the controversy within the scope of what I said at the opening, and that is, in other words, that a person guilty of negligence or derelict in doing his full duty cannot afterwards avail himself of such conduct to assert and build up a claim thereon. And that applies correspondingly and equally well to the plaintiff and defendant in the present case.

The Canadian Rules further provide that a "placement" is made,—that is when the 48 hours of free time begin to run—

> when a car is placed in a reasonably accessible position for loading or unloading.

The plaintiff in the present case has assumed the burden of proof and has established where the cars were during the whole period for which demurrage is claimed, and both parties have adduced evidence in respect of what should be taken to be public team tracks.

However conflicting that evidence may be that brings us to the consideration of that very question.

It results from the evidence, as illustrated by plan exhibit No. 2, that there are 13 tracks at Willow Park used as storage and unloading tracks and I shall now have to determine which are unloading tracks within the intent, meaning and spirit of the regulations.

I may say as a prelude, it has been beyond peradventure established by overwhelming evidence that the use of the words or expression "Cotton Factory Siding" in the present case, means Willow Park. It is an old generic name which is a denomination comprehending all species of sidings at Willow Park. Before the establishment of the Round House, the whole district was known as Cotton Factory Siding. Most that can be said is that one line could be used to go to the Cotton Factory Siding proper. The cotton factory which had been destroyed at the time of the explosion is at some distance from the *locus in quo* in this case.

The General Railway Act, 1919, 9-10 Geo. V, ch. 68, sec. 312, dealing with questions of accommodation for traffic,

(1) [1910] 19 Man. R. 300.

provides, among other things, that the railway company shall furnish adequate and suitable accommodation for unloading such traffic, without delay, and with due care and diligence deliver all such traffic.

Does the General Railway Act apply to the C.N.Ry. as provided by 9-10 Geo. V, ch. 13, before the appointment of the directors as enacted by sec. 1 of the Act? This is a question that came before the courts in the case of *Mount Royal Tunnel Terminal Company and Canadian Railway Company* v. *Rosa* (1) and upon which a formal decision was not given notwithstanding the views expressed by some of the judges.

But whether the Act applies to the Government Railways or not, that railway system cannot rid itself of the duty cast upon all carriers by rail to afford suitable and reasonable facilities for delivery of goods carried to the consignees and to use due care and diligence in making such delivery. It may be that the provisions of the general Railway Act above cited are simply declaratory of the common law duty and no more.

In construing and applying these Rules and Regulations reference must be had to the general body of the Rules, and bear in mind the fundamental obligations of the carriers.

I shall now have to determine which out of the 13 tracks mentioned at trial and shewn on plan exhibit No. 2, were in the spring of 1920, on the one hand, "unloading tracks" and on the other, mere "storage tracks". This has become a very difficult task owing to the especially conflicting evidence upon this point and the further difficulty of making a finding upon the actual state of these tracks, not at the date of the trial or during trial, but dating back two years ago, that is during the months of April, May, June, July and August, 1920, with the then prevailing conditions involving the congestion at Willow Park for the well known reasons mentioned in the evidence.

The thirteen tracks at Willow Park, in question in this case are:—

(1) [1922] Q.R. 32 K.B. 458.

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Audette J.

1, Main line; 2, Short team track; 3, Long team track; 4, No. 3; 5, No. 4; 6, No. 4½; 7, No. 5; 8, No. 5½; 9, A; 10, B; 11, C; 12, Hennessy siding, and 13, City field.

The first track, the main line, can be used for unloading at intervals, when not otherwise used, for shunting, etc., as its very name clearly indicates.

The three tracks over which I experience most difficulty in arriving at a conclusion are tracks A, 4½ and 5, and I confess I have with great hesitation classified them as storage in 1920. They appear to have been in a bad state in the spring. They might have been fit to be used in an emergency under temporarily favourable weather conditions. Yet the fact that it was possible to use them in an emergency when the yard was congested, does not necessarily bring these tracks within the definition of the rules and with what is contemplated by the statute. Moreover, the fact, as established by the evidence, that only half a load, or part of a load, could be hauled or drawn from such tracks, would not be a compliance with or satisfaction of the statute and the regulations—especially when the consignee pays the teams by the time—which in the result would, through the railway's negligence, cost him double the amount for delivery.

Track A is, properly speaking, a car-repair track, leading to the shops—as indicated upon the plan exhibit No. 2, and as put by the yard-master Lovet part of it has been used in an emergency.

With respect to tracks 4½ and 5 there is a deal of conflicting evidence, and it is almost impossible to arrive at satisfactory conclusion upon the same.

Witness McLeod took delivery at tracks 4½, 5 and A, but had trouble at A—too high. Witness Wright considers 4½ as hauling. Witness Bishop hauled from it and declares it is not fit for trucks and it is a question of the size of the load. It was difficult to get out with ½ a load. Witness Craig says one could not take a full load from it at the time, as it was not in good condition. And witness McDonald contends it could be used for unloading provided there would be no running train; but he does not consider 4½ and 5 as unloading tracks. They are storage. It is a fill which

they were grading at the time, both on 4½ and 5. And witness McCann testifies it was not in good condition that season. Witness Bigelow states they are both storage tracks. Witnesses Wright and Craig would consider them as hauling sidings, while witnesses Bigelow, McDonald and Seaforth consider them as storage.

These sidings A, 4½ and 5 were not in 1920 properly speaking, except perhaps in an emergency, fit for unloading, while they have been improved since and could now be considered as unloading sidings.

Having regard to the expression and qualification found both in the regulations and in the statute (which seems to embody the common law in that respect) I find that the 13 sidings above recited must be classified as follows during the months of April, May, June, July and August, 1920, namely:

UNLOADING	STORAGE
1. Main line	No. 3
2. Short team track	No. 4
	No. 5½
3. Long team track	A
4. Hennessy siding	
5. City field	
	4½
	5

Therefore, there will be judgment ordering and adjudging that the plaintiff do recover from the defendant all demurrage charges for the days after which a car has been placed during 48 hours (following the 24 hours notice of arrival) upon a fit and proper siding and in a "reasonably accessible position for unloading", namely, upon sidings or tracks known as: The Main line; Short team track; Long team track; Hennessy siding and City field. The whole with costs in favour of the plaintiff.

If the parties fail to agree in adjusting the amount of demurrage recoverable, leave is hereby given to either of them to apply to the court, upon notice, for further direction in respect of the same.

Judgment accordingly.

1922
Dec. 2.

QUEBEC ADMIRALTY DISTRICT

JOSEPH ROULEAU .....PLAINTIFF;

VS.

THE S.S. *ALEDO*.....DEFENDANT.

Shipping—Foreign vessel—Wages—Protest of foreign consul—Admiralty Court Rule 37 (a)—Contents of affidavit to lead warrant—Discretion of the court—Jurisdiction.

A seaman who had signed on an American ship at Norfolk, Va., instituted an action in the Quebec Admiralty District against the ship for wages. No notice of the institution of the action was given by him to the United States consul, and the affidavit to lead to warrant omitted to state the national character of the ship. When at the port of Montreal the seaman refused to obey the commands of the master, was guilty of disorderly conduct and of being intoxicated. He was arrested and convicted by a local magistrate. Moreover, the consul, by virtue of the powers conferred on him by the law of the United States, discharged the seaman at this port upon the request of the master, who deposited with the consul the seaman's wages to that date and his fare home.

The defendant moved to dismiss for defects in the affidavit and the consul filed a protest against the action being allowed to proceed.

Held, that failure by plaintiff to comply with the provisions of section 37 (*a*) of the Admiralty Rules, is alone sufficient to justify the dismissal of his action by the court.

2. that, while the American consul had power to deal with the dispute between the plaintiff and the American ship, his protest to the court did not deprive it of its jurisdiction. On the other hand the court, under proper circumstances, may exercise its discretion to decline to proceed with such an action.

ACTION *in rem* by a seaman for wages against an American ship the property of the United States Shipping Board.

December 2nd, 1922.

Case now heard before the Honourable Mr. Justice Maclennan, at Montreal.

E. W. Westover, for plaintiff.

W. B. Scott, for defendant.

The facts are stated in the reasons for judgment.

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ROULEAU
v.
SHIP *Aledo*.

MACLENNAN, L.J.A. now (December 2nd, 1922) delivered judgment.

This is an action by a seaman for wages against an American ship the property of the United States Shipping Board. Plaintiff signed articles at Norfolk, Virginia, on 19th June, 1922. The *Aledo* was in the port of Montreal on July 3rd, 1922, when plaintiff refused to obey the lawful commands of the master, was guilty of disorderly conduct and was intoxicated, and in consequence whereof he was arrested and convicted on 7th July, 1922, before one of the judges of the Sessions of the Peace. The American consul has filed a protest against the prosecution of this action. Defendant moves for its dismissal on the ground that the affidavit to lead to warrant did not comply with the rules of practice and in the alternative that in consequence of the protest of the American consul that the action be dismissed or not allowed to proceed. Rule 37 (*a*) requires in an action for damages that the affidavit should state the national character of the ship and if the ship is foreign, that notice of the action has been served upon a consular officer of the state to which the ship belongs, if there is one residing in the district within which the ship is at the time of the institution of the suit, and a copy of the notice should be annexed to the affidavit. In this case there was no notice in writing to the American consul in Montreal, consequently no copy of the notice annexed to the affidavit. This omission alone would be sufficient to justify the court in dismissing the action. The protest of the American consul states that he is authorized by the statutes of the United States to discharge an American seaman (and plaintiff having regularly signed on the articles of an American steamship is to be regarded as an American seaman) from service on an American vessel in his jurisdiction upon the application of the master, if it appears to him that the seaman is entitled to be discharged under any Act of Congress or according to the general principles or usages of maritime laws as recognized in the United States, and to require payment of any arrears of wages; that misconduct on the part of a seaman constitutes a usual case for discharge by a consular

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Maclennan L.J.A.

officer upon the application of the master; that the master of this ship applied for the discharge of plaintiff on the ground of the latter's misconduct and refusal to obey the lawful command of the master; that the consul agreed to discharge the plaintiff on 12th July, 1922, and that the master of the vessel deposited with the consul balance of wages due to plaintiff to said date $22.16, and a further sum of $10.43, the cost on that date of a railway ticket from Montreal to Portland, Maine, a seaport of the United States of America, and the consul has in his possession the total of these deposits $32.59, which he will hand to plaintiff whenever he may personally appear and give a receipt for the same and sign a discharge certificate, and the consul protests that the action should not be proceeded with and that the court in its discretion should decline to exercise jurisdiction. The representations contained in the protest of the American consul are not challenged by plaintiff. The consul's protest does not deprive the Admiralty Court of its jurisdiction in a cause for wages against the foreign ship, but the court will use its discretion whether or not to exercise its jurisdiction.

The Herszogin Marie (1), *The Octavie* (2), *The Nina* (3), *The Bridgewater* (4), *The Leon XIII* (5).

The American consul had power to deal with the dispute between the plaintiff and the American ship and for the reasons stated in the consul's protest, the court is entitled to exercise its discretion to decline to proceed with the present suit, and for these reasons as well as for the defective affidavit already referred to plaintiff's action is dismissed with costs, and there will be judgment accordingly.

Solicitor for plaintiff: *E. W. Westover.*

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

(1) [1861] Lush. 292.
(2) [1863] Br. & Lush. 215.
(3) [1867] L.R. 2, P.C. 38.
(4) [1880] 7 Q.L.R. 346.
(5) [1883] 5 Asp. M.C., 73.

NEW BRUNSWICK ADMIRALTY DISTRICT

1922
Nov. 10.

W. N. McDONALD, OWNER OF SHIP *CURLEW* ..... } PLAINTIFF;

AGAINST

THE SHIP *SENECA*.

Shipping—Salvage services—Conditions required for volunteer or requested services.

The *S.*, a steamship, was caught in the ice off Louisburg, N.S., and the Government steamer *M.* went to her assistance. The *M.* was unable to tow the *S.* to a safe place owing to ice conditions, but with the approval of the *S.* wired the agent of the Marine Department at Sydney, N.S., for further aid. The tug *C.* was engaged for the purpose by such agent. Taking a heavy hawser the *C.* started to render assistance. She was unable to reach the *S.* on that day or the next day owing to ice and fog, but finally reached her. The *S.* sent the tug to the *M.* who told the *C.* to "stand by". On the morning following the day on which she got in touch with the *S.* and while using the hawser brought by the *C.*, the *M.* endeavoured to tow the *S.* After going a few hundred feet the hawser broke, but the *M.* was able to go ahead, clearing the way, and the *S.* was able to follow under her own steam. By this means the *S.* was brought into harbour. A wireless was sent by the *M.* to the marine agent, at Sydney, after the *C.* had left, saying it was useless for the *C.* to try and give assistance, ice being too heavy.

Held, that the *C.* had rendered salvage services to the *S.* and that she was entitled to the ordinary salvage award.

Semble: That a wireless message, contramanding an earlier one requesting the services of a tug, received after the tug had left to render assistance, whether the latter message was or was not communicated to its owners, cannot alter the nature of the services, and change them from requested services to that of volunteer services.

SUMMONS *in rem* issued by plaintiff claiming $10,600.00 for salvage services rendered to the ship *Seneca,* her cargo and freight, between the 4th and 13th days of May, 1922, at Fourchu, and for damages sustained by the ship *Curlew* whilst performing said services.

October 10th and 11th, 1922.

Case now heard before the Honourable Sir J. Douglas Hazen at the City of St. John.

The facts are stated in the reasons for judgment.

1922
W. N. McDONALD
v.
SHIP Seneca.

F. R. Taylor, K.C., for plaintiff: There is no dispute as to this being a salvage service, and the only thing to consider is the question of compensation. Cites *The Undaunted* (1); *The E.U.* (2); *The Santipore* (3); *The Melpomene* (4): *The De Bay* (5); *The August Korff* (6); *The Fairport* (7); *The Glengyle* (8); *The Manchester Brigade* (9).

M. G. Teed, K.C., for defendant: In a requested case, the man is entitled to recover even though he may not have succeeded in what he set out to do. In the case of volunteer service he is entitled to recover only for what services he actually rendered. Both these principles exist here. The vessel was more or less in danger, not imminent, but at risk. We admit we are liable for the first half day. We deny responsibility after that except in so far as the use of the hawser and whatever may flow from that, the value of which we admit responsibility for. After the hawser came, he went out as a volunteer, and he is entitled to only what benefit he conferred. Cites *The Undaunted* (1); *Kay on Shipmasters & Seamen 2nd ed. sec. 698; Maclachlan on Shipping 5th ed. 704; the Killeena* (10); *The Cheerful* (11); *The India* (12); *The Camellia* (13); *The Zephyrus* (14); *The Chetah* (15).

The evidence is clear that the hawser was used to the extent of hauling the boat from one hundred to three hundred yards or thereabouts, and that is all it was used for, and then it snapped. There is no evidence that that conveyed any material benefit upon the saving of the ship. There was no danger of the ship going on Guyan Island. *The City of Chester* (16).

(1) [1860] Lush. 90.
(2) [1853] 1 Spinks E. & A. 63.
(3) [1853] 1 Spinks E. & A. 231.
(4) [1873] L.R. 4 A. & E. 129.
(5) [1883] 8 A.C. 559.
(6) [1903] P. 166.
(7) [1912] P. 168.
(8) [1898] P. 97 and [1898] A.C. 519.
(9) [1921] 276 Fed. R. 410, referred to in 35 Harvard Law Review 887.
(10) [1881] 6 P.D. 193.
(11) [1885] 11 P.D. 3.
(12) [1842] 1 W. Rob. 406
(13) [1883] 9 P.D. 27.
(14) [1842] 1 W. Rob. 330.
(15) [1868] L.R. 2 P.C. 205
(16) [1894] 9 P.D. 182.

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HAZEN, L.J.A. now (November 10th, 1922) delivered judgment.

This is an action for salvage brought by the steamship *Curlew* against the steamship *Seneca*, the alleged services having been rendered in the month of May last.

The *Seneca* was caught in the ice not far from Louisburg. She needed aid, and the Canadian Government steamer *Montcalm* was sent to her assistance. The *Montcalm* finding it impossible in consequence of the ice to take the *Seneca* to a safe place, communicated with the agent of the Marine Department at Sydney, Nova Scotia, the message which was sent being as follows:

RADIO, MONTCALM. May 4, 1922.

V. Mullins, Sydney, N.S.,—

Trying to tow *Seneca* to Louisburg stop Hawser broken stop Impossible to take her in tow tug needed urgently If get tug can make the way and tug will tow her behind if tug on hand kindly advise will meet off Louisburg Harbor.

This message was sent by the captain of the *Montcalm* after communicating with the *Seneca* and getting its approval. On receipt of this message Mr. Mullins got in communication with the owner of the *Curlew* which was at Louisburg and was I think the evidence shows the only tug available, and she was engaged to go to the *Seneca*'s assistance. It appears that Mr. McDonald the owner of the *Curlew* said that he would not send the tug to the assistance of the *Seneca* unless he had some assurance of being paid for his services, as the conditions were such that it was very dangerous for a tug to proceed from Louisburg, and Mr. McDonald in his evidence stated that he was informed by Mr. Mullins that the latter was satisfied that the *Montcalm* would not ask for a tug unless asked to do so by the *Seneca* but she had to wireless herself and that if he, McDonald, sent the *Curlew* he would be paid for it, in consequence of which the Captain of the *Curlew* was instructed to proceed with the *Curlew* taking a hawser with him, which he did.

The *Curlew* which had originally been a Dominion Government cruiser and been converted into a wrecking ship by her owners, left Louisburg at two o'clock on the afternoon of May 4th. She was unable to reach the *Seneca* and

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returned again that night to Louisburg. She went out again early Friday morning, the 5th of May, and again was not able to reach the *Seneca* owing to the ice, and returned to Louisburg the same evening. She left again on Saturday morning at half past five o'clock; in the meantime having got the position of the *Seneca* by latitude and longitude, and finally reached the *Seneca* on the following Tuesday afternoon, that is to say, after she had been trying from the previous Thursday. The delay was caused by the fact that they were interrupted seriously by both ice and fog, and the *Seneca*'s position had, during the period, been changing. When they finally spoke the *Seneca* on Tuesday afternoon, the captain of the *Seneca* sent them to the *Montcalm*, and the *Curlew* told the captain of the vessel that the tug has been sent out by the agent of the Marine Department with a hawser, and the reply he received was "Stand by, and when daylight comes they will take the hawser." On Tuesday, the ships were close together and the ice was heavily packed around them. The *Curlew* had brought out a sixty-five fathom hawser of $11\frac{1}{2}$ inch circumference, which had been used once before, but which was, it appears, in good condition. The captain of the *Montcalm* under the instructions of the captain of the *Seneca* used the hawser which had been brought out by the *Curlew* to take the *Seneca* in tow, instead of carrying out the plan suggested in the wireless message that the *Montcalm* would go ahead of the *Curlew* breaking the ice, the *Curlew* towing the *Seneca* behind. The hawser was taken on board the *Montcalm* and attached to the *Seneca*. The ice, however, was very thick and the hawser broke after the *Seneca* had been towed a distance of a few hundred feet, but after a time, the *Montcalm* was able to go ahead and the *Seneca* to follow under her own steam. It does not appear from the evidence definitely as to whether the *Seneca* was greatly benefited by the distance she was towed by the *Curlew's* hawser or whether or not the *Montcalm* by being able to tow her for this distance, was able to put her in a place of safety.

Dominique LeBlanc, master of the *Curlew*, testified that at the time the *Montcalm* started to tow the

Seneca with the hawser which the *Curlew* had taken out, the *Seneca* was drifting towards Guyan Island, which he described as one of the worst places on the coast, and I am asked to conclude that the result of the vessel being towed by the hawser was to prevent its drifting, on to this coast, and becoming a wreck.

Such may have been the case, but I do not find the evidence is sufficient to justify me in absolutely coming to that conclusion. The *Seneca* eventually got into Louisburg, and the *Curlew* got out of the ice and back to Sydney, which is her home port. The claim is that the case is clearly one of salvage, that the *Curlew* rendered important service by taking out the hawser under instructions from the *Seneca* through the captain of the *Montcalm,* that in the services she rendered, she was engaged continuously for ten days from the fourth to the thirteenth of May, and that she sustained considerable damage, having destroyed her propeller, and being generally injured, and that she had to be hauled up on the blocks and repaired in Sydney, and that those repairs were not completed until the twelfth of June, and that further, the *Curlew* was engaged in actual work for the *Seneca* from the fourth of May until the twelfth of June, and that during that time the repairs were made with the exception of the propeller shaft tube which was injured, and a certain amount of wear and tear which had not yet been repaired, and that the fabric of the ship generally was damaged to an extent which had not been ascertained.

The damages which are claimed are as follows:—

New cast steel propeller	$ 600 00
Amount paid the Sydney Foundry & Machine Co.	581 35
11½-inch hawser	600 00
Damages to the stern tube and damage by general strain going through ice, which was not included in the general repairs made by the Foundry & Machine Works, but would be a very definite depreciation on her general overhauling	1,000 00
Making a total actual damage claimed as sustained by the *Curlew* of	$2,781 35

It appeared in the evidence that the cost of a new hawser would not be more than $400.00. I think that undoubtedly the item for a new cast steel propeller $600.00 and the

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account of the Sydney Foundry & Machine Company are correct, but the damage to the hawser should be reduced by $200.00.

So far as the general damages are concerned, the evidence is very uncertain. Mr. McDonald, the owner, estimated the depreciation in the value of the *Curlew* which had not been repaired at $1,000.00, but admitted it was just more or less a guess, he stated that there was damage that had been done to the machinery caused by the heavy ice work, and by proceeding with a broken propeller. He also testified the propeller being wounded wouldn't run smoothly, and this would cause excessive vibration to the engine and shaft, and that there was also damage done to the lignum vitae bearings, and that these bearings would be very much damaged, during the time the vessel would be working in the ice.

I think no doubt that the fabric of the vessel and parts of her machinery would undoubtedly be damaged, and that amount of the damage could not be ascertained with accuracy until a general overhauling took place, even if then, but in view of the captain's statement, that his estimate of $1,000.00 is more or less of a guess, and as no other witnesses so far as I have ascertained gave any estimate of such damage, I do not think I would be justified in allowing this amount, and would reduce it by the sum of $500.00.

Although a case was cited to me wherein under somewhat similar circumstances 5% of the value of the vessel had been allowed, I have concluded therefore that the amount of damages actually sustained by the *Curlew* should be reduced from $2,781.35, the amount claimed, to $2,081.35.

It was claimed on behalf of the *Seneca* that the service which was rendered by the *Curlew* was partly an engaged service and partly a volunteer service, and that this would affect the question of damages, as in a requested case, the vessel is entitled to recover even though it might not have succeeded in what it set out to do, while in the case of a volunteer service, it is entitled to recover only for what services it actually rendered, and it was admitted that the *Seneca* is liable for the first half day and for the value of the hawser, and that is all.

The contention that the service was a volunteer service and not an engaged service, after the first day, is based on a telegram that was sent by the master of the *Montcalm* to Mr. Mullins at Sydney on May 4th. It was not received until after the *Curlew* had started out to sea. This wireless message gave the position of the *Montcalm* and said:

> Impossible proceed Louisburg, ice too heavy stop Two hawsers broken stop No use *Curlew* try to give assistance believe ice too heavy for her will return now to stand by.

This was received after the *Curlew* had sailed. Mr. Mullins is of the opinion that he communicated the contents or substance of this message by telephone to the owner of the *Curlew* or to somebody on his behalf. His evidence, however, on this point, is not very satisfactory, and Mr. McDonald has no recollection of having received it. Had he done so, I do not understand why the *Curlew* would have proceeded to sea again on the following day with the hawser, especially in view of the fact that before he undertook to go out on the fourth of May, Mr. McDonald was very careful to assure himself that the services of the vessel would be paid for.

The *Curlew* was valued by its owner at $18,000 and he stated that he had refused an offer of $15,000 for it a little over a month ago. The *Seneca* at the trial was valued by Mr. Donald, the managing owner, at somewhere between $18,000 and $20,000 at the time she was in the ice, but it appears that she was insured with Lloyds in November, 1921, for £9,000, and valued at that time at £12,000, so I think that the valuation placed upon it by Mr. Donald is somewhat low, although he states that while he has asked $40,000 for the vessel, he would be willing to accept $20,000.

There was no evidence of the *Curlew* having lost any business during the time it was laid up, waiting for and receiving repairs at Sydney. In my opinion, the *Curlew* is entitled to a reasonable compensation for the services rendered.

Taking all the different facts into consideration, the fact that the *Curlew* had definite instructions to go out and did go out and rendered service, that in doing so, it undertook considerable risk, and that the hawser which it took out,

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was used by the *Seneca* for the purpose for which it was asked to take it, I have decided that the services rendered were salvage services, and that the *Curlew* is entitled to the ordinary salvage award on the usual salvage considerations. In my opinion, in addition to the $2,081.35 actual damage incurred, I should award a further sum of $2,000.00 making a total of $4,081.35, and I accordingly do so,—the defendant to pay the costs.

Judgment accordingly.

J. H. MANSEAU.....SUPPLIANT; 1922 Nov. 30.

AND

HIS MAJESTY THE KING.....RESPONDENT.

"Public Work"—Exchequer Court—Jurisdiction—Tort.

On October 15th, 1921, between 7 and 7.30 p.m., it being quite dark at the time, the launch *Delilah C.* was approaching St. Denis wharf on the Richelieu River. In making her course she guided herself by a buoy, passing from 25 to 30 feet therefrom. While on this course she ran aground and suffered damages. The buoy belonged to the Crown and was under its control at the time in question, under the provisions of R.S.C. 1906, c. 44, sec. 5, and R.S.C. 1906, c. 113, sec. 832. At the time of the accident it was shown that the buoy was wrongly located.

Held: that at the time of the accident herein, neither the Richelieu river nor the buoy in question were "public works" within the meaning of section 20, subsec. c, Exchequer Court Act, and that as the action sounded in tort the court had no jurisdiction to grant the relief sought by the petition of right.

PETITION OF RIGHT seeking to recover $2,430 damages to a vessel occasioned by running aground near St. Denis on the Richelieu river.

October 30th, 1922.

Case now heard before the Honourable Mr. Justice Audette at Montreal.

A. Forest for suppliant:

L. A. Rivet, K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (November 30th, 1922) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $2,430 as damages to his vessel occasioned by her having run aground, opposite St. Denis, on the Richelieu river, in the province of Quebec, as a result of the alleged mis-placement of a buoy under the control and care of the Crown.

On the 15th October, 1921, while cruising with passengers between Sorel and Beloeil, the gasoline-launch *Delilah*

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C., between 7 and 7.30 o'clock in the evening, when it was quite dark, arrived near St. Denis wharf and, guiding herself by the buoy, or light on the float, passed, as testified, from 25 to 30 feet therefrom,—ran aground and suffered damages.

Now, on that night, at the time of the accident, the buoy was on the shoal instead of being at the extremity thereof, and it is contended by the suppliant that it was thus wrongly placed ever since the beginning of the season of 1921, but on that point the evidence is absolutely conflicting.

On behalf of the suppliant, witnesses J. H. Manseau, Leblanc, Phaneuf and Parent testified that the buoy was wrongly placed in the spring of 1921, and that it was in the same position at the date of the accident.

On behalf of the defendant, T. W. Weir, captain of the *Argenteuil,* a government vessel, testified that in 1921, he was engaged in the service of placing buoys, and that he then checked the placing of the buoy in question,—and he further checked it on the 27th July of the same year, and that on both occasions the buoy was in its proper position.

Captain J. D. Weir, the superintendent of the marine department for that division, testified that on the 18th July, 1921, in course of an inspection, he checked the buoy in question and that it was in proper position. Witness Hector Charbonneau who was with the superintendent on the 18th July, 1921, further says, on that occasion he moored at the buoy and found it in good position, after having checked its position from their land-marks.

The conflict between the witnesses is indeed very material and is upon a fact which should not offer much controversy. However, I think, it can, to some extent but to some extent only, be reconciled by some explanatory and corroborative statements taken from the evidence adduced by both parties.

I primarily find that the buoy or float,—about 6 to 7 feet square, with a pole thereon of about 6 feet to which is attached a lantern fed with oil,—was out of its normal position on the evening of the accident.

However, the evidence establishes that at the end of each season, the buoy or float is taken ashore into winter quarters, and that the anchor and chain holding it in proper place is let remain at the bottom of the river, and the chain is picked up the following spring and tied again to the float which is thus placed in proper position and at the same place as in the previous year. That course having been followed it would primarily establish that it was just in the same place in the spring of 1921, as it was in the previous year. That is the necessary inference.

Now, sometime during the season a short piece of rope or cable the size of one's wrist was found tied to the float at one end, and cut at the other end. It was very difficult if not impossible to make out anything satisfactory from the evidence of witness Bourgeois, who testified to having found such rope and having removed it. It would appear to be on in the fall; but, it was not there on the 22nd October, 1921, when the buoy was moved to its proper site. Be that as it may, the discovery or finding of this rope, would go a long way to confirm the conjecture respecting this displacement, suggested by witness Charbonneau, when heard on behalf of the suppliant. He contends the buoy might have been displaced, moved or dragged by the act of a scow or barge mooring to it in stormy weather—such occurrences having to his knowledge already taken place with even heavier buoys. And upon this conjecture he is confirmed by Captain J. D. Weir, who actually saw such occurrence on Lake St. Louis, and by witness T. W. Weir, who confirming this view, adds that he attends to displaced buoys two or three times a week. Then the size of the rope would convey the idea that a large and heavy vessel had used it.

Exhibit "B", produced by witness Bourgeois, would also tend to throw some more light upon the displacement, but that document, written by his wife at his demand, was tendered in evidence in the course of his testimony under such circumstances that it becomes incumbent upon me to find it unreliable.

It is immaterial, to a great extent, to know whether the buoy was properly located in the spring of 1921, but the

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suppliant himself in the course of his evidence stated that when they began navigating that season, the buoy was there and the first time they saw it they thought (on pensait) that it had been correctly placed, but I unhesitatingly find it was in a wrong location at the time of the accident.

That brings us to the consideration of the question as to whether, as a matter of law, the Crown could be found liable in damages under the circumstances.

Under the "Department of Marine and Fisheries Act," R.S.C. 1906, ch. 44, sec. 5, and the "Canada Shipping Act," R.S.C. 1906, ch. 113, sec. 832, it must be found the buoy in question was vested in the Crown and under its control at the time of the accident.

The present action is in its very essence grounded on damages and sounding in tort. In such a case there is no liability on behalf of the Crown, unless it is made so liable by statute or is the result of a breach of contract, Audette's Exchequer Court Practice, pp. 106, 108 (L.), *Hopwood* v. *The King* (1); *Poisson* v. *The King* (2).

To succeed the suppliant must therefore bring his case within the ambit of sec. 20 of the "Exchequer Court Act," as amended in 1917, by 7-8 Geo. V, ch. 23, whereby subsection (*c*) of said section now reads as follows:

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

To bring this case within the provisions of subsec. (*c*), as amended in 1917, the injury to property must result from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon a public work. In other words three cardinal conditions are required: (1st) a public work; (2nd) negligence of the Crown officer thereon; (3rd) and the injury must be the result of such negligence.

There is no public work in question in this case.

The first requirement is wanting. The river Richelieu and the buoy are not public works. Indeed, I must come

(1) [1917] 16 Ex. C.R. 419. (2) [1918] 17 Ex. C.R. 371.

to that conclusion, following the several decisions in the cases of *Wolfe Company* v. *The King* (1); *Piggot* v. *The King* (2); *The City of Quebec* v. *The Queen* (3); *Macdonald* v. *The King* (4); *Larose* v. *The King* (5); *Brown* v. *The Queen* (6); *Montgomery* v. *The King* (7); *La Compagnie Générale d'Entreprises Publiques* v. *The King* (8); *Courteau* v. *The King* (9); *and Desmarais* v. *The King* (10).

Two cases decided by the Supreme Court of Canada are perhaps specially apposite, and they are the *Hamburg American Packet Company* v. *The King* (11) and *Paul* v. *The King* (12). In the former case it was held that the channel of the river St. Lawrence, near Cap à la Roche, between Montreal and Quebec, was not a "public work", —after the Crown had spent money in widening and deepening it, and notwithstanding that subsec. (*a*) of sec. 9 of the *Public Works Act* placed under the control of the minister "works for improving the navigation of any water." In the latter case (the Paul case) it was held that a Government steam-tug and a scow, its tow, working in conjunction with a government dredge, and which caused a collision while engaged in improving the ship channel of the St. Lawrence, was not a public work.

No right of action has accrued to the suppliant under the circumstances of the present case.

On the question of costs, as raised by the argument, I must find that the Crown has pleaded the question of law under sec. 20 of the statement in defence, and further that this case might be distinguished from the Piggot case (*ubi supra*), in that in the present case there might have been some justification to contend that the buoy or float came

(1) [1921] 20 Ex. C.R. 306; [1922] 63 S.C.R. 141.
(2) [1915] 19 Ex. C.R. 485; [1916] 53 S.C.R. 626.
(3) [1891] 2 Ex. C.R. 252, 270; [1894] 24 S.C.R. 420 at 448.
(4) [1906] 10 Ex. C.R. 394 at 397.
(5) [1900] 6 Ex. C.R. 425; [1901] 31 S.C.R. 206.
(6) [1892] 3 Ex. C.R. 79.
(7) [1915] 15 Ex. C.R. 374.
(8) [1917] 57 S.C.R. 527 at 532.
(9) [1915] 17 Ex. C.R. 352.
(10) [1918] 18 Ex. C.R. 289.
(11) [1901] 7 Ex. C.R. 150; 33 S.C.R. 252.
(12) [1906] 38 S.C.R. 126.

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within the definition of what is a public work as defined in some of the statutes.

There will be judgment finding and adjudicating that the suppliant is not entitled to the relief sought by his petition of right.

Judgment accordingly.

HIS MAJESTY THE KING.....PLAINTIFF; 1922 Nov. 30.

AND

THE CITY OF HULL.....DEFENDANT.

Contract—Municipal Law—Hull City Charter—Interpretation.

With a view to the beautification of the cities of Ottawa and Hull and making adequate and convenient arrangements for traffic and transportation within the area in question, etc., the Dominion Crown passed an order in council providing that a commission should be constituted consisting of at least six members, inclusive of the mayor of the cities of Ottawa and Hull, charged with the duties of taking all necessary steps to draw up and perfect such plan, as well as for the systematic development of the cities. The Government to pay half the cost of preparing such plan, the other half to be paid by the two cities in proportion to their population. This was communicated to the city of Hull which at a special meeting passed a resolution approving of the project submitted and appointing the mayor and one alderman to meet with the other members of the proposed commission, to discuss the matter with them and to report. Subsequently the city of Hull passed another resolution that having heard the report of their representatives, etc., it approved of the project as submitted. This was communicated to the Crown who thereupon, by order in council, appointed the commission and the personnel thereof, the mayor of Hull becoming a member. He was present at most meetings and copies of plans prepared by the commission were sent to the city who obtained leave to use parts thereof to advertise the city.

Held that by the orders in council and resolutions above referred to, a valid and binding contract was entered into by the city of Hull with the Dominion Crown to pay its share of the plans, etc., and that a right of action has arisen therefrom in favour of the Crown to recover from the city, notwithstanding the contention of the city that it did not put the amount in its annual estimates, that it did not represent expense for any one current year, that no by-law was passed for payment thereof or submitted to the ratepayers, and that the treasurer had not produced a certificate that funds were in hand available for its payment.

INFORMATION of the Attorney-General of Canada seeking to recover from the city of Hull the sum of $6,560.32 as part of this city's share of certain plans prepared by a commission appointed for the purpose of beautifying the

Reporter's Note:—An appeal has been taken herein to the Supreme Court of Canada.

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cities of Ottawa and Hull and of providing for its future development.

October 18, 1922.

Case now heard before the Honourable Mr. Justice Audette at Ottawa.

Napoléon Champagne, K.C. for plaintiff;

R. V. Sinclair, K.C. and *J. Wilfrid Ste. Marie, K.C.* for defendant.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (November 30th, 1922) delivered judgment.

This is an information, exhibited by the Attorney-General of Canada, whereby it is sought to recover from the defendant the sum of $6,560.32, under an agreement entered into between the Crown and the cities of Ottawa and Hull, as set out in the orders in council and resolutions of the Hull municipal council hereinafter mentioned, for the appointment of a commission to supervise the preparation of plans for regulating the future growth and development of the two cities respectively and the surrounding district, etc.

It is, *inter alia,* admitted by the parties (exhibit No. 1) that, if there is any legal liability on the part of the defendant to pay the plaintiff anything, the amount payable is $6,560.32, with interest from the 25th August, 1918.

And it is further admitted that, pursuant to the order in council of the 12th September, 1913, the mayor of Hull became a member of the commission constituted by the said order in council.

By the order in council of the 5th June, 1913 (No. 1317), it is provided as follows, viz:—

On memorandum dated 29th May, 1913, from the Minister of Finance, submitting that, with others of his colleagues, he has had under consideration the need for the adoption of a comprehensive scheme or plan, looking to the future growth and development of the city of Ottawa and the

city of Hull and their environs, particularly providing for the location, laying out and ornamentation of parks and connecting boulevards, the location and architectural characteristics of public buildings, and adequate and convenient arrangements for traffic and transportation within the area in question.

To this end the Minister is of opinion that a Commission should be constituted, consisting of at least six members, inclusive of the mayor of the city of Ottawa and the mayor of the city of Hull, charged with the duty of taking all necessary steps to draw up and perfect such a plan for the purpose of the beautification and systematic development of the two cities. To carry out this plan, the city of Ottawa, the city of Hull, and the Ottawa Improvement Commission, together with the transportation and traffic companies, would all be required to co-operate with a view to its gradual completion.

It would seem equitable that the Government should pay half the cost of preparing such a plan and that the other half should be paid by the two cities jointly and ratably according to population.

The Minister therefore recommends that the civic authorities in the respective cities be invited to express their views as to the proposals herein made, to say whether they are willing to bear half the expense involved and to assent to the appointment of their respective mayors on such commission.

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

On the 12th June, 1913, the Minister of Finance transmitted to the mayor of the city of Hull a copy of this order in council (5th June, 1913) asking, among other things, the city council to express its views as to the proposals made, etc.

On the 20th June, 1913, at a special meeting of the council of the city of Hull called for the purpose of considering such proposals, it was resolved that:

Attendu que ce conseil approve le projet d'embellissement de la cité tel que proposé par le conseil privé d'Ottawa, et soumis à ce conseil ce soir:

Proposé par l'échevin Thibault.

Secondé par l'échevin Leduc.

Qu'un comité composé de M. le maire et de M.M. les échevins Doucet et le proposeur, soit nommé dans le but de rencontrer les membres du comité du conseil de ville de la cité d'Ottawa, la commission d'embellissement et les membres du conseil privé afin de discuter les propositions contenues dans l'ordre-en-conseil No. 1317, et le rapport du comité du conseil privé approuvé par son Excellence l'Administrateur, en date du 5 juin 1913, relativement à la coopération par la cité d'Ottawa et la cité de Hull à la préparation de plans pour l'embellissement systématique de ces deux cités; et que ce comité fasse rapport au conseil.

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Copy of this resolution was transmitted to the Crown on the 25th June, 1913 (exhibit No. 4), with request to be advised when they could meet the committee.

On the 19th July, 1913, the city of Hull (exhibit No. 6) advised the Crown that at a special meeting of the council of the city of Hull, held on the 18th July, the following resolution was passed and adopted:

Que ce conseil, après avoir entendu le rapport verbal du comité spécial chargé de rencontrer les représentants du gouvernement fédéral relativement à l'embellissement des cités d'Ottawa et de Hull, approuve le projet tel que soumis par le ministre aux membres du comité et que copie de cette résolution soit envoyée au ministre des Finances, à Ottawa.

Thereupon, on the 12th September, 1913, at the recommendation of the Minister of Finance, a further order in council was passed, providing, among other things, as follows:

On a memorandum dated 8th September, 1913, from the Minister of Finance, submitting that in an order in council dated the 5th June, 1913, it was provided that a commission should be constituted consisting of at least six members inclusive of the mayor of the city of Ottawa and the mayor of the city of Hull charged with the duty of taking all necessary steps to draw up and perfect a comprehensive scheme or plan looking to the future growth and development of the city of Ottawa and the city of Hull and their environs and particularly providing for the location, laying out and beautification of parks and connecting boulevards, the location and architectural character of public buildings and adequate and convenient arrangements for traffic and transportation within the area in question.

In this order in council it was further provided that the Government should pay half the cost of the said plan and that the other half should be paid by the two cities jointly and ratably according to population.

The Minister has been officially informed that the municipal authorities have expressed their desire to co-operate with the Government in carrying out the proposal and in bearing their share of the expense as mentioned.

The Minister, in view of the foregoing, recommends that an honorary commission be appointed for the purpose hereinbefore set forth, consisting of the following members, namely,—

His Worship the Mayor of Ottawa, ex-officio.

His Worship the Mayor of Hull, ex-officio.

Sir Alexandre Lacoste, K.C., of the city of Montreal.

Herbert S. Holt, Esq., of the city of Montreal.

Frank Darling, Esq., of the city of Toronto.

R. Home Smith, Esq., of the city of Toronto.

It appears from (exhibit 37) the minutes of the meetings of the commission that the mayor of Hull was present at most of the meetings, except when absent through illness (as therein mentioned) or otherwise.

Furthermore the report of the commission, with copies of plans (exhibit 36) was duly transmitted to the city of Hull after being duly signed by the mayor of that city. And as some of these plans were dealing specifically with the city of Hull, the correspondence filed shows (exhibits 34, 35, 30, 32 and 33) that the city obtained leave to use these plans to advertise Hull.

When the adjustment of the accounts had been prepared (see exhibit 29) and an account rendered to both the city of Ottawa and the city of Hull respectively, the city of Ottawa remitted its share; but the city of Hull, after protracted correspondence exchanged with the Crown, stated the matter had been referred to its legal adviser. In the result the city of Hull refused to pay its share, hence the present controversy.

From the statement of facts above recited, I am of opinion that a perfectly valid contract was entered into as formulated by the two orders in council and the two resolutions of the municipal council of the city of Hull. The letter or language of these documents is perfectly clear, and were it not so, there would in addition be an implied and constructive approval of all their terms and conditions both by the general language used and by the conduct of the duly authorized parties.

The parties having entered into a good and valid contract (see par. 2 of section 392a of charter), a right of action has thereunder accrued to the plaintiff under the circumstances of the case.

Paragraph 2 of section 392a of the charter provides that:—

> Aucun contrat ni arrangement quelconque ne liera la cité, à moins qu'il n'ait été approuvé par le conseil.

The contract in question has been submitted to and approved of by the municipal council of Hull and is therefore binding upon the city, as having been made in the manner provided by section 392a of the charter of the city

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and that alone would seem to entitle the plaintiff to succeed. It has become a "judicial obligation" which the city has to discharge under the provisions of section 393.

A number of cases have been cited at bar by the defendant against recovery, but in almost all these cases a proper or valid contract, as provided by the charter, had not been entered into, which in all cases should be the fundamental consideration.

It is admitted, as already mentioned, that the mayor of Hull became a member of the commission constituted by the order in council. The mayor sat at the meetings of the commission, participated in the deliberations and the city of Hull received and accepted the report of the commission including valuable plans which it intended to use for advertising the city.

However, the defendant refuses to pay upon the grounds that there is no appropriation or provision in the estimates for such extraordinary expenditure and that it had not procured the funds; that the claim does not represent the expense of any one current year; that there is no special by-law passed for the payment of the amount or submitted to the ratepayers; and that the city treasurer never produced to council a certificate under his hand showing there were funds in the possession of the city applicable to the payment of the amount.

The scope of this contract or agreement made in compliance with section 392a is well defined in the orders in council. It cannot be said as contended by counsel, that the expenditure is for the creation of a federal district. That would be confusing a recommendation of the commission with its scope defined by the orders in council as being the preparation of plans looking to the future growth and development of Ottawa and Hull and their environs and particularly providing for the location, and beautification of parks and connecting boulevards, etc., and adequate and convenient arrangements for traffic and transportation within the area in question.

Truly these subjects are such that concern the public and general utility of the citizens of Hull and which come within the scope of sub-sections 3 and 4 of section 390 of the

charter, namely, "contemplated improvements" or "gross unforeseen expenditures"; with, furthermore, the latitude allowed by section 392 "to, at any time, vary the application of appropriated sums to any committee to any other purpose within the jurisdiction of such committee," that is, in the present case the road committee or any committee dealing with such subjects.

The scope of the works contemplated by the commission, as set out in the orders in council, also came within the ambit of sections 92, 142, 143, 144, and 146 of the charter of Hull.

In answer to the defendant's contention it may be said that the improvements, works and plans recommended, done and prepared by the commission have reference partly to improvements in the city of Hull, to traffic and transportation within its area, and more especially where it joins Ottawa—its jurisdiction, under section 4 of the charter extending to the centre of the Ottawa river,—and that there is no obligation that the costs thereof should be all paid in one year. It might be spread over the estimates of several years; and, in case the work has been done during several years, and the cost ascertained only at the end of that period, it is no plea to contend that the city of Hull is not liable because the works were not done during the fiscal year within which payment is asked.

It is also well to bear in mind that the work done or the plans prepared by the commission might be said to be more in the nature of preliminary works or plans necessary for the preparation of estimates, and the consideration of such works, than in the nature of working plans for settled works which might thereafter be contracted for. Were it decided to construct the works recommended by the commission, then a by-law submitted to the ratepayers, with the amount required, would have to be resorted to; but not in a case where the estimates have not been made and the amount sought to be recovered by this action and in the nature of such preliminaries which would be the foundation for the preparation of such estimates.

Furthermore, section 393 of the charter provides that the council may, in cases of urgent necessity (here the credit

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of the city being at stake), either for the purpose of meeting a "judicial obligation" or for other unforeseen or uncontrollable causes, procure the necessary funds to meet such obligation by such means as it may deem advisable.

It is true, as relied upon by the defendant, that the third paragraph of section 392a of the charter provides that the city shall not be liable for the price or value of works done, etc., without special authorization of the city council; but that authorization has been given in the present instance, given at two meetings of the council,—one of which being at the special meeting for the consideration of that very question.

The same sub-section further provides that the City will not be liable unless there is an appropriation in the estimates for the particular object for which payment is sought and that a certificate of the city treasurer is produced establishing such fact.

The first part of this objection has already been considered above. If a corporation contracts within its powers, whether all the formalities are observed or not, the contract is binding and the corporation becomes liable. *Campbell* v. *Community of Sisters of Charity* (1); *Clark* v. *Guardians of Cuckfield Union* (2).

Can it be legally and honestly contended that the city of Hull, relying on specific clauses of its charter, could always defeat the payment of its liabilities by refusing to make appropriation for its just debts and further by the refusal of its city treasurer to give the certificate above mentioned? Acting in this irregular manner by its abstention in voting the necessary appropriation or credits, could the city free itself from its liability to those it contracts with? Contending as the defendant does would not be giving to the act of the legislature that construction and interpretation that would ensure the attainment of the object of the act according to its true intent, meaning and spirit. These stringent clauses of the charter are enacted to protect the municipality, the citizens, against any agreement, contract or dealing made by some unauthorized official and does not apply to cases where a contract has been regularly entered

(1) [1910] 20 Ont. L.R. 467. (2) [1852] 21 L.J.Q.B. 349.

into by the municipality in the manner provided by its charter.

The defendant cannot on the one hand with all due formalities pass resolutions approving of the contract (section 392a), the scope of the commission,—sit on the commission, sign its report, accept copies of the report and plans, use the same, take all benefits derived therefrom, and on the other hand, when the time for payment comes, ignore its liabilities and refuse on mere technical grounds to provide for the payment of the same.

A good and valid contract has been entered into, the contract has been executed and a right of action has arisen therefrom.

Thibault v. *City of Montreal* (1); *La Ville d'Iberville* v. *Banque du Peuple* (2); *Corporation Notre Dame du Bonsecours* v. *Bessette* (3); *Campbell* v. *Community & Sisters of Charity (ubi supra)*; *Clark* v. *Guardians of the Cuckfield Union (ubi supra)*; *Breton* v. *Corporation de St-Michel* (4); *Kerr* v. *Town of Petrolia* (5); *Neelon* v. *Corporation of Thorold* (6).

There will be judgment ordering and adjudging that the plaintiff recover from the defendant the sum of $6,560.32, with interest as above mentioned. The whole with costs against the defendant.

Judgment accordingly.

(1) [1898] Q.R. 14 S.C. 151.
(2) [1895] Q.R. 4 Q.B. 268.
(3) [1898] Q.R. 9 Q.B. 423.
(4) [1893] Q.R. 4 Q.B. 484.
(5) [1921] 51 Ont. L.R. 74.
(6) [1893] 22 S.C.R. 390.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1922
Dec. 28.

RUMELY ..... PLAINTIFF;

AGAINST

THE SHIP *VERA M.*

AND

THE WESTERN MACHINE WORKS, LTD., CLAIMANT.

Shipping and seamen—Possessory lien for repairs to vessel—Loss thereof to claimant by arrest of vessel.

Where a shipwright, having repaired a vessel, takes action to recover the cost of such work and has the vessel arrested by the marshal at his suit, he will be deemed to have relinquished his possession of the vessel to the marshal, and his lien for said services is thereby destroyed.

ACTION by the Western Machine Works, Limited, claiming possessory lien at common law for repairs done to the *Vera M.*

December 12th and 13th, 1922.

Case now heard before the Honourable Mr. Justice Martin at Vancouver.

Roy W. Ginn for plaintiff.

E. A. Dickie for claimant.

John A. Sutherland for the Ship.

The facts and points of law at issue are stated in the reasons for judgment.

MARTIN, L.J.A., now (December 28th, 1922) delivered judgment.

This is a contest between the plaintiff who asserts a maritime lien for seaman's wages and the Western Machine Works, Ltd., which claims a possessory lien at common law for repairs done on the vessel. Several questions of nicety arose at the trial and have caused me to give the matter

much consideration but in the conclusion I have reached it will be necessary to consider only the most important one of them, viz.: that relating to the consequences of the arrest of the vessel by the company. It appears that after the vessel was arrested at the suit of the plaintiff, and while the cause was pending, the defendant company began an action for the value of its repairs and caused the ship to be arrested in that action, the result of which is that the vessel is in the custody of the marshal under two independent warrants of arrest each of which requires him

> to arrest the ship * * * and keep the same under safe arrest until you shall receive further orders from us. (Form 15).

It is submitted by plaintiff's counsel that by voluntarily giving up its right to possession the company has destroyed its lien, assuming it to be a valid one upon the facts in proof, and the case of *Jacobs* v. *Latour* (1) is relied upon as establishing that principle. There it was held that a trainer of horses had lost his lien (if he had one) because he sued the owner for his charges and eventually issued a *fi. fa. de bonis* against him under which the horses, which had remained in the trainer's possession, were sold. The principle involved was thus laid down by the Court of Common Pleas, in Term:—

> A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution, the defendant might have insisted on his lien. But Messer himself called on the sheriff to sell; he set up no lien against the sale; on the contrary, he thought his best title was by virtue of that sale. Now, in order to sell, the sheriff must have had possession; but after he had possession from Messer, and with his assent, Messer's subsequent possession must have been acquired under the sale, and not by virtue of his lien.
>
> As between debtor and creditor the doctrine of lien is so equitable that it cannot be favoured too much; but as between one class of creditors and another there is not the same reason for favour.

After a careful consideration of the question I can only reach the conclusion that this principle applies to the case at bar. Indeed, in one way it is stronger here, because in the common law courts the execution *(fi. fa.)* is directed against the goods in general and so might be satisfied otherwise than out of the goods in possession, whereas in this Court the initial arrest was directed against the *res* in par-

(1) [1828] 5 Bing. 130.

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ticular which was looked to for prime satisfaction at least, and therefore the intention must inevitably have been that the possession of the *res* should pass to the marshal, and with its passing came the destruction of the lien upon it which exists only by possession. See also *Mulliner* v. *Florence* (2), and *Gurr* v. *Cuthbert* (3).

It is unfortunate that this second action should have been begun by the claimant contrary to the practice, because its interests would have been protected by the Court in the ordinary way in the first action wherein the first arrest was made—*Mayers Adm. Law, 57; Williams & Bruce Adm. Prac (1902) 319 (n);* because a lien cannot be asserted against the authority of the court, and even though that course was taken in excess of caution, yet it nevertheless involved the transfer of the claimant's right of possession to the marshal whose assistance was invoked: a shipwright cannot obtain the assistance of a court to enforce his lien by sale—*Thames Iron Works Co.* v. *Patent Derrick Co.* (4).

The result is that the claim of the company for a possessory lien fails, and is dismissed with costs, and the plaintiff's maritime lien is established for the amount for which he has obtained judgment, with costs. Pending further information as to the state of the cause of the company's action, I withhold any present direction concerning it and the action for necessaries in which one Yates obtained judgment by confession in open court on the 13th instant.

Judgment accordingly.

(2) [1878] 3 Q.B.D. 484. (3) [1843] 12 L.J.Ex. 309.
(4) [1860] 1 J. & H. 93.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1922
Nov. 17.

ERIKSEN BROS. (AND OTHERS).....PLAINTIFFS;

AGAINST

THE SHIP *MAPLE LEAF.*

Shipping and seamen—Arrest of ship—Mala fides—Sham proceedings—Value of de facto arrest as basis for jurisdiction.

A ship was arrested at the suit of H.E. who, at the time of said suit, was a member of the firm of Eriksen Brothers, one of the plaintiffs herein. His claim for wages as ship's carpenter on board the ship, was in fact only a part of his firm's claim sued on herein, and the day following such arrest of the ship the firm's action was instituted.

The other plaintiffs finding the ship under arrest took action in the Court for work done by them upon the said ship.

Held that the facts disclosing *mala fides* and an abuse of the process of the court, the arrest could only be viewed as a sham proceeding, and without legal existence as regards Eriksen Brothers who improperly sought to profit by it, but, that the other claimants, being in good faith and innocent of any wrong-doing at the time of instituting their suits, and relying upon the records of the court which, on their face, showed jurisdiction could be invoked, are entitled to rely upon such arrest to give jurisdiction to entertain and support their suit.

FOUR ACTIONS to recover for the value of services rendered the ship in equipping and altering the same.

September 12th and 13th, 1922.

Actions now tried before the Honourable Mr. Justice Martin at Vancouver.

E. A. Lucas for plaintiffs Eriksen Bros., Christian and Hemeon;

Cecil Killam for plaintiff Daly;

Hume B. Robinson for the Ship *Maple Leaf.*

The facts herein and questions of law involved are stated in the reasons for judgment.

See Eriksen Bros. v. The Maple Leaf. 21 Ex. C.R. 401.

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Martin L.J.A.

MARTIN, L.J.A., now (November 17th, 1922) delivered judgment.

These are four actions for equipping and altering the gasoline boat *Maple Leaf* at the port of Vancouver, to which she belongs, and it has been agreed that evidence taken in all of them shall apply to each of them. The vessel had been used as a cargo boat plying from Vancouver to the Islands in the inside waters of the Gulf of Georgia, but after she came into the temporary possession of a new owner, one Thompson, in April last under an agreement for sale, he decided to employ her in outside waters which necessitated (apart from the state of good repair she was in), certain alterations in and additions to her pilot house, rig, spars, sails, tanks, etc., and it is for various parts of this work that the respective claims are asserted.

At the outset objection is taken to the jurisdiction to entertain these claims on the ground that they are for necessaries which were not supplied to a ship "elsewhere than in the port of which (she) belongs," under sec. 5 of the "Admiralty Court Act, 1861," but "in that port," *i.e.*, Vancouver, in answer to which objection the plaintiffs submit that assuming the work of these material men [as they have long been called, *The Neptune*, (1)] may be classed as necessaries, yet quite apart from section 5, their claims are "for the building, equipping or repairing of any ship" under section 4, and so there is jurisdiction because

> at the time of the institution of the cause the ship or the proceeds (were) under arrest of the court,

as section 4 goes on to require. In *The Neptune* it was said, respecting the ancient remedy of material men as then regarded, and the scope of their operations, p. 142:—

> Those are commonly called material men, whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind). Those men, when they have furnished any victuals or materials upon the credit of a ship, are certain losers, if they be prohibited from taking their remedy against such ships, by arresting and proceeding to gain a possession of the ship itself till the debt be satisfied, according to the ancient course of the Admiralty.

(1) [1834] 3 Hagg. 129 at p. 142.

Upon the facts it is beyond doubt that the work herein, though not "repairing" is nevertheless within the expression "building and equipping" as employed in section 4: "building" would obviously include additions built on to the original building, and "equipping" is a very wide term depending upon the service in which the ship was employed, just as frequently "there is very little distinction to be found between "repairs" and "necessaries" under sections 4 and 5 respectively—The *Skipwith* (2), wherein Dr. Lushington said:—

> Now with respect to the 4th section; I am of opinion that, however the claim originally arose, whether it arose from giving credit to the master of the vessel, or not—provided that the claim was not satisfied at the time, and that the work for building, equipping or repairing had been done and provided, also that the ship and proceeds were under the arrest of the court—it was and is competent to the party to proceed here.

In *MacLachlan on Merchant Shipping (1911)*, at p. 117, it is said that claims for necessaries under section 5 "would no doubt cover repairs and equipping which further illustrates how the two sections are interwoven; and in the leading case of the *Riga* (3) [affirmed by the Privy Council in *Foong Tai & Co.* v. *Buchheister* (4), and applied by me in *Victoria Machinery Depot Co.* v. *The Canada* (5)], Mr. Justice Phillimore said:

> I am unable to draw any solid distinction * * * between necessaries for the ship and necessaries for the voyage.

I see no reason, therefore, why said sec. 4 does not cover these claims, and this view brings me to the further objection that although the work had been ordered by the master, Lewis, on behalf of the purchaser, Thompson, who was in sole possession of her under said agreement for sale for $5,250 (upon which he paid $500), yet the ship was not liable because the vendor, Brooks, still remained as owner upon the registry, and later re-took possession before action upon default in payment of the balance. Brooks, however, not only gave absolute possession to Thompson originally but had personal knowledge of the alterations, etc., that were being carried on and actually worked on them himself

(2) [1864] 10 L.T.R. 43.
(3) [1872] L.R. 3 Adm. & Ecc. 516, 522.
(4) [1908] A.C. 458, at p. 462.
(5) [1913] 18 B.C.R. 515.

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in making spars, and raised no objection because, he says in cross-examination, "I didn't consider it my business." In those very unusual circumstances there is no similarity between these cases and those three relied upon by Brooks' counsel, viz:—*Young* v. *Brander* (6); *Mitcheson* v. *Oliver* (7), and *Hibbs* v. *Ross* (8), and the nature of the actions is entirely different, being personal and not *in rem.*, when carefully examined, indeed, the *ratio* of their principles supports the plaintiffs herein; note *e.g.*, the observations of Mr. Justice Le Blanc in the first of them, at p. 12, wherein it was only held that the vendor who was still upon the register and therefore the legal owner was not for that mere reason personally liable in assumpsit for work ordered by his vendee, through his master, who had taken possession, and so the said master was a "mere stranger" to the legal owner who, consequently, could not be made liable for his acts: *cf. Hibbs* v. *Ross, supra,* p. 548.

But the present actions are against the *res* under the radically different circumstances of the legal owner's sale, knowledge, and active participation, and no authority has been cited to show why the *res* should not be made answerable in such circumstances, whatever might be said about the personal liability of the registered owner. Here, though the purchaser was not the legal owner yet as he had been entrusted with the absolute possession of the vessel under the agreement for sale, whereby he became the beneficial owner, as he is styled in the cases, *e.g., Frost* v. *Oliver* (9), he became personally answerable on the facts for the work in question and the *res* also became answerable when the circumstances set out in sec. 4 arose, *i.e.*, "if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court." As to this, the fact is that the ship had been under arrest by the marshal on the 19th of May last, before the institution of these causes, but the objection which was taken before on motion to dismiss on 22nd June last (10), is renewed, viz.: that the arrest which was at the suit of Henry Eriksen was only a sham proceed-

(6) [1806] 8 East's. 10.
(7) [1855] 5 E. & B. 419.
(8) [1866] L.R. 1, Q.B. 534, at p. 544.
(9) [1853] 2 E. & B. 301, at pp. 310 and 312.
(10) *See* [1922] 21 Ex. C.R. 401—3 W.W.R. 41.

ing and therefore should be disregarded and hence jurisdiction could not be founded thereupon. At the time I was of opinion that the evidence which would justify me in reaching such a conclusion was wanting, but at this trial it was proved that Henry Eriksen was at the time of this said suit, and is a member of the firm of Eriksen Brothers, one of the present plaintiffs and that his independent claim for $97.20 for wages as a "ship's carpenter on board the ship *Maple Leaf*" was in truth only a part of his firm's claim for $486.67 sued on herein and is included in the particulars of that claim as carpenter's wages, $346.60, and immediately after the ship was arrested at Henry's suit his firm's action was instituted, viz., on the next day. These facts so obviously disclose *mala fides* and an abuse of the process of the court that the arrest can only be viewed as a sham proceeding, and as not having any legal existence as regards those plaintiffs who improperly sought to profit by it, viz., Eriksen Brothers; but as regards the other claimants I see no reason why they are not entitled to support their suits upon its existence in fact, because in good faith and in innocence of any wrong-doing they instituted their suits relying upon the records of this court which on their face showed that its jurisdiction could be invoked.

The result is that judgment, with costs, will be entered in favour of all the plaintiffs, except Eriksen Brothers, whose suit is dismissed with costs for want of jurisdiction.

Judgment accordingly.

1922
Dec. 27.

HOME APPLIANCES MANUFACTURING CO., LTD. ..... } PETITIONER;

AND

ONEIDA COMMUNITY, LIMITED. . OBJECTING PARTY.

Trade-marks—General trade-mark by a company—Right of another to register the same mark as a specific trade-mark as to goods which the former may be but is not actually manufacturing.

Held, that a general trade-mark obtained by a company covers not only the articles manufactured and sold by it at the time of the registration of such trade-mark but also all articles which would come within the scope of its charter, and that it might at any future time manufacture and sell.

2. that although the objecting party at the time of proceedings taken herein had not manufactured and sold washing machines, etc., yet, as it was entitled under its charter to enter upon this line of business, no other company or individual would be entitled to register the same mark to be used as a specific trade-mark in connection with the manufacture of such articles.

PETITION of petitioners claiming to be proprietor of a specific trade-mark " Community " and asking for an order entitling it to register the same as a specific trade-mark.

June 23rd, 1922.

Case now heard before the President at Ottawa.

Russel S. Smart for petitioner;

W. L. Scott, K.C. for objecting party.

The facts and questions of law involved in this case are stated in the reasons for judgment.

THE PRESIDENT, now (December 27th, 1922), delivered judgment.

The Home Appliances Manufacturing Company, Limited, of the city of Winnipeg, claim to be the proprietor of a specific trade-mark which has been used by it in connection with the manufacture and sale of washing machines, washing machine wringers and other washing machine equipment, which consists of the word " Com-

munity." The petitioner applied to have its trade-mark registered but its application was refused by the Commissioner of Patents on the ground of the existence, on the register, of a general trade-mark registered on the 6th day of November, 1908, by Oneida Community, Limited, of Kenwood, N.Y., U.S.A.

The Oneida Community, Limited, is a very well known manufacturing and trading company incorporated under the laws of the State of New York. Counsel for the petitioner and for the objecting party have agreed upon certain facts and the admissions have been signed and filed in Court.

It is conceded that the business of the Oneida Community, Limited, has been widely extended from year to year and now has assumed a volume of business per annum amounting to a very large sum of money. Enormous sums of money have been spent in advertising their business.

The trade-mark of the objecting party is a general trade-mark of the word "Community." In the case of *Gebr Noelle's* (1) I have endeavoured to express my views as to the distinction to be drawn between a general trade-mark and a specific trade-mark under our Statutes. There is no object in repeating what I have stated.

The perseverance and industry of the counsel who conducted this case have deluged me with a list of authorities and, while I have read a good many of them, I see but little use in referring to most of them. Once the principle is established it comes to be a question of the application of the facts in each particular case.

The charter of the Oneida Community, Limited, is produced and while it may not be very clear, still I think the class of business carried on by the petitioner would be within the scope of the business of the objecting party. The petitioner was incorporated on the 1st June, 1920. It did not actually commence to carry on business until June, 1921. It was notified, on the 14th May, 1921, before any of the petitioner company's goods had been placed upon the market, that the objectors objected to the use of the

(1) [1913] 14 Ex. C.R. 499.

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HOME APPLIANCES MFG. CO., LTD. v. ONEIDA COMMUNITY, LTD.

The President.

word "Community" and the objectors required the petitioner to abandon its intention of making use of the word "Community" in its business. There is no reason why the petitioner should have adopted this particular name for its trade-mark. It appears as if the object of the petitioner was to gain some benefit from the market created by the objector's company at enormous expense.

I cannot accede to the argument that because the objectors had not been making the goods claimed to be manufactured by the petitioner, that therefore the petitioner had the right to come in and claim a specific trade-mark in respect of the manufacture of such goods.

The application of petitioner to register the word "Community" as a specific trade-mark was refused.

Judgment accordingly.

THE RAYBESTOS COMPANY ET AL...PETITIONERS; 1923 Jan. 20.

AND

THE ASBESTONOS COMPANY...OBJECTING PARTY.

Trade-mark—User—Loss of trade-mark by non-user—Expunging—Varying of Register.

The parties herein are both manufacturers of brake lining for automobiles. In 1916, the petitioners, by assignment from the R. E. Co., became the owners of two trade-marks, registered in the United States; one consisting of gold coloured coating on edges of lining with word "Royal" and the other for silver coloured coating. The silver edging was extensively used in Canada, and with respect to the gold edging, the R. E. Co. offered it for sale in Canada in 1914, by letter, and petitioners again began to advertise it in June, 1921, and it was on the market in September of the same year. On October 17th, 1921, the objecting party registered a trade-mark consisting of a wheel with the words "Asbestonos brake lining" thereon and the word "Asbestonos" on a piece of the lining running through the wheel, with gold coloured edges. The objecting party *inter alia* never used its mark as registered and never even used gold colour on the edges but used bronze. Petitioners now ask that the said trade-mark be varied by expunging therefrom the words "la dite bande brake lining peinte en or sur les côtés."

Held that petitioners were the first users of gold colour on the edge of the lining in Canada, and that, in any event, as registration of a trade-mark must be followed by user if the proprietor wishes to retain his right therein, the objecting party never having used its trade-mark as registered, and never having used the gold colouring on the edge, it had lost its right thereto, and that such part of the registered trade-mark of the objecting party as related to the use of gold colour on the edge of the lining should be expunged, and the register of trade-marks be varied accordingly.

PETITION to expunge from the Canadian Register of Trade-Marks a part of the trade-mark registered by the objecting party.

December 18, 1922.

Case now heard before the Honourable Mr. Justice Audette at Ottawa.

Russel S. Smart and *John A. Aylen* for petitioners;

Louis Côté for the objecting party.

The facts are stated in the reasons for judgment.

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AUDETTE, J., now (January 20th, 1923), delivered judgment.

The petitioners, by the present proceedings, seek to expunge from the Canadian Register of Trade-Marks, upon the ground, *inter alia*, of first user, the words:

la dite bande brake lining peinte en or sur les côtés

which are to be found as part of the specific trade-mark, obtained by the objecting party, on the 17th October, 1921, and which

doit servir en rapport avec la vente de brake lining, et qui consiste dans le nom: "Asbestonos Brake Lining" écrit sur une roue, et une bande de Brake Lining passant à travers de la dite roue, et sur la dite bande le nom "Asbestonos" et au milieu de la dite roue, le rond représentant le côté du dit brake lining; la dite bande brake lining peinte en or sur les côtés,

the whole as more specially appears upon exhibit No. 1 filed at trial.

On the 2nd June, 1914, The Royal Equipment Company, a predecessor in title of the petitioners, registered in the United States a trade-mark for brake-lining, consisting of a gold-coloured coating upon the edges of the lining and the word "Royal." A copy of the American trade-mark is filed as exhibit No. 2 and a sample of the brake lining, made under the said trade-mark, is filed as exhibit No. 6.

The same company had also an American trade-mark registered on the 16th February, 1915, consisting of a silver-coloured coating upon an edge of the lining of a brake lining. This trade-mark is filed as exhibit No. 3.

In October, 1916, The Royal Equipment Company assigned its whole business to, and it was taken over by, the Raybestos Company, which, in turn, established a Canadian factory at Peterborough, in August, 1920, with a capital of $250,000,—the stock of the latter being held by the American company, excepting, however, a certain number of qualifying shares.

From 1914 to November 1st, 1922, the petitioners sold in Canada 1,260,212 feet of brake lining with silver edge as shewn by exhibit No. 10 and in the last five years spent $1,200,000 in advertising both in the United States and in Canada.

In June, 1921, the petitioners advertised (see exhibit No. 9) the announcement of the manufacturing and making of gold-edge brake lining by sending such advertisement to

3,400 jobbers and traders in Canada and that was followed by actual sale of their gold edge brake lining in Canada on the 21st September, 1921, as testified to and as appears by invoices filed as exhibit No. 13,—and on the 19th September, 1921, as appears by exhibit No. 14.

Then there is also the further fact which appears from exhibit No. 12, and as testified to by witness Judd, that as far back as 1914, the petitioners were corresponding with Canadian customers with respect to the purchase and sale of their Royal lining,—which would obviously mean at that date the gold edge brake lining mentioned in exhibit No. 2.

The old records of the petitioners have been destroyed and are missing.

The petitioners have built up a large business and have advertised extensively at considerable expense and are well known on the Canadian market where they sold their goods and used their trade-marks.

Coming now to the facts in respect of the case for the objecting party, we find that the company was organized and incorporated in December, 1920, by one Joseph Poulin, who had been previously engaged in the mining business.

He was manufacturing his brake-lining, he says, in April, 1921, and contends he began selling in June, 1921, and in support of his evidence fixing the dates of sales he produces invoices filed as exhibits A, B and C.

In support of this first sale which he says he made in June, 1921, he produces exhibit A, being an invoice showing the purchase by him of bronze which he says he affixed upon the edges of his brake-lining on the very day of the purchase and it is from this exhibit that he ascertains that date.

But this exhibit A does not bear him out, since that exhibit is dated June, 1922, and not 1921. He explains this discrepancy, this conflict in his evidence by stating he affixed that bronze that very day; not the 22nd June, 1922 —but 1921, and that 1922 is a mistake made by the vendors from whom he obtained, he says, this year, the other day, a copy of this invoice exhibit A. He further contends that he received on the day of purchase, a carbon copy of his purchase which he has lost. Out of

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exhibits A, B and C, the exhibit A is the only one which would apparently show user before the petitioners who sold in September, 1921, and yet it is dated 1922. Should the verbal evidence of an interested witness he preferred to documentary evidence?

Be that as it may, this exhibit A remains the foundation upon which the testimony of Poulin rests in arriving at the date of the first user of this gold or bronze lining on the brakes manufactured by him—unsupported by any vouchers or invoices covering his alleged sales or by his books which should also show such sales. Therefore, upon that point, we are left only with his testimony contradicted by the very document he produces. The lack of producing invoices and books of account may also be regarded as significant, and his testimony is certainly that of an interested witness.

Following that event, he made an application in July, 1921, for his trade-mark in question herein and when he originally made that application in July, 1921, there was no mention whatsoever of the "gold on the brake lining." That part of his trade-mark as now extant, did not mention the part which is now sought to be expunged. His application of July was rejected. Then he made a second application which is dated the 19th September, 1921, wherein the gold edge appeared for the first time and he finally obtained his trade-mark on the 17th October, 1921.

The whole correspondence in respect of his application is to be found in exhibit No. 20 which should be read conjointly with the testimony of witness Ritchie. The application upon which the trade-mark was granted is dated the 19th September, but it appears from exhibit No. 20, that it was sent back to the applicant on the 5th October, 1921, to insert an exact and complete description of the mark. If corrected after the 5th October, 1921,—the date at which the correction was made and on which the part respecting the gold on the lining was added, does not appear.

Viewing the evidence as a whole I find first that the objecting party never used his trade-mark, that is, he never applied his trade-mark to the goods he was either manufacturing or selling. It is the use of a trade-mark and not

its invention that creates any right. See *Jones* v. *Horton* (1) and authorities therein cited.

He declared in his application that his trade-mark was not in use to his knowledge by any other person than himself. I gainsay it is not the intention of the law to allow a person to register a number of trade-marks and tie them up without usage.

There were three different substances or colours used upon the brake-linings in question in this case:—

1°. The Silver lining—Silver is a metal of a fine white colour and of lively brilliancy.

2°. Bronze lining—A brown colour. A pigment of yellow and red.

3°. Gold-lining—Gold is a metal of bright yellow colour.

Poulin states when he first started to use bronze on his brake-lining, he knew that the petitioners were selling brake-linings painted in silver; but he denies being aware of the extensive advertising the petitioners had made of their gold lining, through 3,400 jobbers and dealers. Yet would not the inference go to let one believe that a man in that trade would have heard of it? In the case of *Sphincter Grip Armoured Hose Co.* (2) an application was refused under similar circumstances on the ground that the proposed mark so nearly resembled the advertisements that it was calculated to deceive the public.

He never used gold but he used bronze. Now bronze is not gold, and bronze, which is brown, is not of the same colour as gold which is yellow. Furthermore the bronze which is on the lining produced in the carton as exhibit No. 18 is much brighter than gold and has such a brilliancy that when placed alongside exhibit No. 7 (that is the petitioners' gold lining) it appeals to the eye as not unlike silver and aided by the similarity of the carton or box and the marked assonance between Raybestos and Asbestonos, the whole applying to goods of the same descriptive pro-

(1) [1922] 21 Ex. C.R. 330 at 337.

(2) [1893] 10 R.P.C. 84

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perties, the incautious customer could easily be made to buy one article for the other, whereby one trader would be placed in a position to be able to sell his goods for those of another trader.

The phonetic quality in both words, Raybestos and Asbestonos, while not *idem sonans* all through is certainly not without some analogy in sounds which connote the same origin and the same etymology.

It is clearly established that not only did the objecting party never use his trade-mark, but, moreover he never used gold on the lining of his brake,—but he used bronze. Registration must be followed by use if the proprietor wishes to retain his right to the trade-mark. *Spilling Bros.* v. *Ryall* (1).

Witness Lauder testified that the brake-linings are usually bought through the trade-mark and that the silver edge meant the petitioners' goods and that gold and silver on the lining appear alike.

There are a number of cases decided on this colourable similarity, in the use of colour and designs.

In re *Eagle Pencil Co.* (2) the registration of marks consisting of circumferential bands of different colours applied to goods of the same descriptive properties, was refused.

In re *Goodyear Tire and Rubber Co.* v. *The Firestone Tire and Rubber Co.* (3) it was held, *inter alia,* that a broad black circumferential band on the tread of a vehicle-tire, with a red band on each side adjacent to the tread was confusingly similar to a mark which consists of a broad blue circumferential band on the tread of a tire used by the opposant. There is no valid trade-mark in colouring an automobile tire one colour on the tread and another colour on the side, regardless what the two colours are.

The registration of a yellow stripe of uniform width spirally disposed around the surface of a rope was refused when a trade-mark for a red stripe already existed.

(1) [1903] 8 Ex. C.R. 195 at 198. (2) [1912] 185 Pat. Off. Gaz. (U.S.) 1383.
(3) [1917] 240 Pat. Off. Gaz. (U.S.) 641.

A. Leschen & Son Rope Co. v. Broderick & Bascom Rope Co. (1). See also *Singer Mfg. Co.* v. *Wilson* (2).

The petitioners have the uncontested right to the silver lining. The user of the gold lining by the objecting party, under his evidence, unsupported by invoices and vouchers and in conflict with the documents produced by himself, cannot be accepted, coupled with the other surrounding circumstances, in preference to the evidence of the petitioners. Moreover, would not the granting of this gold lining to any one but the owner of the silver lining go a long way towards creating a probable deception on the market when dealing with the incautious and unwary customer or the public. *Melchers Wz.* v. *DeKuyper* (3); *Barsalou* v. *Darling* (4).

The objecting party's packing, carton or boxes are also so similar to that of the petitioners that added this obvious fact to what has already been said, deception would readily arise.

The objecting party or his agents moved, shall I say, with the knowledge of the advantage to be had from the reputation of the petitioners and the desire to benefit by it, also copied the coils, rolls or cones appearing on exhibits 19a, 19b and 19c; but upon representation by the petitioners he agreed not to use them any further; they are not the subject of this litigation, but were filed, I assume, to corroborate the petitioners' contention in showing the objecting party's animus or inclination to copy and imitate their marks and benefit thereby.

The world is wide, as already said by Lord Justice Bowen (Audette Ex. C.P. 322) and there are so many names, so many designs that there is really no excuse for allowing any imitation in trade-marks.

And in trade-mark cases, the Court should exercise the discretionary power and jurisdiction given it by section 42 of the "Trade-Mark and Design Act," in guarding the purity of the register and in not only refusing or expunging

(1) [1911] 164 Pat. Off. Gaz. (U.S.) 977, 978.
(2) [1875] 2 Ch. D. 434 at p. 441.
(3) [1898] 6 Ex. C.R. 82.
(4) [1881] 9 S.C.R. 677.

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in cases that are calculated to deceive but also in cases liable to deceive the public, notwithstanding the usual argument of undesigned coincidence always set up in evidence and at trial.

Exercising this statutory discretionary jurisdiction and approaching my conclusion upon the individual facts above mentioned as well as upon the evidence *dans son ensemble,* as a whole, and within the atmosphere, so to say, prevailing all through the case I find myself unable to place any reliance upon the objecting party's evidence establishing user in June, 1921, contradicted as he is by documentary evidence produced by himself and unsupported by any invoice or books. The next invoice in date of the year, 1921, filed by the objecting party shows the purchase of bronze on 30th September, 1921, and that would synchronize with what Mr. Ritchie states when he says that it was in the latter part of September that the gold edge was first mentioned upon the application for registration. This document exhibit A speaks with more force than the mere verbal statement, especially on a question of date, where any one is liable to make a mistake.

The objecting party knew of the silver lining on the petitioners' goods and he selected a gold lining for his trade-mark; but he never used his trade-mark and therefore derived no right or protection therefrom; he used bronze and not gold on his lining, gold being only a small part of his trade-mark. Moreover, if the extensive advertisements placed by the petitioners in Canada of their gold lining in June, 1921,—in respect of goods of the same descriptive properties as those of the objecting party, could have remained unknown to the latter up to December, 1921,—the public was made aware of it and would obviously become liable to be deceived in purchasing gold lining, and easily be made to purchase the goods of one person for those of the other,—especially if it is considered that the goods are packed in similar cartons, bearing names not unlike with respect to its etymology and the sound of some of its syllables—having both the word Asbestos as foundation.

The objecting party had already copied some of the petitioners' literature in advertising—namely the coils

which he abandoned upon the petitioners' representation.

Taking all the circumstances of the case into consideration I find the petitioners are entitled to claim the first legal user in Canada of the gold on their brake lining in 1921, without entering any further upon the evidence tending to show their user in Canada as far back at 1914, and I hereby order to vary the Canadian Register of Trade-Marks by expunging the words: "*la dite bande brake lining peinte en or sur les côtés,*" which appear in the body of the said trade-mark registered in Register No. 128, folio 29578, on the 17th October, 1921, and which were so registered without sufficient cause.

There will be judgment accordingly and the whole with costs against the objecting party.

Judgment accordingly.

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Feb.6.

QUEBEC ADMIRALTY DISTRICT

GEORGE HALL COAL COMPANY OF CANADA, LIMITED ..... } PLAINTIFF;

AGAINST

THE SHIP *PARKS FOSTER*

Shipping—Collision—Canal Rules and Regulations No. 19 and 22b and Rules of the Road for Great Lakes—Burden of Proof—No presumption of contributing to accident by non-observance of Rule.

The collision took place in the Cornwall Canal, above Lock 18. The *P.F.* coming down, tied to the south bank to permit of the *S.D.* coming out of the lock to pass. The *S.D.* started out of the lock at slow speed, and when her bow was about opposite that of the *P.F.* the down current (between 2 and 2½ miles an hour) caught her port bow, causing her to sheer to starboard, and her master signalled for ½ speed ahead to give her steerage way. She was allowing for all possible space between the vessels.

As the *S.D.* left the lock, the mate of the *P.F.* went astern to look after the stern line. A second line was lying on the deck, but was not used. As he arrived aft, the *P.F.* began to surge ahead and he eased the stern line which was attached to the capstan. The *P.F.* moved ahead about 10 feet and stopped, and thereupon the mate took the line off the capstan, and had a deck hand on the bank remove the line from snubbing post and carry it forward to the next, 75 feet distant. In the meantime he was hauling in the slack by hand, and placed his end on the bollard. While this change was being made, the stern of the *P.F.* swung out into the canal, and, as the *S.D.* was passing, she began to surge astern, the mate slackening on the stern line; her stern went out 15 to 20 feet from the bank and her port quarter came into collision with the rail of the *S.D.*

Held, upon the facts, that the breach of Rule 19 of the Canal Rules and Regulations by the *S.D.*, in not stopping her engines while passing, did not cause or contribute to the collision, but that the immediate and proximate cause thereof was defendant's non-observance of Rule 22b in changing the stern line at the time and in the manner aforesaid.

2. That the burden of proof was upon the defendant to show that non-observance of the Rule 19 caused or contributed to the accident, as non-observance by itself creates no presumption. *Fraser* v. *Aztec,* 19 Ex. C.R. 454 at p. 467.

ACTION by plaintiff to recover damages sustained by reason of a collision in the Cornwall Canal above Lock 18. January 30th and 31st, 1923.

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Case now heard before the Honourable Mr. Justice Maclennan at Montreal.

A. R. Holden, K.C. and *R. C. Holden* for plaintiff;

Francis King, K.C. and *W. B. Scott* for the ship *Parks Foster.*

The facts and points of law raised herein are stated in the reasons for judgment.

MACLENNAN L.J.A., now (February 6th, 1923), delivered judgment.

The plaintiff is the owner of the Steamer *Senator Derbyshire* and sues for damages resulting from a collision with the Steamer *Parks Foster* in the Cornwall Canal, and for costs.

The plaintiff's case is that in the afternoon of 27th May, 1922, the weather being fine and clear with no wind, the Steamer *Senator Derbyshire* upbound left Lock 18 of the Cornwall Canal after the *Parks Foster* was made fast to the south bank about 300 feet above the upper gates of the lock, and as the *Senator Derbyshire* was passing the *Parks Foster* at a suitable distance and speed the stern line of the latter was let go and her stern swung away from the bank and her port-quarter struck the port side of the *Senator Derbyshire* causing serious damage; that no blame in respect of the collision is attributable to the *Senator Derbyshire* or those on board her, but on the contrary the collision was due solely to the fault and negligence of the *Parks Foster* and those on board her; that the *Parks Foster* improperly let go some of her lines and put her engines in motion while the *Senator Derbyshire* was passing; that the *Parks Foster* broke Rules 22 (*b*), 27 and 46 of the Canal Rules and Regulations and Rules 37 and 38 of the Rules of the Road for the Great Lakes; that she gave improper signals, was not provided with proper or sufficient lines or hawsers and the same were improperly handled; that she did not have competent or sufficient men attending to her lines and did not have competent or sufficient officers or watch on duty, and the plaintiff claims a declaration that it is entitled to the damages proceeded for, a condemnation

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of the defendant and its bail in such damage and in costs, to have an account taken of such damage and such further and other relief as the nature of the case may require.

The case of the defendant is that shortly before the collision the *Parks Foster* on a voyage from Toledo, Ohio, to Montreal, laden with a cargo of coal, had arrived in the Cornwall Canal at a point 300 feet or more above the upper gates of Lock 18 and was there securely moored at the southern bank of the canal to await the passage of an up-bound steamer then in Lock 18, which proved later to be the *Senator Derbyshire* belonging to plaintiff; that the weather was fine and clear and there was practically no wind. While the *Parks Foster* lay securely moored the *Senator Derbyshire* left the lock and approached the moored steamer and when the bows of the two steamers were almost abreast a signal of four bells was heard given from the bridge to the engine room of the *Senator Derbyshire,* and her engines were accordingly turned full speed ahead and she came on at excessive speed. Immediately a signal of three blasts was blown to her on the main whistle of the *Parks Foster* as a signal to check down, but the *Senator Derbyshire* continued at full speed with the result that her suction drew the stern of the *Parks Foster* away from the canal bank and subjected the stern moorings of that steamer to such excessive and dangerous strain that those in charge of the *Parks Foster* eased these moorings gradually to prevent parting; that the stern of the *Parks Foster* remained at all times clear of the centre of the canal; the stern of the *Senator Derbyshire* as she continued to pass at excessive speed and too close was drawn by the suction towards the *Parks Foster* and the port side of the *Senator Derbyshire* abreast of the boiler house hit the *Parks Foster* on the portquarter at the knuckle of the stern; that those in charge of the *Senator Derbyshire* were negligent and disregarded their duty in coming up to the *Parks Foster* at excessive speed and in increasing speed as she passed and in failing to check down when signalled so to do, in violating Canal Regulation 19, which required her to have her engines stopped while passing the *Parks Foster* moored to the bank, in not keeping to her own side

of the canal and at a safe distance from the *Parks Foster* and in failing to make any reasonable allowance for the risk of accident and in unnecessarily crowding into the southern bank of the canal, in not controlling her helm and in not observing Rule 38 of the Rules of the Road. No blame for the collision is attributable to the *Parks Foster* or to any of those on board her, and defendant claims the costs of the action and such further and other relief as the nature of the case may require.

The Canal at Lock 18 and for fifty feet above the lock has a width of about 45 feet. At that point a guard pier on the north side runs out about 175 feet and ends at a point about 80 feet from the south side of the canal. On the south side of the canal there is a straight stone wall running westward past a railway bridge which crosses the canal about 850 feet from Lock 18. The passage way for boats in the canal at this bridge has a width of 100 feet from the south wall. In the reach between the end of the guard pier and the railway bridge the canal varies in width on top of the water from 175 to 200 feet. The north bank of the canal is of clay and stone and is slanting from the top of the bank out into the canal. Opposite the end of the guard pier there is a headrace to a paper mill through the north bank. This headrace is about 80 feet wide. The current down the canal from the railway bridge sheers towards the north bank, part of the water escaping through the headrace and part going over a waste weir on the north side of the canal. When the *Parks Foster* came down through the opening at the railway bridge she tied up to the south bank about half way from the railway bridge to Lock 18, two wire cables being put out from the bow, one leading head and the other leading astern. From her stern a six-inch hemp hawser was put out from the capstan on the poop and was fastened to a snubbing post astern of the ship. The length of the *Parks Foster* was 248 feet, her beam 39 feet 6 inches, and being moored about half way between the bridge and the lock her stern was about 300 feet below the railway bridge and her bow was about 300 feet above the upper gates of Lock 18.

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As the *Parks Foster* tied up to the south bank the *Senator Derbyshire* came into Lock 18 and upon the opening of the upper gates of the lock she started up at slow speed taking about ten minutes to get clear of the lock. When she got through the narrow passage between the south bank and the guard pier already referred to and her bow arrived about opposite the bow of the moored vessel, the down current there bearing to the north side of the canal in the direction of the headrace to the paper mill caught her port bow and she began to sheer to starboard. The down current was from two to two and a half miles per hour, she had her helm hard astarboard and her mate, who was at the wheel, asked the master, who was standing beside him, to give her more speed, and the master then sounded four bells to the engine room and she was put at half speed. The master of the *Parks Foster* testified that he heard these four bells and at once gave three short blasts on the steam whistle of the *Parks Foster* intending that as a signal to the other steamer to check her speed. The master and mate of the upbound steamer testified that the signal they heard was two short blasts followed by a short interval and then one short blast. They did not understand what the signal meant and the *Senator Derbyshire* continued at half speed which was not greater than three and a half to four miles through the water, and taking into account that the down current was from two to two and a half miles, the speed of the upbound passing the moored steamer would be in the neighbourhood of one and a half miles per hour. It is clearly established by the evidence that the only signals given from the bridge of the *Senator Derbyshire* to her engine room, from the time she started to leave the lock until after the collision, was one bell when she started, slow, and four bells when she was put at half speed. There was no second signal of four bells as was suggested at the trial. The distance between the steamers when the *Senator Derbyshire* was put to half speed and their pilot houses were abreast was about 15 to 20 feet. The purpose of putting the upbound steamer at half speed was to give her steerageway, which was necessary in order not to be carried too much by the current to starboard

towards the north bank and also in order that she might safely pass through the opening of the canal at the railway bridge. This opening, as already stated, is on the south side of the canal and was 300 feet above the stern of the moored steamer. As the *Senator Derbyshire* left the lock the mate of the *Parks Foster,* who was then forward, went astern to look after the stern line which had been put out when she moored. Another line was lying on the deck astern but had not been put out. There was a deckhand also aft when the mate went to look after the stern line. The *Parks Foster,* about the time the mate arrived aft, began to surge ahead and the mate eased the line leading astern. This line was attached to the capstan. The steamer surged ahead about ten feet and then came to a standstill and the mate thereupon took the line off the capstan and had one of the deckhands, who was on the canal bank, take the other end off the snubbing post and carry it down the bank to the next post at a distance of 70 or 75 feet. In the meantime the mate was hauling in the slack by hand and placed his end of the line on the bollard. While this change was being made the stern of the *Parks Foster* swung out into the canal from the bank, and as the upbound steamer was passing the *Parks Foster* began to surge astern, the mate slacked off two or three feet under the strain, her stern went out into the current 15 or 20 feet from the bank and her port quarter came into collision with the rail of the *Senator Derbyshire* doing some damage thereto.

I had the assistance at the trial of two Assessors, Captain J. O. Gray, Shipping Master of the port of Montreal, who has had great experience, and Captain Legault, who has navigated the canals and Great Lakes since 1911 and has had a Master's certificate since 1917. Among the questions put by me to the Assessors with their answers are the following:—

1. Under all the circumstances would it have been safe and practicable for the *Senator Derbyshire* to have given the *Parks Foster* a wider berth while passing her?

Ans. No. Had she done so there was a great possibility of her getting ashore on the North Bank. And again act-

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ing on her starboard helm to straighten up for the bridge, she would have got the current on her starboard bow and possibly have struck the South wall.

2. Was the speed of the *Senator Derbyshire* excessive while passing the *Parks Foster?*

Ans. No. It was imperative that sufficient speed was kept to counteract the effect of the strong down current and the indraft of the headrace.

3. When the *Senator Derbyshire* was passing and the *Parks Foster* had surged ahead ten feet, should the line aft leading astern have been changed by the mate to the next snubbing post down the canal bank where it became a line leading ahead? If not, why, and what was the effect of this change?

Ans. The stern line should have been kept on the post in its first position, slacked away as the *Parks Foster* surged ahead, and as she surged back again on its return, the slack should have been gathered in by the steam capstan. The effect of changing the line at this time was to give the first cant of her stern away from the wall, and with the changing of the line to the next post all control over keeping her stern alongside was lost.

4. Was there anything to prevent the mate from putting out a second line from the stern of the *Parks Foster,* and what effect would a second line there have had?

Ans. There was nothing to prevent a second line being passed ashore. A sailor was already on the dock, another was on the poop. A line was all ready with heaving line attached. Had this second line been passed out and the first remained in its place the ship would have laid snug alongside all the time and all danger averted.

Rule 19 of Canal Regulations provides that the engines of steamers passing vessels moored to the bank of any canal shall be stopped while so passing. The *Senator Derbyshire* did not stop her engines while passing the *Parks Foster;* she could not have done so without losing steerage way and getting into a dangerous position. I am satisfied that, had she stopped her engines when she came opposite the moored steamer, she would have been carried by the current

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into the north bank of the canal. My Assessors are of that opinion and so advise me. Besides, the breach of Canal Rule 19 did not, in my opinion, cause or contribute to the collision. The burden was upon defendant to prove that the non-observance of the rule contributed to the accident, as its non-observance by itself created no presumption; *Fraser* v. *SS. Aztec* (1). This disposes of the contention that the speed of the *Senator Derbyshire* was excessive.

The *Senator Derbyshire* was 235 feet long with a beam of 40 feet 6 inches. She was bound to pass the *Parks Foster* at a sufficient distance from her to avoid the chance of collision. Did she do so? Suction is a force which has to be recognized, but there was no danger so long as the moored vessel was kept tied to the canal wall. The *Senator Derbyshire* was passing the moored steamer at a distance of from 15 to 20 feet and her master had a right to expect that the *Parks Foster* would have been kept securely moored to the canal bank and no collision would have taken place if she had been so kept. My Assessors advise me she was passing at a sufficient distance and I am of the same opinion. That, in my judgment, was not the cause of the accident.

The collision was due to the stern of the *Parks Foster* swinging out into the canal until it came into contact with the upbound steamer. Rule 22 (*b*) of the Canal Rules and Regulations provides that:—

> All vessels approaching a lock, while any other vessel going in the contrary direction is in or about to enter the same, shall be stopped and be made fast to the posts placed for that purpose, and shall be kept so tied up until the vessel going through the lock has passed.

The six-inch line holding the stern of the *Parks Foster* against the canal wall was changed from one snubbing post to another at a very critical moment while the other vessel was passing, with the result that from the combined influence of the down current and the suction from the other vessel, the stern of the *Parks Foster* began to move out into the canal and all control over keeping her against the canal wall was lost. A second line ready for use on the poop was not put out, which would have been the natural and logical thing for the mate of the *Parks Foster* to have done, if he considered the six-inch line already out was

(1) [1920] 19 Ex. C.R. 454 at pp. 467-468.

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insufficient. When the *Parks Foster* was made fast to the canal bank, her master knew the vessel in the lock would have to pass up in a short time and it was his duty to see that his vessel was properly and sufficiently moored and to have kept her so tied up until the other had passed in safety. The *Parks Foster* was not so kept tied up and the improper handling of her stern line brought about the collision. My Assessors advise me the collision was due to the changing of the stern line from one post to another. The control of the stern was lost as soon as the line leading aft was taken off the snubbing post and the collision then became inevitable. That, in my opinion, lead directly to and was the proximate and immediate cause of the collision.

Having regard to the advice of my Assessors, my own appreciation of the evidence, the Rules of the Road, the Canal Regulations and the principles of law which govern the case, I come to the conclusion that the *Parks Foster* failed to observe Rule 22 (*b*) of the Canal Regulations and Rules 37 and 38 of the Rules of the Road for the Great Lakes, and she is therefore alone to blame for the collision. No blame is imputable to the *Senator Derbyshire* or those in charge of her.

There will therefore be judgment against the *Parks Foster* and her bail for the damages proceeded for and for costs with a reference to the Deputy District Registrar and merchants to assess the amount of the damages.

Judgment accordingly.

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

Solicitors for the Ship: *King & Smythe.*

AMERICAN DRUGGISTS SYNDICATE LTD. ..... } PETITIONER; 1923 March 12.

AND

BAYER COMPANY, LIMITED.....OBJECTING PARTY.

IN RE "ASPIRIN"

Trade-mark—Essentials—Distinctiveness—Publici juris—Trade-mark valid when registered may be subsequently attacked for invalidity—Effect of expiry of a patent of an article upon the trade-mark of the name given to such article—Publication and user—Abandonment.

Held that when a person invents a new article and at the same time invents a word to designate it, he cannot claim the exclusive use of that word to denote his own manufacture as distinguished from others. The name given to the invented article becomes part of the English language and is therefore *publici juris.*

2. That as the word "Aspirin" *qua* the public did not distinguish the goods of one trader from those of another it was incapable of exclusive appropriation, and lacked the essentials of a valid trade-mark.

3. That where a new article is invented on which a patent is taken and a new name given to the article, when such patent expires, the public, who are free to make use of the article, may also use the name by which it is known. That moreover in the present case, the article never having been patented in Canada, the name had been *publici juris* there from the beginning.

4. That where a word is originally registerable as a valid trade-mark, if it subsequently becomes merely descriptive of the article and loses its distinctiveness, it may be attacked as invalid and, in the discretion of the Court, may be ordered to be expunged from the register.

5. That B. & Co., never having used the trade-mark "Aspirin" alone, and having later registered two trade-marks consisting of the name Bayer and the Bayer Cross, and having then used these along with the word "Aspirin", and having advertised this combination, such non-user of the trade-mark "Aspirin" coupled with the above facts constituted a distinct manifestation of real and intentional abandonment of the word "Aspirin" alone as a trade-mark, and amounted to a notice to the public of their intention to use such name simply as the name of the drug.

ACTION by the petitioner herein to have the trade-mark "Aspirin" expunged from the Canadian Register of Trade-Marks.

December 11th to 15th, inclusively, 20th to 22nd inclusively and 27th to 29th inclusively, 1922.

Case now heard before the Honourable Mr. Justice Audette at Ottawa.

W. F. Chipman, K.C., Russel S. Smart and *B. H. L. Symmes* for petitioner.

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The Honourable Wallace Nesbitt, K.C. and *A. W. Langmuir* for objecting party.

The facts and questions of law involved in this case are stated in the reasons for judgment.

AUDETTE J., this (March 12th, 1923), delivered judgment.

This is an application, by the petitioner, to expunge from the Canadian Register of Trade-Marks a

specific trade-mark, to be applied to the sale of pharmaceutical preparations which consists of the word ASPIRIN,

and which was registered by Farbenfabriken Vormals Friedrich Bayer & Company, of Elberfeld, Kingdom of Prussia, Empire of Germany, on the 28th April, 1899 (Ex. No. 1) upon an application for the same, dated the 12th April, 1899.

On the 1st August, 1898 (ex. No. 8), one Felix Hoffman, chemist, residing at Elberfeld, Germany, applied for and obtained on the 27th February, 1900, in the United States, a patent for what he claimed

a new and useful improvement in the manufacture or production of acetyl salicylic acid

stating that

In the Annalen der Chemic und Pharmacie, Vol. 150, pages 11 and 12, Kraut has described that he obtained by the action of acetyl chlorid on salicylic acid a body which he thought to be acetyl salicylic acid.

This American patent, No. 644,077, of the 27th February, 1900, which further states that Felix Hoffman assigned it to The Farbenfabriken of Elberfeld Company, of New York, expired in 1917.

Moreover, on the 3rd April, 1899, the said The Farbenfabriken of Elberfeld Company of New York, applied for and obtained, in the United States, on the 2nd May, 1899, the registration of the Trade-Mark "Aspirin" which they

adopted for a trade-mark for a pharmaceutical compound, etc. (ex. No. 91).

This American trade-mark was, on the 8th March, 1919, cancelled and avoided. (See exhibits 92 and 93.)

The British trade-mark "Aspirin" was under special legislation, avoided, in England, on the 5th February, 1915, as from the 22nd December, 1914. (See Ex. No. 20.)

Then on the 12th June, 1913, Farbenfabriken Vorm Friedr. Bayer & Co., of Leverkussen, Germany, sold,

assigned, transferred and set over unto the New York Corporation, The Bayer Company Inc., the good will of its business and all the trade-marks, trade-names and brands owned by the Farbenfabriken vorm Friedr. Bayer & Co., in the Dominion of Canada. This assignment was registered in the Canadian Register of Trade-Marks on the 26th March, 1919.

And on the 30th May, 1919, The Bayer Company, Incorporated,

did sell, assign and transfer unto The Bayer Company, Limited, the trade-mark "Aspirin" for the Dominion of Canada, etc., and all the good-will and business in the Dominion of Canada in connection therewith.

Bowden Wire, Ltd., v. *Bowden Brake Co.* (1), *Edwards* v. *Dennis* (2).

It might have been well to state the pleadings in the interest of a clearer understanding of the varied issues and contentions between the parties, but they are too lengthy for full quotation here and they do not admit of being succinctly paraphrased.

At the opening of the trial, counsel for the petitioner moved for judgment by default against the said Farbenfabriken Vorm Friedr Bayer & Co., upon which, under special order of the court, a notice of the said petition to expunge the Canadian trade-mark above referred to had been served in Germany, requesting them to file any plea to the said petition that they saw fit, within sixty days from the service upon them of the said petition.

The Farbenfabriken Vorm Friedr Bayer & Co. are the predecessors in title of the present objecting party, to whom they have assigned whatever rights they had in respect of the said trade-mark. After hearing counsel both for the petitioner and for the objecting party upon this application, I reserved judgment intimating that I would dispose of the motion for judgment by default when I pronounced upon the merits of the whole controversy.

The Canadian Custodian of Alien Property was also served with a similar notice and he appeared and filed a declaration reading as follows:—

The Secretary of State, acting in his capacity as Custodian under the terms of the Treaty of Peace (Germany) Order 1920, hereby declares that

(1) [1913] 30 R.P.C. 580. (2) [1884] 30 Ch. D. 454, at p. 479.

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he is not interested in the present petition herein, filed on the 11th day of April, 1921, inasmuch as the interest in the word "Aspirin" registered in folio 6889 of Register 29 in the Exchequer Court of Canada, does not come within the purview of section 33 of the Treaty of Peace (Germany) Order 1920.

From all of which it will be seen that the present controversy involves intricate and complex facts, as well as some nice questions of law from which the clouds of doubt have not been, in Canada, cleared away up to the present time.

This court is given general jurisdiction over trade-marks under section 23 of the Exchequer Court Act, and general as well as special and discretionary jurisdiction under section 42 of the Trade-Mark and Design Act. *Billings & Spencer* v. *Canadian Billings* (1); *Auto Sales Gum and Chocolate Co.* (2).

Now, on the 1st August, 1898, when Hoffman applied for his patent in the United States, he clearly set out that his patent was for an

improvement in the manufacture or production of acetyl salicylic acid,

stating that Kraut had already obtained that acid in a given manner. That has not been controverted.

Therefore, in 1898, before Hoffman's discovery or improvement became known, it must be found that Acetyl Salicylic Acid existed and was known as such and that Hoffman's discovery was only an improvement in the manufacture or production of the same.

Moreover, that is confirmed and corroborated by *viva voce* evidence establishing that, as far back as that date and before the patent and the two trade-marks were issued Swiss Aspirin, German Aspirin and French Aspirin as well as Swiss, German and French acetyl salicylic acid, were known as such by the trade, were in existence and being sold and used for medicinal purposes even in Canada. And that would suggest this *quaere*, as to whether that would or would not amount to user and publication by others before the issue of the trade-mark "Aspirin."

Then, simultaneously, I will say, Hoffman's assignees, whom I will call the "Farbenfabriken" people, applied and obtained both in Canada and in the United States the registration of the specific trade-marks above mentioned

(1) [1921] 20 Ex. C.R. 405, 410. (2) [1913] 14 Ex. C.R. 302.

for their word "Aspirin" to be applied to pharmaceutical preparations and compounds, etc.

The application for the patent and the trade-marks went hand-in-hand, so to speak; at the same time with the combined purpose of the patent for the improvement in the process and the trade-marks for the name of that improvement or drug.

A person who invents an article and wishes to maintain a trade-mark on it must give it one name by which it can be identified and known as such and give it also another name to indicate his manufacture. One name or word cannot both describe the thing as made by any body and the thing made by a particular person or maker.

By paragraph 10 of the statement of objection, the objecting party avers that

> the objecting party and its predecessors in title in the said trade-mark were the first to adopt and use the said word "Aspirin" as a trade-mark, and have for many years past used the same in connection with the distribution and sale of their manufacture of acetyl salicylic acid in order to distinguish it from the acetyl salicylic acid manufactured, produced, prepared or offered for sale by any person, firm or corporation other than the objecting party and its predecessors.

That clearly means that the respondent claims to use the trade-mark "Aspirin" to distinguish the Hoffman acetyl salicylic acid from the acid manufactured by any other firm or persons, including "its predecessors," that is, to denote the manufacture by it of the acetyl salicylic acid covered by the patent No. 644,077, as distinguished from the manufacture of the same by any other person, including its predecessors. Therefore, the word "Aspirin," according to the objecting party's own view, would mean both the acetyl salicylic acid manufactured by them, as distinguished from any other manufacturer, and furthermore the word "Aspirin" would also mean the acetyl salicylic acid manufactured under the Hoffman patent, as distinguished from the acetyl salicylic acid of Kraut, or any such acid manufactured by its predecessors.

In other words, "Aspirin" would be the name of the new acetyl salicylic acid manufactured under the Hoffman patent, as distinguished from Kraut's acetyl salicylic acid or any such acid produced before by the objecting party's predecessors, by any one before the Hoffman patent. Hoffman's product became known and was chris-

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tened as "Aspirin" by the objecting party's predecessors in title. Moreover, "Aspirin" also meant, according to the pleadings, the acetyl salicylic acid manufactured by them.

It is quite clear and logical from the above that if the product of that Hoffman patent were put on the market, the mere name acetyl salicylic acid, *per se*, would not identify the "new compound"—that "new article of manufacture"—; but that some name had to be given to this new birth in pharmacy. It was christened "Aspirin." A generic name which became part of the English language; and by which name, as was stated under oath by one of the company's officials, the product of Hoffman's patent became known to pharmacy. No one can monopolize the English language. Nor can anyone have a monopoly in the name of anything.

The chemists, says witness Grant, use to-day the two names of acetyl salicylic acid and aspirin simultaneously, meaning interchangeable terms. However, witness Heebner says, the public, the consumer, probably knows no other name than "Aspirin." These two witnesses were heard on behalf of the objecting party. Aspirin is the name of a drug not indicating the name of the manufacturer or dealer. The public asks for Aspirin, says witness Munroe, there is no other name. *Dadirrian* v. *Yacubian et al* (*"Matzoon"*) (1); *The Gramophone Case* (2); *Williams, Ltd., Appl.* (*Chocaroons Case*) (3); *Manhattan Medicine* v. *Wood* (4).

When a person invents a new article and at the same time invents a word to designate it, he cannot claim the exclusive use of that word to denote his own manufacture as distinguished from others. The name given to the invented thing becomes part of the English language and is thereby made *publici juris* and that person cannot appropriate it to the exclusion of others.

There is this difference between a patent and a trade-mark: Under the former, every sale made without a license of the patentee must be a damage to the patentee. In the case of a trade-mark

(1) [1896] 72 Fed. Rep. 1010.
(2) [1910] 27 R.P.C. 689.
(3) [1917] 34 R.P.C. 197.
(4) [1882] 108 U.S.R. 218, 222.

the property and the right to protection is in the device or symbol which is invented and adopted to designate the goods to be sold and not in the article which is manufactured and sold.

Sebastian, pp. 12 and 13.

And in that view—respecting the creation of a name to designate a new article and using the same to denote the manufacture of the same as distinguished from others—the objecting party is corroborated by the documentary evidence produced as exhibit No. 94 by the petitioner. This exhibit is the bill in equity in the case of *Farbenfabriken of Elberfeld Company* v. *Edward A. Kuehmsted,* for infringement of the word "Aspirin," wherein it is stated, in the third paragraph of the second page, that

the product described and claimed in the said letters patent (No. 644,077) and patented thereby is the substance now known in pharmacy as "Aspirin."

This declaration and affirmation is furthermore sworn to by one Wm. Diestel, the treasurer of the complainant, the Farbenfabriken people, who are the objecting party's predecessors in title and who are thereby bound. This admission by the assignors of the objecting party, in respect of the very trade-mark assigned by them, and its legal effect upon the trade-mark in question must be taken as if the admission had been made by the objecting party itself. *Keuhmsted* v. *Farbenfabriken* (1); *Smith* v. *Farbenfabriken* (2); *Farbenfabriken* v. *Kuehmsted* (3).

And after all, the evidence of the fifty odd druggists heard in this case, between Halifax, N.S., and Victoria, B.C., from coast to coast, amply confirms that fact.

Acetyl salicylic acid became first known to the trade in Canada as a powder or crystal, under the name "Aspirin." The druggists became acquainted with it from the doctors' prescriptions who, barring a few exceptions, used the word Aspirin to designate the acid. In some cases, a doctor, being somewhat pedantic or desirous that his prescription should retain as much as possible the character of a scientific document, not intelligible to the man on the street, would use the word acetyl salicylic acid. The word monoaceticacidester of salicylicacid too cannot be said to have been used. *Qua* the public, the word "Aspirin" did not

(1) [1910] 179 Fed. R. 701. (2) [1913] 203 Fed. R. 476.
(3) [1909] 171 Fed. R. 887.

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indicate the origin, but the name of the drug. The powder or crystal came first, then the tablet with the name of the chemist and then the tablet with the name of the manufacturer,—all being known and sold as Aspirin.

The trade, that is the druggist, the wholesale dealer and the manufacturer were aware of the two names, but the public was not. The druggists treated the names of "Aspirin" and acetyl salicylic acid as synonymous and interchangeable when filling prescriptions; and they were treated in the same way by the doctors. The use is *qua* the public, the consumer, as pointed out in *Ford* v. *Foster* (1). The public up to the present time does not know it under any other name than Aspirin. The sale over the counter, to which reference will be made hereafter, did really and actually begin with the tablets and was always sold as "Aspirin," from somewhere in 1906 on. "Aspirin" became the name of the drug acetyl salicylic acid, just as much as salt means and is the popular name for sodium chloride; Epsom salts, for magnesium sulphate; calomel, for sub-chloride of mercury; blue pill, for pill hydrag; paregoric, for tint of camph. Co., and sugar for saccharin. Chemical or scientific names are not expected to be used by the public,—as the fact truly is—because they are not known to the public.

Now, as has been mentioned before, Hoffman's product has been christened "Aspirin."

The name acetyl salicylic acid does not define, so as to identify, the product of Hoffman's patent, as distinguished from that of Kraut, the German or from the Swiss and the French acetyl salicylic acid, and therefore the objecting party's assignors,—predecessors—christened that product "Aspirin" which, according to their own statement, substantiated under oath, became known in pharmacy under that generic name and as the name for that particular product described and claimed in said (Hoffman's) letters patent. Therefore Aspirin is not and never was a trademark, but is merely the name of a new product which anyone in Canada, at any time, and in the United States at the expiry of the patent, might and may use as a word to designate the same.

(1) [1872] L.R. 7, Ch. App. 611.

"Aspirin" is both the commercial and the generic name of the product of Hoffman's patent, which being so christened by those who then owned the patent, was presented to the whole world as describing that particular article.

Distinctiveness is the cardinal requirement for a trade-mark to be good and valid,—and distinctiveness means that the word, symbol or device shall be used or adapted to distinguish the goods of the proprietor of the trade-mark from those of other persons.

While the word "Aspirin" has no descriptive signification to persons unacquainted with the druggist trade, save and except that it is the name under which the drug is known to the public, it does indicate to persons versed in the trade an article prepared according to a definite process. Therefore it becomes descriptive and incapable of exclusive appropriation. Sebastian, 5th ed. 66-72.

The function of the trade-mark is merely to distinguish the goods of one proprietor from that of any other proprietor of similar or other goods. There is a wide distinction to be made between a patent and a trade-mark. In the former the monopoly given to the patentee, for a certain period, is the consideration in return for which the patentee dedicates his invention to the public at the expiration of the patent. While in the case of a trade-mark there is no such consideration and any attempt to prolong the term of a patent by means of a trade-mark will be discouraged. If that were allowable, a patent could be made perpetual, notwithstanding the existence of the Statute of Monopoly. Sebastian, 5th ed. p. 12.

The development of "Aspirin" as a household remedy and household word, as a self-prescribed drug and a valuable anodyne, has been contemporaneous with the application of that name to the drug itself. It became generally and universally known to the public under the generic name of "Aspirin." From the beginning the word was part of the English language, the name by which the drug was christened, as attested to by dictionaries (1) and by the

(1) Littré-Dictionnaire de Médecine; Larousse-Supplément; Nelson-Encyclopaedia; Cyc Britannica; Squire's Companion, the *Vade Mecum* of all druggists; American Medical Dictionaries. See Ex. No. 18 and all other exhibits filed at trial. It is not necessary for the purpose hereof to mention them all.

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price lists of manufacturers of drugs and pharmacists. It was used by the doctors in their prescriptions to designate the drug, with few exceptions. It is the name by which the public now knows the drug and by which it has been known ever since the public became aware of its existence, and ever since sales over the counter began. It was so used in trade literature and in common daily practice, as established by the evidence of record.

As a result of these uncontrovertible facts, the public is entitled to the free use of the word "Aspirin," which from its origin has been the name by which the drug is known and so has become part of the English language and *publici juris*. This use cannot be taken away from the public under a pretended monopoly resulting from the registration "without sufficient cause" of a trade-mark which does not possess the essentials for its proper and legal existence.

Our Canadian Trade-Mark Act provides, by section 5, what shall be deemed to be a trade-mark, and section 9 provides for its registration, which does not confer any new right but merely gives him a *locus standi* in the courts to enforce his rights. Then by sub-section (*e*) of section 11, it is provided that the minister may refuse to register any trade-mark.

if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking.

After citing the above section, the judgment of the Judicial Committee of the Privy Council in *The Standard Ideal Co.* v. *The Standard Sanitary Mfg. Co.* (1), states:

The Act does not define or explain the essentials of a trade-mark, nor does it provide for taking off the register an alleged trade-mark which does not contain the requisite essentials. In applying the Act the courts in Canada appear to consider themselves bound or guided mainly by the English law of trade-marks and the decisions of the Courts of the United Kingdom.

Having found, as before stated, that the word "Aspirin" is a common English word, and applying the judgment in the *Standard Ideal Case* (ubi supra 85) it can be said, without attempting to define "the essentials necessary to constitute a trade-mark properly speaking," that this word, which, although originally a coined one, has become a

(1) [1911] A.C. 78 at p. 84.

common English word to designate the new product manufactured under the Hoffman patent, and that standing alone and by itself,—as shown in the trade-mark certificate (ex. No. 1) it cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. It has no distinctiveness to identify the product of any particular trader. The word "Aspirin" primarily means the product of the Hoffman patent and cannot be exclusively used to mean specifically the goods of any distinct manufacturer. The trade-mark does not contain

the essentials necessary to constitute a trade-mark properly speaking,

and the owners thereof are not entitled to register the word "Aspirin" as a valid trade-mark.

The result is in accordance with the decision of the Supreme Court of Canada in *Partlo* v. *Todd* (1) that the word though registered is not a valid trade-mark.

A word first invented to designate a substance may cease to retain the characteristics which it once possessed of conveying the idea of the goods being of a particular manufacture,—having become purely descriptive of an article which all may freely make. Sebastian, 5th ed., p. 68.

2nd. The proprietor of a word, mark or symbol can register the same as a trade-mark, giving him *primâ facie* exclusive use thereof before and after registration. If he is truly the proprietor and first to use it,—a matter of vital and fundamental importance—it gives him the exclusive use thereof and the right to sue upon the same; but it does not give him any new right which he did not otherwise have before. The Act establishing registration "takes nothing from anybody." It confers, under certain conditions and under particular circumstances, rights which but for the Act, would not be as clearly asserted, but it takes nothing away and is merely declaratory of a claim to a right. See also *Vulcan Trade-Mark* (2).

No right is created by the registration of a generic name. *Liebig's Extract of Meat Co.* v. *Walker* (3).

(1) [1888] 17 S.C.R. 196.

(2) [1914] 15 Ex. C.R. 265, at p. 272; 51 S.C.R. 411.

(3) [1902] 115 Fed. R. 822-826.

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Judge Howlay is reported as saying that registration *per se* is of but little value, if any, except for the purpose of creating a permanent record of the date of adoption or where it is necessary to give the court jurisdiction in certain cases. Hopkins, 3rd ed., p. 384. See also Paul on Trade-Marks, pp. 29, 30.

It has been contended at bar that if, at the time of the registration of the trade-mark, the owner had a right to register, that the validity of that trade-mark could not afterwards be attacked. With that contention I am unable to agree. In the case of *The Autosales Gum and Chocolate Co.* (1) the learned trial judge quoted the language of the Master of the Rolls upon this question in the *Batt case* (2) as follows:—

> The entry of these marks is "an entry made without sufficient cause in the register." We are not disposed to put a narrow construction on this expression nor to read it as if the word "made" were the all important word and as if the words "made without sufficient cause" were "made without sufficient cause at the time of registration" so as to be confined to that precise time. If an entry is at any time on the register without sufficient cause however it got there, it ought, in our opinion, to be treated as covered by the words of the section. The continuance there can answer no legitimate purpose; its existence is purely baneful to trade * * *.

This case was taken to the House of Lords (3), and the proposition above quoted has been approved and stands unimpeached. See also re *Smollens Trade-Mark* (4); *Billings et al* v. *Canadian Billings* (5).

(See now in England, 9-10 Geo. V, ch. 79.)

A *primâ facie* title to the mark does not take away the right of other persons to question the validity of the same. *Partlo* v. *Todd* (6).

The registration of the word "Aspirin" alone was made by persons claiming to be the proprietors thereof "by reason . . . of having been the first to make use of the same." *Edwards* v. *Dennis* (7).

Witness Buckley testified having started selling "Aspirin" somewhere about 1898, and witness Laroche said he began selling and handling "Aspirin" in 1898. It was just known as Aspirin without any reference to Bayer.

(1) [1913] 14 Ex. C.R. 302, at p. 307.
(2) [1898] 2 Ch. D. 432, at p. 441; [1898] 15 R.P.C. 534.
(3) [1899] A.C. 428.
(4) [1912] 29 R.P.C. 158.
(5) [1921] 20 Ex. C.R. 405.
(6) [1888] 17 S.C.R. 196.
(7) [1884] 30 Ch. D. 454.

Before Aspirin was known in Canada, his father imported from a German firm called Sherings, and it was labelled "Aspirin." See also witness Vadeboncoeur. The general trend of the evidence, including Merck's Report, exhibit No. 101, would also seem to establish that there was German, Swiss and French aspirin and acetyl salicylic acid on the market at the time of the application for the trade-mark.

Section 13 of the Canadian Trade-Mark Act provides that the applicant may have his trade-mark registered upon forwarding a declaration that it

was not in use to his knowledge by any other persons than himself at the time of the adoption thereof.

Does all this amount to publication and user by others before the registration of the trade-mark?

3rd. Moreover, as above set forth, the Hoffman patent was obtained in the United States in 1900 and expired on the 27th February, 1917.

It has long since been recognized, as a sound doctrine of patent as well as trade-mark law, that when an article has been patented and a name has been given to such article, so that this particular patented thing has become known to the public under the particular and distinctive name thus given to it, when the patent expires, the public at large has the right not only to make that thing, but in making it the public has a right (indeed it is its duty if it desires to designate that particular thing) to apply to it the name which has thus become the characteristic name of such patented thing.

In other words a patentee under his patent obtains a monopoly, in return for which he is held to dedicate the invention and the name by which it is known to the trade, to the public upon the expiration of the patent. Such dedication would be rendered ineffective if another manufacturer were unable to sell the product under the name by which it has become known. Such dedication would also be clearly ineffective if the patentee could continue and perpetuate his monopoly under the guise of a trade-mark.

Furthermore, if a trade-mark were valid for the name of a new article, newly invented, and whether patented or not, the name by which it becomes known to the public, it would be giving to the owner a monopoly in perpetuity

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which would be far more valuable than any patent could ever be. The right of an owner of a trade-mark ends where that of the public begins.

It has been said that as the American patent has expired this only makes the name of the invention *publici juris* in the United States. Is not that assertion the result of confusing trade-mark with patent rights? If a patent has been obtained both in the United States and in Canada the question as to whether or not the expiry of the American patent would entail also the expiry of the Canadian patent is one dependent altogether upon legislative enactments; —but in trade-mark law it is quite different. If a person tacitly contracts in the United States,—as he does when he obtains a patent in consideration of the limited monopoly he obtains,—to make the object of his patent public property at the expiration of the same, the right of the public is not limited to the citizens of the United States. It extends to the whole civilized world. After the expiry of the American patent it would seem that an application made in Canada for the first time to register "Aspirin" as a trade-mark could not be entertained.

A trade-mark is used in the place of a person's name,— the mark, device or symbol replaces his name. Does not therefore the trade-mark become the name in the trade the world over? Does not the trade-mark assume an international character since it distinguishes the goods of a trader from that of another trader. If a trade-mark is in lieu of a trader's name, should not the trade-mark, alike the name of the trader, be operative the world over? And if such a mark is allowed to be imitated or is otherwise abused in any country other than the one in which it is registered, is there no remedy at law there? Or should the trade-mark be limited to the country of origin wherein it is registered? The refusal to respect or control such a mark would affect trade to the detriment of all countries in their intercourse in trade and commerce.

The text-book writers, supported by decisions of the courts both in the United States and in England, confirm that view.

In re *Ford* v. *Foster* (1), Sir G. Mellish L.J., says:

(1) [1872] L.R. 7 Ch. App. 611, at p. 628.

Then the question is, has it become *publici juris?* And there is no doubt, I think, that a word which was originally a trade-mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris,* as in the case which has been cited of Harvey's Sauce.

If a name used by way of a trade-mark was originally, or has since come to be merely descriptive of the article to which it is attached so that while serving to indicate what the article is, it does not serve to connect it with any particular manufacturer or manufacturing establishment, that name cannot be protected as a trade-mark or registered as special and distinctive. Sebastian, 5th ed. p. 76.

In the leading case of *Singer Mfg. Co.* v. *June Mfg. Co.* (1) it was held that:—

On the expiration of the patent the right to make the patented article and to use the generic name passed to the public with the dedication resulting from the expiration of the patent.

On the expiration of a patent, one who uses a generic name by which articles manufactured under it are known, may be compelled to indicate that the articles made by him are made by him and not by the proprietors of the extinct patent.

The decision in *Holzapfels Composition Co.* v. *Rahtjen's Amer. Comp. Co.* (2) is direct and clear authority to establish that on the expiration of the English patent the trade-mark rights disappeared in the United States. In that case, Rahtjen invented in Germany a new and improved paint especially useful in the protection of ships' bottoms. He and his sons set up the business of making and selling the paint which became known as "Rahtjen's Composition." In 1873 that paint was patented in England. The product of that patent was of course a paint, but its virtue laid in the fact that it was made in accordance with the invention of Rahtjen and possessed the virtues of that invention, and, hence that particular paint possessing the virtues of that invention later patented in England became known, so as to be identified, under the name of "Rahtjen's Composition." The name of "paint" or "ships' bottoms paint" would not have identified it, because other paints and other ships' bottoms paint were known; but that particular paint having the virtues of Rahtjen's invention could only be identified by the name "Rahtjen's Composition."

(1) [1895] 163 U.S.R. 169.

(2) [1901] 183 U.S.R. 1, at pp. 10-12.

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That "Rahtjen's Composition" having become a well known article of commerce by that name, through the expired English patent and the operations thereunder, the name had become descriptive of the article rather than indicative of its origin and it is open to anyone to sell that same article under that name.

In the case of *Centaur* v. *Heinsfurter et al* (1) Mr. Justice Brewer, after referring to the fact that the case turned upon the question as to whether or not the plaintiff had an exclusive right to the use of the word "Castoria" as a trade-mark, because in that case (as is true with respect of "Aspirin") the defendant had merely used the name "Castoria" as a product made in accordance with the expired Pitcher patent and clearly indicated on all of its labels that it was the manufacturer of the substance or product marked with the name "Castoria", the distinguished judge said, page 956:—

Whether the defendants had a right to use this name depends on the further question whether the word "Castoria" is the generic name of the thing manufactured and sold or is a mark or name used to distinguish one party by whom the thing is manufactured and sold from all other manufacturers of that thing. The relation of the patent to this matter must be first considered. In 1868 Dr. Pitcher compounded a medicine composed of various ingredients, according to a certain formula which he invented and discovered. For this invention and discovery he obtained a patent which gave to him the exclusive right of making, using and selling this new medicine. During the life of that patent he alone or his successors in interest had the right to manufacture and sell that medicine by whatsoever name it might be called. The patent gave no right to any particular name but simply to the exclusive manufacturing and sale. All such rights expired in 1885 and from that time forth any party has had a right to manufacture and sell that particular compound and also a right to manufacture and sell it under the name by which it has become generally known to the public; and, if to that public the article has become generally known only by his single name, that name must be considered as descriptive of the thing manufactured and not of the manufacturer.

In connection with this holding reference has already been herebefore made that the bill in equity stated

that the product described and claimed in the said letters patent, and patented thereby, is the substance now known in pharmacy as "Aspirin."

Farbenfabriken v. *Kuehmsted* (2).

Mr. Justice Brewer in the "Castoria" case at page 957 further adds:—

It is true that during the life of a patent the name of the thing may also be indicative of the manufacturer, because the thing can then be

(1) [1898] 84 Fed. R. 955. (2) [1909] 171 Fed. R. 887.

manufactured only by the single person; but when the right to manufacture and sell becomes universal, the right to the use of the name by which the thing is known becomes equally universal. It matters not that the inventor (or his assignee) coined the word by which the thing has become known. It is enough that the public has accepted that word as the name of the thing, for thereby the word has become incorporated as a noun into the English language and the common property of all.

And further at page 958 the learned judge, after citing the Singer case (ubi supra), said:—

The word has become known as the name of the thing and as such it could not be appropriated as a trade-mark.

Then in the case of *The Linoleum Mfg. Co.* v. *Nairn* (1) it was held:—

That where the inventor of a new substance has given to it a name and having taken out a patent for his invention has, during the continuance of the patent, alone made and sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of that patent.

Those who made and sold the invention, this new floor cloth, and who appropriated it under the patent, gave to this new floor cloth the name "Linoleum." After the patent expired the company that had formerly owned and operated it under the patent for this new floor cloth and who had named the product of this patent "Linoleum" sought to monopolize the name "Linoleum" as the name of that patented product and brought suit against one who, after the patent had expired, made exactly the new kind of floor cloth of the expired patent and gave it the name by which that product had become known. The English courts refused to recognize any such claim, refusing to hold that the name "Linoleum" was a trade-mark; but, that on the contrary, it was simply the name given that new product made under the patent, which name anyone could use for that particular floor cloth, after the patent had expired.

It is impossible for one who by taking out a patent obtains a monopoly on a particular article, to which article is given a particular name, as was decided in the case of *The Formalin Hygienic Co.* (2), to say

that that name which he says means the patented article means something else, namely, the article made by him * * * . If a man has once said, "Here is a process; if you manufacture in accordance with that process that is the name to call it by," he has, as Mr. Ingle Joyce suggested,

(1) [1877] 7 Ch. D. 834.
(2) [1900] 17 R.P.C. 486.

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made a present of that name to the whole world as describing that particular article.

In our own Canadian courts there is also the case of *Rubberset Co.* v. *Boeckh Bros. Co., Ltd.* (1), in which while the controversy resolved itself into a passing off case, nevertheless the same doctrine, as provided in the Singer and other cases, has been followed. And in the judgment of the First Division, Ontario, the learned judge cites therein from Lord Davey in *Cellular Clothing Co.* v. *Maxton et al* (2), in which the language of Fry L.J., in *Siegert* v. *Findlater* (3), is cited as follows:—

> If a man invents a new article and protects it by a patent, then during the term of the patent he has, of course, a legal monopoly; but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article; all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *prima facie*, use the name by which the article is known in the market.

In the *Cellular* case (ubi supra), it was held that the word "Cellular" was an ordinary English word which appropriately and conveniently described the cloth of which the goods sold by the defendant were manufactured; and that the term had not been proved to have acquired a secondary meaning or special meaning so as to designate only the goods of the appellants. See also *Merriam et al* v. *Syndicate Pub. Co.* (4), approving of Merriam et al, v. *Halloway Pub. Co.* (5), where the same principles are accepted and wherein it was held:—

> As is the case with patents, so after the expiration of copyright securing the exclusive right of publication, the further use of the name by which the publication was known and sold cannot be acquired by registration of a trade-mark.

There is also the other English leading case of *The Magnolia Metal Co.* v. *Atlas Metal Co. et al* (6). In this case the plaintiff owned the invention relating to certain anti-

(1) [1918] 46 Ont. L. R. 11.
(2) [1899] A.C. 326, at p. 344.
(3) [1878] 7 Ch. D. 801.
(4) [1915] 237 U.S.R. 619.
(5) [1890] 43 Fed. R. 450.
(6) [1897] 14 R.P.C. 389.

friction metal and gave to the product of that invention the name of Magnolia. He also claimed a registered trade-mark for the metal, the product of the said invention, consisting of the picture of a magnolia flower and the word "Magnolia". Mr. Justice Collins at page 396 clearly shows that the name Magnolia applied to the metal made in accordance with the invention and patent meant that particular patented metal and not the manufacturer or maker of the manufacture of a particular manufacturer and said:—

It was started as a secret process. It was afterwards covered by a patent and, in that sense, a practical monopoly by that means was secured for a certain time; and, in point of fact, the only persons who did manufacture for all practical purposes, were the plaintiff. In my judgment, that does not give them a continuance of the monopoly as soon as any other person legitimately can manufacture the same article.

On appeal, on the same line of reasoning, Lord Esher M.R. and Chitty L.J. followed Mr. Justice Collins and affirmed his finding above quoted and held that the defendants were at full liberty to use the word "Magnolia" applied to that metal so long as they also indicated, attaching their own name thereto (as is so in the case of Aspirin), that the Magnolia metal which they made and sold emanated from them and not from the plaintiff.

In the case of *St. Louis Stamping Co.* v. *Piper* (1) it was held with respect to the product called "Granite" that after the expiration of the patent anyone who made that particular ironware, in accordance with the invention of the patent, could lawfully make such ironware with the word "Granite" and the plaintiff had no trade-mark rights in the name.

In the case of *Dover Stamping* v. *Fellows* (2) the same doctrine and principle were adopted with respect to an egg-beater called "Dover".

In *Leonard and Ellis* (the Valvoline case) (3) it was said by Fry L.J.:—

When a new material is invented, and at the same time a new single word is invented which is applied to that material alone, I am by no means satisfied at present that that single word can be treated as a special and distinctive word within the meaning of the section. It is difficult to suppose that one word can both describe the thing as made by anybody and the thing as made by a particular maker.

(1) [1895] 33 N.Y. Supp. 443. (2) [1895] 163 Mass. 191.
(3) [1884] 26 Ch. D. 288 at 304.

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In that case the Court of Appeal held that a firm who invented a new description of oil and called it "Valvoline" had no right of trade-mark in the word. No patent was taken to protect the invention, just as in the case of "Aspirin" in Canada. If a person who invents a process for making a new article invents at the same time a new name for describing the same article, and the article comes to be known by that name only, he cannot afterwards, when everybody is at liberty to make that article, claim a monopoly in the name.

See also *B. B. Hill Manufacturing Co.* v. *Sawyer-Boss Manufacturing Co.* (1); *Yale & Towne Mfg. Co.* v. *Restein et al* (2); *Young* v. *MacRae* (3); *Powell* v. *Birmingham Vinegar Brewery Co.* (4); *Singleton* v. *Bolton* (5); *Hostetter* v. *Fries* (6); *Leclanche Battery Co.* v. *Western Electric Co.* (7); *Adee* v. *Peck Bros (Foley's Patent Valves);* (8); *Selchow* v. *Baker* (9); *Lecouturier's Trade-Mark (Chartreuse Case)* (10); *Woodward's Trade-Mark* (11); *Bayer Co. Inc.* v. *United Drug Co.* (12).

From the above decisions and the facts in connection with the Hoffman patent and the admission in the Bill above mentioned, it would appear that the name acetyl salicylic acid does not define, so as to identify it, the product of the Hoffman patent; but that, as the assignor of the Bayer patent in the United States contends, the word "Aspirin" is the name known in pharmacy as the name for that particular product described and claimed in Hoffman's letters patent and patented thereby, and that, therefore, "Aspirin" is not and never was a trade-mark but instead, is the name of a new product which anyone who may lawfully make that product (as may be done by anyone after the patent has expired) may use to designate the same.

When a new thing is invented or discovered, whether it be patented or not, if in fact it be a new substance or pro-

(1) [1901] 112 Fed. R. 144.
(2) [1912] 196 Fed. R. 176.
(3) [1862] 9 Jur. 322.
(4) [1896] 2 Ch. D. 54; 65 L.J. Ch. D. 563.
(5) [1783] 3 Dougl. 293.
(6) [1883] 17 Fed. R. 620.
(7) [1885] 23 Fed. R. 276.
(8) [1889] 48 U.S. Pat. Gaz. 823.
(9) [1883] 93 N.Y.R. 59.
(10) [1907] 25 R.P.C. 265.
(11) [1916] L.J. 85 Ch. D. (N.S.) 27, at pp. 30-31.
(12) [1921] 272 Fed. R. 505.

duct, the name given to such thing under which it has become known commercially and to the public, is the proper name for that thing. A trade-mark may be removed from the register, notwithstanding the argument to the contrary at Bar, not only on the ground that it was not originally distinctive, but on the ground that its distinctiveness has ceased. Kerly on Trade-Marks, 4th ed. 370.

The doctrine propounded above is to be found supported and analysed in Fulton on Patents and Trade-Marks, 2nd ed. at pages 261 and 262 in cases where a patent has been taken out or not.

4th. Coming now to the question of non-user and abandonment, one may cite *in limine* the words of Hughes J. in *Blackwell* v. *Dibrell* (1):—

> That the right to use a trade-mark may be lost by abandonment or disuse is too clear to need argument or the support of authority.

It may be abandoned in several ways, such as the non-user during a certain period and the longer the period the stronger the inference, because no one has right to ask for a trade-mark and tie up that name, so to speak, and not use it. It may be deduced from the evidence that the name so protected by registration has been openly used during a number of years, in a manner that was so public that it must have come to the knowledge of the owner of the mark and more especially if the user by others was by persons engaged in the same trade and business as the owner. It is practically a question of fact, from which logical and reasonable deduction may be made. Paul on Trade-Marks, 100.

The circumstances of each case must be considered, yet the underlying principle seems to require intention to abandon, if abandonment can be distinguished from non-user.

In the present case it has been established by evidence that the objecting party, or its predecessors in title, refused to sell any more Aspirin some little time before the war or at the time of the war.

One must bear in mind that from the 12th June, 1913, the Bayer Co., Inc., of New York, were the owners of the trade-mark in question and had been assigned the good-

(1) [1878] 14 U.S. Pat. Gaz. 633.

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will of their predecessors in title with respect to the same. That they only assigned to the Canadian company on the 30th May, 1919. That is the same year when the assignment bearing date of June, 1913, was registered in Canada. Therefore, between these two dates, the company was an American company which refused to sell Aspirin.

That in 1906 or thereabouts, the manufacturers of "Aspirin" in tablets began to develop that trade which created before long a large demand from the public who from that time on began to know the medicine by the name of "Aspirin" and by no other name. The objecting party has to-day the full benefit of that tablet trade established by other manufacturers and dealers than itself.

The trade of "Aspirin" tablets increased gradually and received a new impetus in about 1919, by a system of extensive and intensive advertising by the new Canadian company

Looking into this literature and advertising campaign of the objecting party, the new Canadian company, one is primarily struck with the total absence of the word "Aspirin" appearing by itself. Numerous samples of such advertising have been produced as exhibit No. 19, and from the perusal of this very literature is found an admission of the general existence of the drug "Aspirin" as distinct from the "Aspirin" that is being sold by the objecting party

Taken at random, one finds one sample stating: "There is only one genuine "Aspirin"—and that genuine Aspirin has Bayer cross and that indeed is accompanied by a label showing a round tablet with the word Bayer written perpendicularly and horizontally within the circle. There can only be one meaning resulting from such language and that is there exists some other "Aspirin" besides the one sold by us with our trade-mark of the Bayer Cross, and that these advertisements claim that the "Aspirin" manufactured and sold by Bayer is better and preferable, from their own standpoint, from the other "Aspirin" on the market, manufactured or sold by anybody else.

And these samples which are numerous and varied, but all to the same effect, are in the aggregate a distinct and definite manifestation of the real and intentional abandon-

ment of the use of the word " Aspirin " alone and by itself, as registered, and, further, a declaration or notice to the public that in future they intend to use the word as the name of the drug but with their own name attached thereto to show it has been manufactured by them.

This intention is further manifested in a tangible and open manner by, I may say, the objecting party in 1919. Indeed, on the 8th August, 1919, the Bayer Co., Inc., of New York, registered two new trade-marks: one registered in Register No. 105, folio 24895 (ex. No. 96), and the other in the same register but under folio No. 24896 (ex. No. 95). These trade-marks also registered by the Bayer Co. of New York in August, 1919, were respectively assigned to the present objecting party, The Bayer Co., Ltd., of the city of Toronto, on the 15th May, 1920.

The trade-mark registered under folio No. 24895 is a specific trade-mark to be applied to the sale of synthetic coal-tar remedies, chemicals, medicines and pharmaceutical preparations of every kind and description and which consists of the word " BAYER."

The other trade-mark under folio No. 24896 is also a specific trade-mark to be applied to the sale of synthetic coal-tar remedies, chemicals, medicines and pharmaceutical preparations of every kind and description and which consists of a conjunction of letters in the form of a cross having four arms of equal length, the said letters being B A Y E R, arranged horizontally and vertically at right angles in the form of a cross, the letter " Y " forming the centre of such cross.

It is quite significant, indeed, that these two trade-marks should be taken and registered with respect to synthetic coal-tar remedies. Aspirin is a coal-tar drug.

These two new trade-marks can readily be applied to coal-tar drugs and ever since 1919, by reference to exhibit No. 19, it will be seen that they were used with the word " Aspirin." The only deduction and inference to be drawn from the fact of getting these two new trade-marks and using them ever since 1919, as shown by exhibit No. 19, in union and with the trade-mark for the word " Aspirin " alone, in 1899, is a clear manifestation of the

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intention of the objecting party (presumably acknowledging it has no right to) not to use the word Aspirin by itself, but to associate it, as it has done, with both trade-marks taken out in 1919 and assigned to it in 1920. The label with the combined words of "Bayer" and "Aspirin" never appeared on the Canadian market until 1919.

It is obvious that by such a practice the old trade-mark "Aspirin" used by itself loses its distinctive character and is an indication that the word "Aspirin" is accepted as the name of the drug and not as the name of the manufacturer of the product of the patent. In re *Lea* v. *Millar* (1) it was held that in addition to the evidence as to the common use of the registered trade-mark by persons other than the plaintiff, the fact that the plaintiff had recently adopted a new label upon his goods on the ground that his existing label did not afford sufficient protection was a public abandonment of the latter; and, in *Manhattan Medicine Co.* v. *Wood* (2), it was held that a mark had been lost by abandonment, a new form of bottle and label having been adopted in place of the old ones. An exclusive right to a mark may be lost by its owner using it habitually and exclusively upon goods which passed through other persons' hands so they acquired a right in it. See also *Wood* v. *Butler* (3); *MacMahan Pharmacal Co.* v. *Denver Chemical Mfg. Co.* (4).

In re *Hare* (5), and in re *Paine & Co., Ltd.* (6), registrations were limited by excluding certain goods in which the registered proprietor did not deal; and in re *Philippart* v. *Whiteley* (7), Parker J. suggests at page 573 that section 37 might be construed as enabling the court to remove a mark which had ceased to be used or had never been used for the legitimate purposes of a trade-mark. The section 37 referred to here is the section of the English Act of 1905 providing for the removal from the register of a mark for non-user. *Jones* v. *Horton* (8).

(1) [1876] Sebastian Digest T.M. No. 513 at p. 305.
(2) [1882] 108 U.S. 218.
(3) [1886] 3 R.P.C. 81, at pp. 88-90.
(4) [1901] 113 Fed. R. 468.
(5) [1907] 24 R.P.C. 263.
(6) [1908] 25 R.P.C. 329.
(7) [1908] 25 R.P.C. 565.
(8) [1922] 21 Ex. C.R. 330.

The objecting party long before 1919 or 1920 did not use its trade-mark at all. From 1919 it did not use the word "Aspirin" by itself. In fact, *qua* the consumer, the public, the Trade-Mark "Aspirin" by itself, has never been used by the objecting party or its predecessors in title. Their position has been consistent that from the very first the word meant then, means now and has always meant the name of the drug itself. In *Ayre* v. *Rushton* (1).

the plaintiffs (had) invented and prepared a medicine for chest diseases to which they gave the name of "Cherry Pectoral," which was extensively known and sold as "Ayre's Cherry Pectoral;" one of the ingredients was extract of wild cherry, and the word "pectoral" had been before the invention of the plaintiffs' medicine, applied to medicines for chest diseases. (It was) held, that the plaintiffs could not claim the exclusive use of the words "Cherry Pectoral" as a trade-mark.

See Paul on Trade-Marks, p 114.

In *Perry Davis & Sons* v. *Harboard* (2) a distinction is drawn between the use of a trade-mark alone or with other words.

Sebastian, 6th ed. at p. 109, says:—

Numerous trade-marks have been removed from the register, or limited to certain goods, for non-user.

He cites a number of decisions. See also Kerly, on Trade-Marks, 4th ed. p. 413; Sebastian, p. 128.

All of this, coupled with the facts of the case, cannot mean anything else than a recognition by the Bayer people that they have no monopoly over the word "Aspirin" and that they are selling it, as they have the right to do, with their own name attached to it; accepting thereby and recognizing implicitly that the word "Aspirin" is the name of the drug which is now known and accepted by the public to designate it. There is nothing to prevent Bayer, or anyone, to sell "Aspirin" with their own name attached to it.

The public does not know the drug under any other name. It has become part of the English language and the objecting party realizing that fact is now advertising in a manner that the public can understand; that is: using the name of "Aspirin" as the name of the drug coupled with its name to show it was manufactured by it.

(1) [1877] 7 Daly (N.Y.) 9. (2) [1890] 15 A.C. 316.

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I might go over all the samples produced as exhibit No. 19 and in each will find the same characteristic expression which amounts to the same admission. The matter is too obvious to be questioned.

Therefore, taking the chain of circumstances and of facts which transpired from 1913, it must be first found that the owners of the trade-mark refused to sell. Then they lay dormant, so to speak, and watched the unusual development of the tablet trade of "Aspirin" created by new manufacturers and dealers. They realized that "Aspirin" had become almost universally known in the public, and in 1919 they purchased from the American people both the trade-mark and the good-will, for a price unknown, unless it is taken to be the amount mentioned in the assignments; or these American people came to Canada, formed a company and started the business of manufacturing pharmacists.

We have no evidence on the record to tell us what actually transpired between 1913 and 1919. There is a kind of blank in the life of the company during that period. And then it suddenly revives and starts that extensive advertising by the means of the language already referred to, which on its very face admits implicitly almost all that has been said above.

Under these circumstances does it not appear clearly that there has been non-user and abandonment of the trade-mark for the word "Aspirin" used alone, and that it has become the name of the drug, a name which has become part of the English language, which has become *publici juris*, and that anyone may use with impunity to designate the drug which is now part of pharmacy? No one has any right to register a trade-mark, tie it up, take it away from the public and not use it.

No one of the public is to-day deceived by the word "Aspirin." The word is used to denote the drug and not the manufacturer of the same, and when Bayer, the objecting party, advertises as Bayer's Aspirin, or under any of the forms in exhibit No. 19, the public knows that it is Bayer's Aspirin, whilst the word "Aspirin" of itself would not necessarily indicate that it is aspirin manufactured by Bayer.

5th. In the view I have taken of the case, it becomes unnecessary to discuss a number of other questions raised at bar. Among others: (*a*) The effect upon the trade-mark of the objecting party or their predecessors in title, allowing the tablet-makers for years to use the powder and put it out into tablets with the label "Aspirin," with the name of the manufacturers, without any interference. Did it viciate the trade-mark? The manufacturing of tablets, involving the mixing of Aspirin with starch, sugar or any other adhesive binder, constituting a product different from the one actually pure and free from any ingredients. (*b*) The official analysis of the powder. (*c*) The Order in Council alleged to have been passed with the view of giving authority to the Crown to institute an action to determine the respective rights of the Bayer people and of the public in respect of the trade-mark "Aspirin." (*d*) The assignment alleged to be in gross under the evidence of Weiss (See also exhibit Z39). (*e*) The question of the chain of title of the objecting party's predecessors in title, the sale by the Alien Property Custodian of the shares of the Bayer Co., Inc., of New York, to the Sterling Products, Inc. (see exhibit Z39). (*f*) The question of effervescent aspirin (exhibits 56, 57, 62 and 63) and many others.

I may further add I am not overlooking the Canadian decision in *The Centaur Co.* v. *American Druggists Syndicate* (1), but, with all deference, I am unable to follow it. I do not feel bound thereby, and moreover the case is distinguishable both on the law and the facts. The Canadian Bar Review (1923), pp. 14 to 16.

I have therefore come to the conclusion, for the reasons above set forth, to adjudge and order to expunge from the Register of Canadian Trade-Marks, No. 29, folio 6889, the specific trade-mark registered on the 28th day of April, 1899, of the word "Aspirin," as applied to the sale of pharmaceutical preparations,—the whole with costs in favour of the petitioner.

There will also be judgment granting the motion for judgment by default against Farbenfabriken vorm Friedr.

(1) [1922] 68 D.L.R. 84.

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Bayer & Co., named in the petition, declaring the present judgment effective as against them—as if parties in the action.

Judgment accordingly.

Solicitors for petitioner: *Brown, Montgomery & Michael.*

Solicitors for objecting party: *Osler, Hoskin & Harcourt.*

HIS MAJESTY THE KING.....PLAINTIFF;

AND

DOMINION CARTRIDGE COMPANY LTD. .....DEFENDANT.

1923
Feb. 8.

Revenue—Excise tax on price of goods—Sale, when completed—Special War Revenue Act, 1915, as amended by 10-11 Geo. V, c. 71—Interpretation.

The defendant company, manufacturers of cartridges, determined the yearly quantity to be manufactured upon the orders received from customers generally. Upon receipt of such orders and their acceptance by the company, the manufacturing of cartridges was proceeded with, and the goods placed as part of the general stock. Subsequently when preparing to make delivery under the orders, the cartridges were counted, sorted and appropriated to each shipment or contract.

Held that, under the provisions of Article 1474 C.C., the mere giving of the order and its acceptance did not amount to a complete sale, which indeed was only perfected when the goods had been so manufactured, sorted, counted and appropriated to the respective shipments or contract, and notification thereof given to the purchaser, which, in the present case, took place at the time of delivery.

2. That the agreement arising upon the order and acceptance thereof resulted in an executory and not an executed contract.

3. That the excise tax of 10 per cent on the total purchase price of goods mentioned in subsections 1 and 4 of section 19 (*bb*) of the Special War Revenue Act, 1915, as amended by 10-11 Geo. V, c. 71, s. 2, is properly and completely imposed and recoverable under the provisions of said subsections, apart from the provisions of subsection 5 of said section 19 (*bb*).

4. That subsection 5 of section 19 (*bb*) in no way detracts from the full force and complete effect of subsections 1 and 4 of said section; but only provides machinery for the mode of ascertaining the purchase price, upon which the tax is to be levied, in a case where the goods are imported.

INFORMATION by the Attorney General of Canada seeking to recover $59,095.22 representing 10 per cent of the total purchase price of sale of firearms, shells, etc.

January 26, 1923.

Case now heard before the Honourable Mr. Justice Audette at Montreal.

Aimé Geoffrion, K.C. for plaintiff.

Eugène Lafleur, K.C. for defendant.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (February 8, 1923) delivered judgment.

This is an information, exhibited by the Attorney General of Canada, whereby it is sought to recover from the

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defendant, the sum of $59,095.22 as representing a tax of 10 per cent on the total purchase price upon sales of firearms, shells, or cartridges for use other than for militia purposes, as imposed, in 1920, under the amendments to "The Special War Revenue Act, 1915," sec. 2 by adding sec. 19 (*bb*) thereto (10-11 Geo. V, c. 71), and which came into force, under sec. 3 thereof, on the 19th May, 1920.

The operating clauses of the statute under which the tax in question in the present controversy is claimed read as follows, to wit:—

19 (*bb*) (1) The following excise taxes shall be imposed, levied and collected on the total purchase price of the article hereinafter specified:—

Then come subsections 2 and 3 which have no bearing upon this case and that takes us to subsection 4 which reads as follows:—

(4) The following excise taxes shall be imposed, levied, and collected on the articles hereinafter specified, namely:—

(*c*) a tax of ten per cent on . . . . . firearms, shells, or cartridges for use other than for militia purposes.

Then comes subsection (5) upon which centers much of the conflict in this case and which reads as follows, to wit:—

(5) The excise taxes as imposed by the preceding subsection four shall be payable on the duty paid value in addition to the present duties of excise and customs at the time of sale by the Canadian manufacturer or when imported or when taken out of customs or excise bond, but shall not apply to such aricles when exported, and shall be accounted for to His Majesty in accordance with such regulations as may be prescribed.

It is well to bear in mind that there is nothing in this recited subsection (5) which detracts from the meaning, force and effect of section 1 and subsection 4, the first clauses of the section, which say that the tax shall be imposed, etc., on the "total purchase price" of the articles "hereinafter" specified. Most of the goods forming part of the enumeration in subsection 4 are not subject to customs duties and it would be, so to speak, altering the nature and economic purpose of the present excise tax to contend that it is only to be imposed upon imported goods.

Briefly stated, the evidence and admissions of counsel establish that the transactions in question consisted in the defendant receiving orders for goods, in the form shown by exhibit A, the defendant to answer by forwarding an acceptance (exhibit B) of such order with a special nota-

tion in the margin, and that while all the goods in question were ordered before the 19th May, 1920 (date of the Act coming into force) they were all delivered after that day.

The cartridges in question in this case were not for "military purpose" and the present tax becomes thereby essentially a luxury tax.

Two substantial grounds of defence are advanced at bar.

The first one is that the sales in question, made through these orders and acceptances, are all prior to May, 1920, and were thereby perfected and completed sales prior to the time the Act became in force—before the 19th May, 1920—and that they are therefore not subject to the tax in question although the goods were all delivered subsequent to May, 1920. I am unable to assent to that view: an executory contract is the result of these transactions. The fallacy of the argument lies in that there is not at the time of the order or acceptance, a definite, specific, physical substance ear-marked as sold—since the goods have either to be manufactured, or taken from the stock, counted, sorted and appropriated to a specific shipment.

These transactions all took place in the province of Quebec and therefore the liability, in the present controversy, is to be determined by the laws of the province wherein the cause of action arose, B.N.A. Act, section 92, subsection 13; *The King* v. *Desrosiers* (1); *The King* v. *Armstrong* (2); *The King* v. *The Hudson's Bay Co. et al* (3).

The manufacturing of cartridges by the company, as established by the evidence, is dependent upon the estimate of sales to customers generally and when the goods are manufactured they are added to the stock and sorted. Then prior to the shipment, as per the orders above mentioned, the goods are taken apart, sorted, counted and appropriated to a particular shipment or person according to directions.

It may be casually mentioned that the company at the beginning of the period in question, in May, 1920, made their first shipments with the tax paid and discontinued doing so upon the representation and objections by their

(1) [1908] 41 S.C.R. 71, at p. 78. (2) [1908] 40 S.C.R. 229 at 248.
(3) [1921] 20 Ex. C.R. 413, at p. 423.

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customers and that the shipments mentioned in this case only actually began with the 1st July, 1920.

Under the laws of the province of Quebec, as set forth in article 1474, of the Civil Code:

When things movable are sold by weight, number or measure, and not in the lump, the sale is not perfect until they have been weighed, counted or measured, etc.

The same principle obtains under the English law. See Benjamin, on Sale, 6th ed. pp. 7, 346 et seq.; Hals. 25, p. 167.

The agreement made under the order and acceptance results in an executory and not an executed contract.

Article 1026 C.C. further adds:

If the thing to be delivered be uncertain or indeterminate, the creditor does not become the owner of it until it is made certain and determinate, and he has been legally notified that it is so.

And the notification in the present instance takes place at the delivery, after the goods have been manufactured, sorted, counted and appropriated to the purchaser.

The same principle obtains under articles 1683 and 1684 of the Civil Code.

There was no completed sale in the present instance until the goods had been manufactured, had been set apart, counted and appropriated to the particular contract. If the goods were manufactured, they were not counted and appropriated except immediately before shipping and it was only by the shipment that the appropriation was notified to the purchaser and by receipt that it was accepted. The ownership of the goods is not transferred,—does not pass until it is known what is the subject matter of the sale in respect of which ownership would pass to the purchaser—until the goods are identified, and that would be only consonant with logic.

The sales were perfected after the 19th May, 1920. The matter is clear and not open to the possibility of conjuring upon some nicety of thought in regard to such transaction. No perfected sale arises until the property in the goods passed to the buyers or before the goods are delivered, under the circumstances.

The manufacture of cartridges covers a variety of different grades and when manufactured they have to be selected, counted and set apart according to the orders. So

long as the goods remain undetermined and unascertained the ownership does not pass. Delivery is an obvious appropriation, but short of delivery, appropriation on notification may be procured. See also Art. 1200 Civil Code.

In cases of executory agreement of sale it is the appropriation of the unascertained goods that completes the sale, followed by the notification of such ascertainment.

Something might indeed occur between the date of this order and acceptance, and the date when the goods can be manufactured, etc., that would prevent the very manufacturing of the article upon which that tax might have been imposed if the statute had been in force before.

Moreover, let us take the converse of the present case as an hypothetical one producing results which would illustrate the present transaction. Assuming, for the sake of argument, that the statute under which the tax in question was being collected had been in force since the 19th May, 1919, and had been repealed on the 19th May, 1920, could it be contended that the tax on the orders and acceptances bearing a date previous to the 19th May, 1920, could be levied, when as a matter of fact the goods were actually set apart, counted and appropriated after the latter date? The answer is necessarily in the negative and it is with the same logical force that it must be found that the present transactions, under the circumstances of the case, are subject to the tax as claimed.

Therefore, upon this first ground of defence, I find that the sales or agreements of sale were never perfected before the 19th May, 1920, when the Act in question came into force and that all such sales mentioned in this case are declared subject to the tax of 10 per cent upon the purchase price as established by the invoice which is *prima facie* evidence of the value of the goods, and is recoverable when the sale is perfected in the manner above set forth. See also *Cohen* v. *Stone* (1).

Coming to the second ground of defence advanced by the defendant and which amounts to saying, as set out in the statement of defence, that there is no provision, no method or machinery provided by the Act, whereby the amount of

(1) [1922] 70 D.L.R. 85.

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the tax can be calculated in respect of the goods in question; or, in other words, that, under subsection 5, there must be a custom duty paid on the property before it can become taxable.

In the consideration of this all important question I may say as a prelude that there is found, in the first volume of Blackstone's inimitable Commentaries, a valuable rule of guidance for the interpretation of a text of law and that is:

> The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and the spirit of it; or the cause which moved the legislator to enact it.

Now going into preliminary principles it must be found that the very economic necessities of a Government depend upon the collection of revenue and there is an inherent condition in the ownership of property that it shall contribute to the public revenue. This method of imposing and levying taxes is vested in the legislative power, which it is presumed, will always exercise such power with equal regard to the security of the public and individual rights.

The object of the Act of Parliament in question in this case is to raise revenue. It is, as set forth by its title,

> An Act to supplement the Revenue required to meet War Expenditures.

(5 Geo. V, ch. 8 (1915)).

Under section 15 of the "Interpretation Act" (R.S.C. 1906, ch. 1) "every Act and every provision and enactment thereof shall be deemed remedial." It would therefore seem that if the Act of 1915 is an Act to supplement the Revenue, that it is an Act, which in its remedial aspect, would add revenue to those collected under the customs and not to be exempted in the cases where custom duties are levied, as contended at Bar when interpreting subsection 5 of the Act of 1920, unless words to the contrary can be found in the statute.

Section 15 of the Interpretation Act further enacts that

> every Act and every provision and enactment thereof . . . . shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

Article 12 of Civil Code (P.Q.) also provides that

when a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the end for which it was passed.

The preamble which forms part of the Act, assists in explaining it.

Then approaching the construction of section 19 (*bb*) (10-11 Geo. V, c. 71, sec. 2) as affecting the tax thereunder imposed upon cartridges—in the light and with the help of the principles above set forth—I am primarily of opinion that this section 19 (*bb*) when placing an interpretation or meaning upon any of its subsections, must be read *dans son ensemble,* as a whole.

By the first paragraph of section 19 (*bb*), the tax in question is called an excise tax and is

imposed, levied and collected on the total purchase price of the articles hereinafter specified.

The next paragraph having any bearing upon the present case is subsection (4) of section 19 (*bb*), reading as follows:

The following excise tax shall be imposed, levied, and collected on the articles hereinafter specified.

That is—as will be seen by reference to this long section (19 *bb*) of the Act—a new class of article and by paragraph 5 of subsection (*c*) of said subsection 4, the tax of ten per cent is imposed on cartridges.

Therefore, so far we have complete and exhaustive provisions and enactments of a statute imposing on the total purchase price (according to the first article of section 19 (*bb*) which must be read together with subsection 4) of cartridges a ten per cent tax, as specified ("hereinafter"—says first article of section 19 (*bb*)) by subsection 4.

The enactments of the first paragraph of section 19 (*bb*), read together with subsection 4, constitute full power and authority to impose, levy and collect the tax in question on the total purchase price of the articles mentioned in subsection 4.

However, a different construction of this section 19 (*bb*) has been propounded at Bar. It is contended by the defence that subsection 5 would absolutely control all taxes imposed by subsection four and declare the tax payable only on the duty paid value

in addition to the present duties (these words seem to be overlooked) of excise and customs at the time of sale by the Canadian manufacturer,

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etc., and as there is no customs or excise bond duties payable upon the article in question the Act remains without authority or machinery to levy the tax.

This contention has been answered by the plaintiff in asserting that the expression "duty paid value" is defined by section 19 (*a*) of the Act of 1918, and that for the purpose of ascertaining the same, reference must be had to section 40 of the Customs Act (R.S.C. 1906, ch. 48) which says that:

> 40. Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country, whence and at the time when the same were exported directly to Canada.

See also section 2 of ch. 18 of 12-13 Geo. V, amending above section 40 respecting the depreciation of foreign currency.

Now, I have came to the conclusion that this subsection 5 has no application when the goods affected by the tax imposed by the previous sections or subsections of 19 (*bb*) (i.e. subsection 1 and subsection 4) is not subject to the additional duties of "custom, or when the goods are imported or taken out of customs or excise bond," etc.

This subsection (5) provides only for machinery in case the goods taxed by 19 (*bb*) (subsection 1, subsection 4) are subject to further customs or excise duties.

The tax in question is properly imposed and duly recoverable from the defendant under the full provisions of subsection 1 and subsection 4 of section 19 (*bb*) above cited apart from subsection 5; and there is nothing in this subsection 5 of the Act to detract from the force and effect of the enactments of the said subsection 1 and subsection 4 of section 19 (*bb*).

All that subsection 5 in question provides is that

> the excise taxes as imposed by the preceding subsection four on the total purchase price of the article—subsection 1 of 19 (*bb*) shall be payable on customs duties, when payable, etc.,

and is quite consistent with the previous section 1 and subsection 4 that impose a tax on the purchase price of the article in question,—in that it provides first that the excise duty imposed by the present Act will also be imposed and run upon imported goods subject to customs duties or excise bond as well as upon such duties, and secondly provides the machinery for finding out the purchase price (as

enacted by subsection 1 of section 19 (*bb*) in cases of importation. That is, in cases of importation, the mere purchase price may not be—according to principles obtaining under the "Customs Act"—the amount, as in normal cases, upon which the tax should be imposed. In customs cases, to avoid dumping in Canada the surplus of a glutted market at slaughtered prices, below market value, the Customs Act provides that the valuation for duty shall be arrived at in a manner to afford protection to the Canadian trader and that is fixed by section 40 of "The Customs Act," R.S.C. 1906, ch. 48. Repeating myself that means that in cases of imported goods the tax shall not necessarily be ascertained upon the actual purchase price but in the words of the "Customs Act" upon

> the fair market value thereof (of the article) when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

In other words subsection 5 is an enactment only by way of supplement, to the previous sections (subsection 1 and subsection 4 of section 19 (*bb*)) in that it provides that this new tax runs upon customs duties and further provides how the valuation for duty of the purchase price (the amount upon which the tax is recoverable in such cases) is ascertained and arrived at in a case where customs duties are also payable and that such purchase price is only due at the time of sale—that is when the sale is perfected.

This new tax is called excise tax. Yet the word excise—which is a corruption of the old French word *assis*—merely means here assessment or imposition. And the French word *accise,* says Littré, rather comes from the Latin "*accidere,* couper, tailler et signifie *taille*—de *a* et *cidere* pour *caedere* couper." Therefore, subsection 5 by way of an extension, as explanatory or curative but not interfering with the previous enactment, acting only as a logical sequence to the imposition of this new tax, provides that it shall be recoverable over and above customs duties and provides further the manner in which the purchase price, mentioned in subsection 1 of section 19 (*bb*), shall be in such cases arrived at—and no more.

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There is no enactment in the statute suggesting any intention or intimation of leaving the subject matter out of the field of taxation, under any circumstances.

While not disregarding the meaning of the words in subsection 5, taken even by themselves they must be considered as plainly declaring that this 10 per cent runs over customs duties; but reading and construing this section 19 (*bb*) as a whole, *dans son ensemble,* I find that no other meaning than the one mentioned above can be attached to subsection 5 thereof which is controlled by the whole of section 19 (*bb*). It cannot be denied that the phraseology of that subsection could be improved; but that is only to admit that it is another striking illustration of the ineptitude and want of care that beset the modern method of drawing our statutes. Indeed, as said by Bentham IV, 281:

Les paroles de la loi doivent se peser comme des diamants.

And these words have been quoted and amplified in an able article of *The Honourable Mr. Justice Rivard,* in La *Revue du Droit,* 1 p. 149, wherein citing J. E. Prince, he says that:

Pour écrire des lois, il faut savoir le droit, la logique et la langue.

Since section 6 of the Act, referred to by me at Bar, provides that in cases of any difference or doubt as to whether any war excise tax is payable, gives the Board of Customs the power to decide the same, in case no previous decision upon the question by any competent tribunal binding throughout Canada, it would seem that this last branch of the phrase or proviso would also give the Court jurisdiction to pass upon the same and further seem to detract from vesting the decision of all such matter exclusively to the Board, which does not become, under the circumstances, *aula designata,* thereby taking away the jurisdiction of this Court and I am therefore assuming jurisdiction. Under section 20 of the Act of 1915 (5 Geo. V, c. 8) all taxes imposed by the Act are recoverable in the Exchequer Court of Canada. I may also add that I am unable to follow the decision cited at bar in the unreported case of the *Attorney General* v. *Karson,* of the 21st July, 1921.

It is admitted, on behalf of the defendant, that if the question of liability is decided against the company, that

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the amount recoverable herein is the amount claimed by the information.

It was further asserted at bar that if effect were given to the plaintiff's claim it would impair existing rights. The answer to this is that parliament is supreme and moreover that similar conditions present themselves on every occurrence when any change is made in our Canadian Customs Act. Perfect equality in adjusting such matters is beyond the pale of human achievement.

There will be judgment in favour of the plaintiff against the defendant for the sum of $59,095.22 with interest thereon at the rate of five per centum per annum from the 22nd day of June, 1922, and with costs.

Judgment accordingly.

1923
Feb. 24.

BRITISH COLUMBIA ADMIRALTY DISTRICT

LARSEN ..... PLAINTIFF;

AGAINST

THE *GAS BOAT*

Shipping—Salvage services—Conditions necessary before ship becomes derelict or abandoned.

On the 12th December, 1922, at 11.35 a.m., the owner of the *G.B.* coming down the Fraser River had engine trouble and decided to anchor the *G.B.* and go ashore for assistance. Though apparently the anchor cable was long enough, in some unexplained way the *G.B.* got adrift and when the owner returned, at about 4 p.m., she was not to be found. At 2.30 p.m. the *C.* finding the *G.B.* adrift towed her to Vancouver. The weather was fine with a light breeze and no sea to speak of. The *G.B.* was drifting slowly and was impeded by the trailing anchor.

Held that it could not reasonably be assumed that the *G.B.* would have been carried across the gulf in the dark and be seriously damaged or lost, and that the element of danger was too remote and speculative to permit of the services rendered the *G.B.* being regarded and compensated for as salvage services.

2 That, on the facts, the *G.B.* could not reasonably be regarded as an apparent derelict.

ACTION by the owners of the steam tug *Clive* for alleged salvage services rendered to the *Gas Boat*.

February 14, 1923.

Case now tried before the Honourable Mr. Justice Martin at Vancouver.

Hume B. Robinson for plaintiff;

A. J. B. Mellish for the ship.

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

MARTIN, L.J.A. now (24th February, 1923) delivered judgment.

This is an action for alleged salvage services rendered to a gas boat (30 feet in length, unnamed) which the plaintiff's steam tug *Clive* picked up in passing in to Vancouver on 12th December last about 2.30 in the afternoon when some three miles off Point Grey, in the Gulf of Georgia, and towed to Coughlan's Wharf, False Creek, Vancouver, arriving there about an hour and a quarter thereafter; the weather was fine with a light breeze and no sea to speak of. The tug on her approach to Point Grey from the Fraser River had sighted the gas boat drifting

about aimlessly and so ranged up alongside and finding no one on board, and with some water in her and an anchor attached to a manila rope trailing over her stem, boarded her without difficulty, pulled up the anchor and towed her to port as aforesaid. It appears that earlier in the day the owner of the gas boat, George Thomson, in company with John Barkley, in coming down the Fraser River had trouble with her engine and when off Sturgeon Point, near the wireless station at Point Grey, decided to anchor her at 11.35 a.m. and go ashore for assistance, but though apparently a proper length (20 feet) of cable was paid out, in some unexplained way the boat got adrift, and when later in the afternoon shortly after 4 o'clock Thomson reached the place he had anchored her, she was not there to be found.

On behalf of the *Clive* evidence was given to the effect that with the ebb tide setting out of English Bay it was probable that the *Gas Boat* would have been carried across the Gulf sixteen or seventeen miles away in the direction of Porlier Pass, and that as it grew dusk at about 4 o'clock, she would probably not be picked up that evening or night and so would be beached and damaged, if not destroyed, on some of the islands across there. And it was further submitted that in the circumstances she should be regarded as an apparent derelict within the meaning of the decision of the Supreme Court of the United States in *The Island City* (1), the passage relied upon, I presume, being this:—

> The crew had left her thus apparently abandoned. The Westernport was, therefore, justified in taking possession of her, and taking her to a place of safety in the port of Hyannis, and to have a liberal salvage compensation, even if it should turn out that the barque had not been derelict.

But the court goes on to say:

> To constitute a case of derelict, the abandonment must have been final, without hope of recovery, or intention to return. If the crew have left the ship temporarily, with intention to return after obtaining assistance, it is no abandonment, nor will the libellant be entitled to the salvage as of a derelict.

I find it difficult, with all possible respect, to fully appreciate the effect of these apparently contradictory passages; but it is not necessary in this case to attempt to do so, because the circumstances here are of a very different

(1) [1861] 66 U.S. 121.

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Martin L.J.A.

nature from those perilous ones in which the *Island City* unhappily found herself, dismasted and rudderless, and left, though temporarily, on her stream anchor only, to ride out a storm.

In the light of all the circumstances of this case I am unable to take the view that the *Gas Boat* could reasonably be regarded as an apparent derelict; on the contrary, she had obviously drifted away from her moorings not far off and at the slow rate of progress she had made in her drift, impeded by the trailing anchor, I am unable to take the view that there was a reasonable apprehension of her being carried across the gulf in the dark; the element of danger is too remote and speculative to permit the service to be regarded as salvage from any point of view and it comes then to a question of remuneration for towage services. These were of a simple kind and took not more than an hour and a half, yet the boat is admittedly worth $850 and the plaintiff lost further time in pumping her out at the wharf and in finding her owner, which was rendered unexpectedly difficult because she had no name painted on her.

No precise evidence of the value of this service was given, but the defendant offered $10 which in my opinion is clearly inadequate, not to say niggardly. I think if he had offered $25 this action would not have been brought, and as that would be a fair sum to allow, speaking from my long experience in these matters, judgment will be entered for that amount.

Judgment accordingly.

1923
Feb. 27.
Martin L.J.A.

BRITISH COLUMBIA ADMIRALTY DISTRICT

THE ATTORNEY GENERAL FOR BRITISH COLUMBIA ..... } PLAINTIFF;

AGAINST

THE SS. *BERMUDA*

Shipping—Maritime lien—Innocent purchaser subsequent thereto—Delay within which to be exercised depending on circumstances—Limitation of Actions.

On the 8th October, 1919 the *B.* caused certain damages to the Government bridge at Sea Island, Fraser River. The amount of the final bill for repairs was received on the 16th March, 1920, and the writ issued on the 19th November, 1921, but was not served till the 11th August, 1922. On the 15th May, 1920, the present owners bought the ship from the person who was owner at the time of the damage, in entire ignorance of any claim against her on that head, of which they did not hear until after the writ was served. Service was delayed in order to catch her in Vancouver and to avoid heavy expense, inasmuch as the *B.* was employed in outside waters. The log contained no reference to the accident.

Held that plaintiff showed reasonable diligence, and that the delay in serving the action herein did not deprive plaintiff of his maritime lien, which could still be enforced even as against an innocent purchaser of the *res*.

2. That the statutory provisions in the B.C. Municipal Act limiting the time for bringing actions does not apply to suits *in rem* in Admiralty.

ACTION by the government of the province of British Columbia to recover damages caused to one of its bridges on the Fraser River.

February 13, 1923.

Case now tried before the Honourable Mr. Justice Martin at Vancouver.

Cecil Killam for the plaintiff.

R. L. Reid K.C. for the ship.

The points of law raised and the facts herein are stated in the reasons for judgment.

MARTIN L.J.A. now (27th February, 1923) delivered judgment.

This is a suit to recover damages caused to the government bridge at Sea Island, Fraser River, to answer which the defendant ship has been arrested. The damage was done on the 8th October, 1919, and it is established that it was negligently caused by said ship and that it amounted to $505.38; the amount of the final bill for repairs was

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received on the 16th March, 1920, and the writ issued on 19th November, 1921, but it was not served till the 11th of August last. About two months after the receipt of said final bill for repairs, viz., on 15th May, 1920, the present owners, the Whalen Pulp and Paper Mills Co., bought the ship from the person who was her owner at the time she did the damage, and in entire ignorance of any claim against her on that head, which it did not hear of till August, 1922, after the writ was served. The reason assigned for the delay in serving the writ is that the vessel was employed in middle northern waters (Swanson Bay), and on the west coast of Vancouver Island (Port Alice), where she could not be readily found for service and only at heavy expense, and she only came once to Vancouver City during that time, and unknown to the plaintiff, for boiler inspection; the log contained no reference to the accident.

It is submitted that the maritime lien for the damage should not be allowed to be enforced as against the innocent purchaser after this delay. The general and well-known principle, extracted chiefly from the judgment of the Privy Council in *The Europa* (1) which defined the decision of the same tribunal in *The Bold Buccleugh* (2), is succinctly and correctly stated in Maclachlan on Merchant Shipping, (1911) 334, thus:

> A maritime lien for damage done by a ship attaches that instant upon the vessel doing it, and, notwithstanding any change of possession, travels with her into the hands of a *bona fide* purchaser though without notice, and being afterwards perfected by proceedings *in rem*, relates back to the moment when it first attached; such proceedings, however, to be effectual, must be taken with reasonable diligence, and followed up in good faith.

And see Mayer's Admiralty Law, (1916), pp. 64 and 210, where the subject is given later and detailed consideration in that most useful and reliable work. To the cases cited in the notes by Maclachlan I add the following from our Canadian Courts: *The Hercyna* (3), *The Haidee* (4), and *Kennedy* v. *The Surrey* (5), in the last of which I considered the question at p. 508 and held that the delay in suing of two years, less one month, was not unreasonable, and there the purchase of the ship did not take place till

(1) [1863] Br. & L. 89.
(2) [1851] 7 Moor's P.C. 267.
(3) [1849] 1 Stuart 274.
(4) [1860] 2 Stuart 25.
(5) [1905] 11 B.C.R. 499.

one year and eight months after the accident, whereas here it occurred only seven months thereafter. I agree with what was said in the *Hercyna,* that the manifestation of the intention to retain and enforce the lien.

must depend upon the circumstances of the case and is not susceptible of any definite rule;

and it was said in the *Europa,* p. 93, that " consideration of expense and difficulty " should enter into the question of diligence. In the circumstances before me I am of opinion that there has not been a lack of reasonable diligence, and the observation I made in the *Surrey* is also applicable to this case, viz:—

There is nothing before me to show that the owners in any way whatever have been or will be prejudiced by this not very long delay.

It is only desirable to add with respect to that case, that the opinion I therein expressed to the effect that the statutory provision in the Municipal Act limiting the time for bringing actions does not apply to suits *in rem* in Admiralty, has been confirmed by the subsequent decision of the Court of Appeal in *The Burns* (1).

It follows that judgment will be entered in favour of the plaintiff.

Judgment accordingly.

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(1) [1907] P. 137.

1923
March 2.

QUEBEC ADMIRALTY DISTRICT

GEORGE McCULLOUGH ET AL.....PLAINTIFFS,

AND

SS. *SAMUEL MARSHALL* AND OWNERS. DEFENDANTS,

AND

HYMAN I. ELIASOPH.....CLAIMANT,

AND

THE STEEL COMPANY OF CANADA...CONTESTANT.

Shipping and seamen—Duties of purser and ship's husband distinguished—Admiralty Court Act 1861, section 10—Canada Shipping Act, section 326—Lien for services of ship's husband—Non-assignability of seaman's claim for wages.

E. had not signed the ship's articles, and was not a member of the crew and the services performed by him were not performed on board the ship. He acted as the shore agent for the owners, collecting freights, ordering supplies, signing contracts for the owners, receiving and disbursing their monies.

Held, that E. was not a seaman within the meaning of the Admiralty Court Act, 1861, s. 10 and the Canada Shipping Act, s. 326, and consequently had no right to proceed in rem.

(2) That the services rendered by him were in the nature of those usually performed by a managing owner or ship's husband which does not carry maritime lien. That calling himself purser employed by the owners did not give him the status of a seaman.

(3) That, even if E. had paid off any members of the crew with his own funds, and not as agent for the owners, and took assignments of their rights, such transfers and assignments to him are of no avail as maritime liens, other than liens for bottomry, which are not assignable.

CONTESTATION of the claim made by the agent of the owners for salary and for monies advanced to pay seamen, etc.

December 16th and 29th, 1922, and March 2nd, 1923.

Case now heard before the Honourable Mr. Justice Maclennan, at Montreal.

T. M. Tansey for Claimant

W. R. L. Shanks, K.C. for Contestant.

The facts are stated in the reasons for judgment.

MACLENNAN, L.J.A., now (March 2, 1923) delivered judgment.

The SS. *Samuel Marshall* was sold by order of the Court on 31st January, 1921, and the proceeds of the sale were paid into the office of the Deputy District Registrar for distribution among creditors and claimants according to their respective ranks. On 31st May, 1921, the claimant

filed an affidavit stating that the ship and her owners were indebted to him in the sum of $4,855.75 made up of: (*a*) $1,600 wages and $200 bonus as purser under written contract for the season of 1919; (*b*) $1,800 wages and $240 bonus under a verbal renewal of the same engagement at an increase of wages and bonus for the same duties during the season of 1920, and (*c*) $1,015.75 for monies advanced by him to Captain Ludger Marchand during November, 1920, to pay wages then due to the seamen, which money was used for that purpose, and he claims the right to be collocated by preference and privilege and that he had a lien on the proceeds of the sale of the ship in the hands of the Deputy District Registrar. At the hearing claimant made an additional claim of $447 consisting of two payments alleged to have been made by him on September 30, 1920, and three on October 15, 1920, for wages due to members of the crew and from whom he claims to have obtained receipts transferring and subrogating him in their respective rights. All these claims are contested by the Steel Company of Canada, a mortgagee judgment creditor of the ship for an amount considerably in excess of the balance of the money in the hands of the Registrar. In support of his claim the claimant has filed a letter dated Montreal, May 1, 1919, addressed to himself and signed by S. D. Miller on behalf of the owners of the ship agreeing to engage claimant as a purser for the steamer for the navigation season 1919 at a salary of $200 per month payable monthly and a bonus of $200 at the end of the season. There was no written engagement for the season 1920, but claimant claims that his engagement was verbally renewed for that season at $225 per month with a bonus of $240. The ship, during the seasons of 1919 and 1920, was operated under a season's charter for the carriage of coal from lake ports to Montreal. Claimant had not signed the ship's articles. Captain Ludger Marchand was her master during both seasons and he has testified that he had no purser either season and claimant was not a member of the crew. Captain Grey, master mariner, and for the past five years Shipping Master for the port of Montreal, with thirty-eight years' experience in marine matters, seventeen of which were in Montreal, testified that he never heard of

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any ship of the *Samuel Marshall's* class carrying a purser. It was not necessary and there was no work on her for a purser. John Waller, marine superintendent, who has had twenty-three years' experience, the last twelve being with the Keystone Company, has testified that he is familiar with the coal transportation business and never heard of a coal boat having a purser when under charter for the season. Claimant during two seasons acted as the shore agent for the owners of the ship collecting freights, ordering supplies, signing contracts for the owners, receiving and disbursing their monies and performing the usual duties which are performed by a managing owner or ship's husband. The duties of a managing owner or ship's husband are set forth as follows in Abbott on Shipping, 14th ed., p. 130:—

> He is to see that the ship is properly repaired, equipped, and manned; to procure freights or charter parties; to preserve the ship's papers; to make the necessary entries; adjust freights and averages; disburse and receive monies; and keep and make up the accounts between all the parties interested. His acts for these purposes are considered to be the acts of the part owners appointing him, who are liable on all contracts entered into by him for the conduct of their common concern—the employment of the ship.

See also Bell's Principles of the Law of Scotland, 10th ed., p. 205, par. 449, and *Darby* v. *Baines* (1).

The result of the evidence is that the services performed by the claimant during the seasons of 1919 and 1920 were not performed on board the ship. He was not employed or engaged in any capacity on board the SS. *Samuel Marshall.* His own testimony, to say nothing of witnesses called on behalf of the Steel Company and the evidence of the master, is sufficient to defeat his pretensions in that respect. Consequently he has no right to proceed in rem not being a seaman within the meaning of the Admiralty Court Act, 1861, s. 10, and Canada Shipping Act, s. 326. The claimant does not pretend that he had been engaged by the master of the ship one of whose duties is to enter into an agreement with every seaman whom he carries as one of his crew; "Canada Shipping Act," s. 328. Calling himself purser employed by the owners does not give him the status of a seaman.

The portion of the claim for $1,015.75 for monies advanced to the master in November, 1920, to pay wages of

(1) [1851] 21 L.J. Ch. 801.

the crew is not established. The claimant pretends that these monies had been borrowed by him from his father-in-law, one Frank, and that he handed it over to the master but got no receipt. Frank was not called to confirm claimant's statement as to the alleged borrowing. At the time claimant was the recognized agent of the owners. During the season of 1920 the ship was under charter for the carriage of coal to Montreal for the Steel Company of Canada, Limited. This company, from May to November 15, 1920, paid over $18,000 for freight by its cheques to the order of S. D. Miller, one of the owners, which cheques in nearly every instance were endorsed by claimant under his power of attorney and deposited in the Union Bank of Canada in Montreal in an account kept for the ship. That bank account was subject to cheques drawn upon it by claimant. He has not shown in this case what he did with the proceeds of the freight received by him and deposited in that account. From time to time he paid monies over to the master to be used in paying wages of the crew and other disbursements. He has no vouchers for payments making up this sum of $1,015.75. His additional claim for $447 is based upon the allegation that he paid that sum to members of the crew and holds assignments of their rights. At the date when these alleged assignments were obtained by claimant, he was the recognized agent of the owner's and the ship's husband. Every one having any business with the ship knew him in that capacity. If he paid off any members of the crew, as he pretends to have done, in his personal capacity and not as agents of the owners, the transfers and assignments to him are of no avail as maritime liens other than liens for bottomry which are not assignable: *The Janet Wilson* (1); *Rankin* v. *The S.S. Eliza Fisher* (2); *A. J. Bjerre* v. *The SS. J. L. Card* (3); The *Petone* (4); *Bonham* v. *The SS. Sarnor* (5).

To entitle claimant to be collocated by preference and privilege against the money in the Registrar's possession as is attempted here, he must be entitled to enforce a maritime lien. If his claim is not founded upon a maritime

(1) [1857] Swabey 261.
(2) [1895] 4 Ex. C.R. 461.
(3) [1899] 6 Ex. C.R. 274.
(4) [1917] P. 198; 86 L.J. Adm. 164.
(5) [1918] 21 Ex. C.R. 183, at p. 187.

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lien, it must fail. There is no maritime lien for the salary or wages of a managing owner or ship's husband and the weight of authority is strongly against the doctrine that the man who has paid off a privileged creditor stands in the shoes of the privileged creditor, has his lien and is entitled to the rights and remedies of the person whom he has paid. The claimant has no right *in rem* independent of a maritime lien and, in my opinion, the claimant has not acquired any maritime lien and his claim to rank by preference and privilege must be rejected.

Apart from the legal objections to this claim, it is surrounded by circumstances of grave suspicion. I have serious doubts as to the contract between S. D. Miller and claimant for the season 1919. These men are brothers-in-law and on their own admissions at the trial had no occupation. The claimant swore that he received no pay for his services in 1919 and 1920, although very considerable sums of money passed through his hands. He had no other occupation except a connection with a defunct company known as Baines, Limited, of which Miller was president and from which he occasionally got something. Since 1920 he claims that he, his wife and three children have been supported by his father-in-law, one Frank. This Mr. Frank did not appear at the trial. Miller swore the claim before the Court has been checked over and found correct. There is evidence to show that claimant had some interest in the SS. *Samuel Marshall*. From the manner in which claimant and Miller gave their evidence and having regard to claimant's record in the Criminal Court, it was quite evident the truth could not be obtained from them. They were acting in collusion. The claim was put forward as an after thought for the purpose of reducing the amount which the Steel Company of Canada would receive from the proceeds of the sale of the ship after payment of prior claims. In my opinion, the claim is wholly fraudulent and fictitious and there will be judgment rejecting it with costs.

Judgment accordingly.

Solicitor for claimant: *S. Eliasoph.*

Solicitors for contestant: *Brown, Montgomery & McMichael.*

1923
Jan. 20.

J. A. LEFEBVRE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Constitutional Law—Powers of Minister—R.S.C. 1906, ch. 66, sec. 9—No payment for services without special mention.

In the course of casual conversations with the then Postmaster General who was considering improvements in the administration of his department, L. suggested that the system followed in France of collecting subscription to newspapers through postmasters be adopted in Canada, stating that he was leaving shortly for France on personal business and could look into the matter and report to him. Before leaving, to accredit him with the French postal authorities he wrote to the Minister asking to be appointed special officer for the above purpose, who replied: "You are by these presents authorized to act as such special officer, etc." No mention was made of any payment or remuneration for such services.

Held that the special officer aforesaid is not an officer or servant within the meaning of R.S.C. (1906) c. 66, s. 9, ss. (*b*).

2. That, even had the Minister power under the statute aforesaid to make such an appointment, as no mention was made of any remuneration or payment for services to be rendered, L. could not recover against the Crown payment for his services as such.

PETITION OF RIGHT claiming $1,500 for expenses of trip to Paris, France, and for services alleged to have been rendered to the postal department by suppliant.

11th January, 1923.

Case now heard before the Honourable Mr. Justice Audette, at Montreal.

L. M. Gouin for suppliant.

Z. Filion for respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (January 20, 1923) delivered judgment.

Le pétitionnaire, par sa pétition de droit, réclame la somme de $1,500 pour frais de voyage à Paris, France, encourus sous les circonstances ci-après énoncées et couvrant une période de trois mois et dix jours.

Dans le cours de l'année 1912, le pétitionnaire qui était en bons termes avec le ministre des Postes, l'honorable Louis P. Pelletier, rencontra ce dernier dans trois ou quatre occasions, tant à bord du train qu'à son bureau, et comme le Ministre était dans le temps à considérer certaines améliorations dans l'administration de son département,

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Lefebvre lui suggéra d'adopter le système d'encaissement par les maîtres de poste des abonnements dus aux journaux, tel qu'il existait en France. Il fit de plus part au Ministre qu'il lui fallait sous peu, pour fins personnelles, aller en France où il avait un fils et qu'il pourrait lui fournir les renseignements relativement au système en force en France, s'il le désirait. Il avança même, dit-il, son voyage pour rencontrer les désirs du Ministre.

A la veille de son départ pour la France il écrivit au Ministre en date du 24 septembre 1912, le priant de lui adresser une lettre officielle, lui disant:

pour me (lui) faciliter l'entrée du Ministère des Postes français, auriez-vous l'obligeance de me nommer " officier spécial " à cet effet.

Et c'est sous ces circonstances que le ministre lui adressait la lettre en date du 26 septembre 1912, récitée au long dans la pétition de droit et faisant base à la présente action et se lisant comme suit:—

Re enquête en France et rapport à faire concernant l'encaissement par les maîtres de poste des abonnements aux journaux. Vous êtes, par les présentes, autorisé à agir comme officier spécial au sujet de cette enquête. Lorsque vous aurez pris les renseignements nécessaires, je vous prierai de me faire rapport.

Cette lettre était pour l'accréditer et lui faciliter son entrée au ministère des Poste français. Subséquemment, dans une lettre en date du 4 février 1915, de l'honorable L. P. Pelletier à l'honorable T. C. Casgrain, alors ministre qui avait succédé à Monsieur Pelletier au Département des Postes, ce dernier disait au sujet de la présente réclamation:

Quand il (Lefebvre) est revenu, il m'a exposé le résultat de son travail et m'a laissé un certain nombre de pièces et de documents à ce sujet. Il n'a été aucunement question de paiement et cela m'a confirmé dans l'idée que j'avais bien compris la situation et que Monsieur Lefebvre offrait de faire cela comme ami du parti.

Il résulte donc de ces pourparlers et négociations que le pétitionnaire repose sa réclamation sur la lettre du 26 septembre 1912, qui ne le nomme même pas officier spécial mais qui l'autorise à agir comme tel,—le langage est très gardé. A cette date il n'est aucunement question de paiement ou rémunération et le même silence se maintient à son retour lorsqu'il communique au ministre le résultat de son voyage.

En considération de la question de droit qui se présente au seuil de la cause et qui le prive de tout recours en droit, je suis dispensé d'entrer dans de plus grands détails relativement aux faits et surtout quant au *quantum;* mais je dois cependant mentionner que Lefebvre a été absent trois mois et dix jours et que pendant son séjour à Paris il allait dit-il " je suppose " une couple de fois par semaine au département des Postes et que la balance du temps lui appartenait pour vaquer à ses affaires personnelles.

Le savant avocat du pétitionnaire a prétendu, à l'audition, que le ministre, en vertu de la sous-sec. (*b*) de la sec. (9) ch. 66, S.C.R. 1906, avait le pouvoir de faire la nomination dont il est question en la présente cause. Je ne puis partager cette opinion. La classe de fonctionnaires, employés et serviteurs, mentionnée à l'Acte, est tout autre et différente de celle dans laquelle la mission du pétitionnaire doit nécessairement entrer. La sphère de l'emploi du pétitionnaire est essentiellement spéciale et n'entre pas dans la clause ou sous-section mentionnée au statut. De plus, sa nomination, si nomination il y a, se résume à être autorisé à agir comme officier spécial pour une fin spécifique.

La Couronne ne parle que par son exécutif, par un arrêté du Conseil privé du Roi pour le Canada, et un de ses ministres agissant en son nom personnel et de son propre chef ne peut lier l'Intimé sans autorité légale. *Quebec Skating Club* v. *The Queen* (1); *Re Mackay & Public Works Act* (2); *Mackay & Co.* v. *Toronto Corporation* (3); *The King* v. *McCarthy* (4); *Livingston* v. *The King* (5); *Gaston, William et al* v. *The King* (6); *The King* v. *Vancouver Lumber Co.* (7); *British American Fish Corporation* v. *The King* (8); *May* v. *The King* (9).

Et même si le ministre des Postes avait eu le pouvoir et l'autorité de faire la nomination en question en vertu du Statut (S.C.R. 1906, ch. 66, sous-sec. (*d*) sec. 9), comme

(1) [1893] 3 Ex. C.R. 387.
(2) [1921] 58 D.L.R. 332.
(3) [1919] L.J. 88, P.C. 204.
(4) [1919] 18 Ex. C.R. 410, at p. 414 et seq. confirmée en appel.
(5) [1919] 19 Ex. C.R. 321.
(6) [1922] 21 Ex. C.R. 370-373.
(7) [1914] 17 Ex. C.R. 329; 41 D.L.R. 617; 50 D.L.R. 6; confirmée en appel à la Cour Suprême du Canada, 4 décembre 1914.
(8) [1918] 18 Ex. C.R. 230; confirmé en appel C.S. du Canada 59 S.C.R. 651.
(9) [1913] 14 Ex. C.R. 341, at p. 345 et seq.

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aucune question de paiement n'avait été mentionnée, sous l'autorité des décisions dans les causes de *Tucker* v. *Le Roi* (1) et *De Cosmos* v. *Le Roi* (2), le pétitionnaire ne pourrait encore recouvrer. Si les réclamants dans ces deux causes ne pouvaient recouvrer, *a fortiori* Lefebvre ne le peut. Il serait oisif de répéter ici les arguments de ces causes citées, le principe de droit est trop bien connu et est maintenant fermement établi.

(His Lordship here cites the head notes in these two cases.)

Il y a en la présente cause absence de contrat passé en la manière voulue par la loi et par une personne duement autorisée par et au nom de la Couronne. Il y a aussi absence totale de contrat pour rémunération quelconque.

En conséquence, considérant que la pétition de Lefebvre n'est pas fondée en droit, la présente action est déboutée avec dépens en faveur de l'Intimé.

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(1) [1902] 7 Ex. C.R. 351; 32 S.C.R. 722.

(2) [1883] 1 B.C.R. pt. (II) 26.

QUEBEC ADMIRALTY DISTRICT

1923
April 21.

EXPORT STEAMSHIPS, LIMITED.....PLAINTIFF;

AGAINST

THE SHIP *IOCOMA*

Shipping—Collision—Canal navigation—Inevitable accident—Antecedent error of seamanship.

At about 9.30 p.m. on the 4th May, 1922, a collision took place in a straight reach of the Welland Canal, between The *I.* and *T.* Weather was fine and clear, wind light, and current about 1½ miles per hour. The *T.* was going with the current and the *I.* was coming up. All regulation lights were shown on both ships and all proper signals were given, and both vessels were going slow. The *T.* at time of collision was on her own side of the canal, but the bow of the *I.* sheered to port across the canal and collided with the *T.*

Held that although at the moment of collision all was done by the *I.* that maritime skill could suggest to avoid it, the earlier manoeuvres of the *I.* in changing her direction too soon; going too near the bank, thus subjecting the stern to suction, resulting in a loss of control and, when endeavouring to straighten up, putting her helm too far to starboard thus giving her bow a cant from the bank, were unseamanlike and unskilful and were the cause of the sheer to port and the consequent collision.

2. Where a defendant alleges that the collision was inevitable, the burden of proof is upon him to show, not only that at the moment, in the agony of collision, or immediately before it took place, he had done all that ordinary care or maritime skill could suggest to avoid it, but also that all antecedent manoeuvres had been adopted which might have prevented it or rendered the risk of it less probable, and that the position in which the vessels found themselves at or just before collision, and which made it inevitable, was not due to any error in manoeuvring on its part.

ACTION in rem for damages resulting from a collision between the *Trevisa,* one of plaintiff's ships, and the *Iocoma.*

March 15th, 25th, April 4th and 21st, 1923.

Case now heard before the Honourable Mr. Justice Maclennan, at Montreal.

R. C. Holden, Jr. for plaintiff;

P. A. Badeaux for defendant.

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

MACLENNAN, L.J.A. now (April 21st, 1923) delivered judgment.

Plaintiff sues *in rem* for damages resulting from a collision between its Steamer *Trevisa* and the Steamer *Iocoma.*

1923

EXPORT STEAMSHIPS, LTD. v. SS. *Iocoma*

Maclennan L.J.A.

Plaintiff's case is that at about 10.30 p.m. on 4th May, 1922, the *Trevisa* was coming down the Welland Canal at a slow speed when she sighted the *Iocoma* coming up; the weather was fine and clear with practically no wind and there was a current of about one and a half knots with the *Trevisa*. The latter gave a one blast signal which was answered by the *Iocoma* and when the ships were at a suitable distance apart the *Trevisa's* helm was ported and she was taken close to the bank of the canal on her starboard side. When about to pass, the *Iocoma* suddenly swung violently towards the *Trevisa;* the latter's engines were at once put full speed astern, but the *Iocoma* struck her port bow causing serious damage; neither the *Trevisa* nor those on board her were in any way responsible for the collision which, on the contrary, was due solely to the fault and negligence of the *Iocoma* and those on board her; the *Iocoma* improperly and without reason or excuse failed to keep to the side of the fairway or mid channel which lay on her starboard side and her rate of speed was improper; she was improperly and negligently navigated and broke Rules 28, 31 and 37 of the Rules of the Road for the Great Lakes, and plaintiff claims a declaration that it is entitled to the damage proceeded for, a condemnation of the defendant and her bail in such damage and in costs, to have an account taken and such further relief as the nature of the case may require.

Defendant's case is that when the vessels were about two ships length from each other, the *Iocoma* put her wheel to port, to which the vessel responded. The *Trevisa* did not apparently port her helm nor slacken speed, but continued in the middle or very near the middle of the canal. When the vessels were on the point of passing, the bow of the *Iocoma* took a sudden turn to port which was not caused by any action of her helm, and her port bow struck the port bow of the *Trevisa*. The moment the bow of the *Iocoma* began to swing to port the engines were put full speed astern, the helm was hard-a-port. She was practically stopped when the collision occurred. The *Trevisa* did not alter her helm or her speed. The reason for the sheer taken by the bow of the *Iocoma* is unknown, but was not due to any act or

neglect on the part of those in control of her. It may have been due to a current, to the wash of the *Trevisa* or to a landslip from the bank of the canal beneath the surface; but in any event the collision would not have occurred had the *Trevisa* been farther toward her starboard side of the canal for which there was plenty of room, and had she observed her own signal to the effect that she was going to that side, and had she had proper regard to the difficulties of navigation in a narrow space such as the canal, and to the respective beams of the two vessels, in effect forcing the *Iocoma* too near the other side of the canal. The *Iocoma* did not break any of the rules applicable to navigation nor neglect to observe any. The *Trevisa* was improperly and negligently handled and violated Rules 31, 37 and 38 of the Great Lakes Rules, and defendant claims that plaintiff's action should be dismissed with costs.

The collision took place in a straight reach of the Welland Canal between Rami's bend and the Air Line Bridge about 9.30 p.m. Standard time, on May 4th, 1922. The weather was fine and clear, wind very light and current about one mile and a half per hour. The *Trevisa,* a steel steamer 256 feet long, 42 feet 6 inches beam and drawing 14 feet forward and 14 feet 3 inches aft, was going down with the current and under the rules had the right of way. The *Iocoma,* a steel steamer 252 feet long, 42 feet beam, light, drawing 5 feet forward and 12 feet 6 inches aft, was upward bound. All regulation lights were shown on both ships. When at a distance of about half a mile the *Trevisa* gave one blast on her whistle and the *Iocoma* answered with a similar signal. The *Trevisa* was going at half speed and on giving the signal reduced to dead slow. The collision happened about ten minutes later. The speed of the *Iocoma* was slow from the Air Line Bridge until the ships were within one ship's length, when her master put her engines dead slow. Both were approaching each other in the middle of the canal, the water having a width of 200 feet on the surface. The banks sloped down and came in 15 or 18 feet, so that the bottom of the canal had a width of over 160 feet. All witnesses agree that the *Iocoma* was first to change direction by porting and then the *Trevisa*

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ported. There is some contradiction as to the distance the ships were apart when these and subsequent manoeuvres took place. According to the master of the *Trevisa* her helm was altered half a point to port about three ships' lengths from the other ship—her second mate who was at the wheel says he started to alter the wheel at about two lengths—she was then going dead slow and went to starboard, and when the ships were about one length apart her engines were put full speed astern and the wheel was put hard-a-port. The chief engineer of the *Trevisa* says her engines were going full speed astern at least 25 to 30 seconds before the collision, while the second mate says the order to go astern was given by the master about a minute before the collision. According to the mate she touched the bank after her engines began to go astern and when the collision took place was in her own water.

According to the master of the *Iocoma* he ported her helm about half a point when about two ship's length from the other ship; the latter did not alter her course until at about a boat's length, when the *Iocoma's* engines were checked to dead slow, and at half a ship's distance she was straightened up, her bow began to go to port across the canal and her engines were put full speed astern, the helm amidships, and the *Iocoma's* stem struck the *Trevisa's* port bow about ten feet abaft the latter's stem. There were several movements of the *Iocoma's* wheel between the time when she first ported and the collision. The wheelsman of the *Iocoma* was in charge of her wheel, her master and second mate being in the wheelhouse with him. He does not say how far apart the ships were when he got an order from the master to port the wheel and clear the other vessel, and he put the wheel to port, then he got an order "steady" and he altered to starboard to get her steady and stop her swing, then he eased the helm back to amidships and a little bit to port, and then he got the order to straighten her up and he "starboarded a little" and got her into a position parallel to the starboard bank of the canal; he cannot say whether he brought the wheel back a little to port or amidships, but he saw her bow swinging over to the *Trevisa* and he then put the wheel hard-a-port

of his own accord to keep her from swinging. When the *Iocoma* was straightened according to the wheelsman, she was probably about one and a half or two boat lengths from the other ship,—perhaps a little more or a little less —the full speed astern order was given when the ships were somewhere near a boat's length apart and the master told him to put the wheel amidships. If the *Iocoma* when straightened in her course was one and a half or two lengths from the other ship, she must have ported when considerably more than two ship's lengths, as her master says, from the *Trevisa*. The mate of the *Iocoma* says the swing to port started at three-quarters ship's length from the *Trevisa* and the collision occurred half a minute or a minute after. There is a discrepancy between the master, mate and wheelsman as to when the swing to port started; the master says around half a ship's length from the *Trevisa*, the mate at three-quarters' ship's length, and the wheelsman at one and a half to two ship's lengths. The master did not order the engines full speed astern until the ships were less or about half a boat's length apart. There is a question if the full speed astern order was proper, and if so, was it given too late. There is also the action of the helm having been put amidships when the engines were going astern.

The evidence further establishes that the stem of the *Iocoma* struck the port bow of the *Trevisa* at an angle of about 45 degrees and that the latter was then well over to her starboard side of the canal and close to the bank. The anchor of the *Iocoma* was hanging over her port bow and was crushed through the shell plates of the *Trevisa* and part of its stock and flukes was carried away in the side of the *Trevisa*. The impact was fairly heavy, no doubt due more to the weight of the ships than to their speed, and several plates on the *Trevisa* were damaged. No damage was caused to the *Iocoma* apart from the loss of her anchor. At the trial counsel for the *Iocoma* abandoned any contention that the *Trevisa* was to blame except possibly that she may have been too near the centre of the canal at the time of the collision, but a careful consideration of the evidence leads me to the firm conclusion that she had gone

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to her own side of the canal and did not in any way crowd the *Iocoma*.

It was contended that the sheer to port which ended in the collision was due to suction of the stern of the *Iocoma* towards the canal bank due to a cave in. The evidence in support of this theory is not very definite or conclusive. Suction is a force which has to be reckoned with in shallow waters. It usually occurs between passing ships and the extent to which its force may be exerted depends upon the distance between the ships, their relative speed and size and the character of the channel or water in which they pass. It is well known that when ships approach too near the bank or bottom, or " smell the land," in sailor parlance, they have a strong tendency to sheer. The bank of the canal sloped from top to bottom and the closer the ship approached the bank the less water she had under her. The *Iocoma* was light and could go much closer to the bank than if loaded. Her stern was much deeper in the water than her bow and if, as is contended, her stern was affected by suction, it may have resulted from having gone too close to the bank. If the sheer was due to a force not then under her control, it is necessary to consider several questions of navigation, viz:—Was it without fault on her part? Could it have been avoided by the exercise of ordinary vigilance and seamanship, or have been controlled and the ship's course recovered by the exercise of reasonable and ordinary good seamanship? The plaintiff has a right to call upon the *Iocoma* to show that she was brought within this influence without any antecedent fault and that there was no fault in her management after this force began to exert itself upon her. The question whether proper manoeuvres were employed and whether any manoeuvres could have averted the collision, are matters of nautical skill upon which I have taken the advice of my assessors.

Among the questions which I have put to my assessors, with their answers, are the following:—

1. Did the *Iocoma* port too soon?—Ans. Yes.

2. Did she go too close to the canal bank and thereby subject her stern to suction and become incapable of

answering her helm?—Ans. Yes. We are inclined to say that in the straightening up of the ship, the wheelsman, on his own initiative, gave her too much starboard helm and was unable to overcome the swing to port in sufficient time to avert the collision.

3. Was full speed astern a proper manoeuvre, and if so was it done at the right time?—Ans. If the two ships were only one-half ship's length apart at this moment, this was the right manoeuvre. If, as the wheelsman says, they were one and one-half ship's length apart, a kick ahead on her engines would have straightened her up.

4. What should have been done with the helm when the full speed astern order was given?—Ans. We would suggest the rudder should have been put hard-a-starboard, particularly as the ship had very little way through the water.

5. Was her speed under the circumstances too great?—Ans. No.

6. Did the *Iocoma* fail to use any manoeuvre which would have averted the collision?—Ans. If she had not gone so close to the bank, and remembering she was a light ship, she would not have felt the suction of the bank to the extent claimed.

Although the canal is a narrow channel, there is ample room for ships to meet and pass in safety provided they are navigated with care and ordinary nautical skill and seamanship. I am advised by my assessors that it is not necessary for meeting ships to change their course from the centre to their respective sides at a very great distance from each other, in fact, they can approach each other with safety to a comparatively short distance and that then with proper manoeuvring they pass without difficulty. The defence relied upon here is inevitable accident and the burden of that defence rests on the defendant. This defence is well known in Maritime Law and the principles applicable have been stated in a great many cases.

In *St. Clair Navigation Company* v. *The Ship D. C. Whitney* (1), Mr. Justice Hodgins said:—

> The law of inevitable accident where the maritime offence of collision is charged, requires the offending party to prove that he could not possibly

(1) [1905] 10 Ex. C.R. 1, at p. 13.

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prevent it by the exercise of ordinary care, caution, prompt action or maritime or engineering skill. It is not enough to show that the damage could not be prevented by the offending party at the moment of collision; for one of the crucial questions is—could previous measures have been adopted which would have prevented it or rendered the risk of it less probable.

In the *D. C. Whitney* case the defence of inevitable accident was rejected by the trial judge and the plaintiff's action was maintained, but it was reversed in the Supreme Court on the question of jurisdiction alone (1).

Taylor v. *SS. Prescott* (2) affirmed by the Supreme Court of Canada and the Privy Council.

Ulric Tremblay v. *Hyman* (3), and authorities there cited.

Marsden's Collisions at Sea, 7th Ed., p. 19:—

> It is not enough for a ship to show that, as soon as the necessity for taking measures to avoid collision was perceived, all that could be done was done. The question remains whether precautions should not have been taken earlier. When two ships are shown to have been in a position in which a collision was inevitable, the question is, by whose fault, if there was fault, did the vessels get into such a position.

See also the leading English case of The *Merchant Prince* (4), and also the case of The *Ralph Creyke* (5), and a leading American case of The *Ohio* (6).

Smith's Rule of the Road at Sea, 218.

The collision in this case was caused by the bow of the *Iocoma* sheering to port and coming across past the centre of the canal until she came in contact with the *Trevisa*, notwithstanding that her engines had been put full speed astern. How did the *Iocoma* get into the position which immediately preceded the sheer to port? I am advised by my Assessors that she ported too soon and went too close to the canal bank on her starboard side and that in straightening up her wheelsman put the helm too much to starboard. This gave her bow a cant away from the bank and her bow continued to swing to port until the collision happened. I accept the advice of my Assessors that the master did right in putting her engines full speed astern when he did. In my opinion his evidence as to the distance the ships were apart when the sheer to port

(1) [1906] 38 S.C.R. 303.
(2) [1908] 13 Ex. C.R. 424; [1910] A. C. 170; 79 L.J. P.C. 65.
(3) [1920] 20 Ex. C.R. 1.
(4) [1892] P.D. 179.
(5) [1886] 6 Asp. (N.S.) 19.
(6) [1898] 91 Fed. Rep. 547.

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started is more trustworthy than the evidence of the wheelsman. The speed of the ship was not excessive and it was then too late to attempt to recover her course by increasing her speed ahead. The reverse was the only thing for the master to do under the circumstances, but unfortunately it did not avert the collision. I think it is very plain that the *Iocoma* changed her direction too soon and went too close to the bank, with the result that being too close to the bank the ship refused to answer her helm. If she had delayed porting in the first place until the ships were closer, she would have passed in safety, and this is the opinion of my Assessors. There was therefore antecedent fault in porting too soon and in going too close to the bank, and this fault lead to the situation which exposed the stern of the *Iocoma* to suction towards the bank and resulted in the collision. I am of opinion that the master did the best he could when he found that the bow of his ship was swinging to port when it should have been going in the contrary direction, but I cannot excuse his owners from the manœuvres which preceded the sheer and for which I think the wheelsman is mainly responsible. This is also the opinion of my Assessors. There was fault as above pointed out in the navigation of the *Iocoma* between the time she ported and the sheer to port started which prevents the defence of inevitable accident prevailing. No blame is imputable to the *Trevisa* or those in charge of her.

There will therefore be judgment for the plaintiff for damages and costs against the defendant and her bail, with a reference to the Deputy Registrar to assess the damages.

Judgment accordingly.

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

Solicitors for defendant: *Messrs. Atwater, Bond & Beauregard.*

1923
April 18.

QUEBEC ADMIRALTY DISTRICT

GEORGE HALL COAL CO. OF CANADA, LTD. ..... } PLAINTIFFS;

AGAINST

The SHIP *BAYUSONA*.

Shipping—Damages due to collision—Practice—Motion to amend writ by increasing amount—Re-arrest—Costs

Plaintiffs by their action claimed $4,000 damages, by reason of a collision between one of their barges and the *B*. The *B*. was arrested and the bail fixed at the said sum of $4,000, the then estimated cost of the repairs. Later, but before trial of the action, it was found that the actual cost of the repairs amounted to $5,512.94. The gross register tonnage of the *B*. was 1366.96 tons and the bond for $4,000 was insufficient. Plaintiffs now move to amend their writ by adding to the amount claimed and for the issue of a warrant to re-arrest the *B*.

Held that the court may direct measures to be taken to do full justice to plaintiffs, and to that end may permit the amendment and the issue of a warrant for the re-arrest of the ship, but with costs of the motion and of the re-arrest against the plaintiff.

(The *Hero*, 1865 Br. & L. 447 followed.)

MOTION for leave to amend the writ herein by increasing amount of the claim and for a warrant to re-arrest the ship.

April 7th, 1923.

Motion heard before the Honourable Mr. Justice Maclennan at Montreal.

R. A. Holden K.C. for plaintiff.

Lucien Beauregard for defendant.

The facts and questions of law are stated in the reasons for judgment.

MACLENNAN L. J. A., this (18th April, 1923), delivered judgment.

This is a motion by plaintiff for leave to amend the praecipe and writ of summons by altering the sum in which the action was entered from $4,000 to $6,500 and that a warrant be issued for the re-arrest of the SS. *Bayusona*.

By the action plaintiff claimed $4,000 damages by reason of a collision between the plaintiff's barge *Frank D. Ewen* and a dock in the Lachine Canal which happened on or about 25th October, 1922, and which it is claimed was caused by the improper navigation of the SS. *Bayu-*

sona, which was arrested and subsequently released upon bail being furnished in the amount of $4,000, which it was estimated at the time would be sufficient to cover the cost of the repairs to plaintiff's barge, compensation for her detention and costs of the action. The repairs have now been made and it is claimed that the damages sustained in consequence of the collision amount to $5,512.94 apart from the costs of the action. The gross register tonnage by the *Bayusona* is 1366·96 tons and the bond for $4,000 is insufficient, hence the demand for leave to amend by increasing the amount claimed and the re-arrest of the ship.

Rule 9 of the General Rules regulating the practice and procedure in admiralty cases in this court provides that the Judge may allow the plaintiff to amend the writ of summons and endorsements thereon in such manner and on such terms as to the Judge shall seem fit. Counsel for defendant does not contest the application to amend by altering the sum claimed from $4,000 to $5,600, but submits that the Court has no power to grant a re-arrest for the same cause of action after the ship has been released on bail.

In the case of the *Hero* (1), in which the plaintiffs move for leave to amend by increasing the amount in which the action was entered and for a warrant for the re-arrest of the ship, Dr. Lushington, at page 448, said:—

> I am of opinion that where application to increase the amount of the action is made before judgment has been pronounced, the court has power to direct measures to be taken to do full justice to the plaintiff.
>
> I am of opinion, therefore, that the court has power to grant this motion, and that under the circumstances it is just and proper that the plaintiffs should be relieved from the mistake committed. I allow the re-arrest, but the plaintiffs must pay all the expenses arising from their mistake.

In that action the clerk of plaintiff's proctor by mistaking his instructions entered the action for one thousand pounds instead of twenty-six thousand pounds. The ship was accordingly arrested and bailed in that sum. The error was not discovered until about eight months later. The damages were estimated at two thousand and three hundred and fifty pounds and the gross register tonnage

(1) 1865 Br. & L. 447.

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of the ship was 602 tons. It is important to observe that the leave to amend and re-arrest was obtained before trial.

In the *Flora* (1), re-arrest before trial was allowed to stand.

In the *City of Mecca* (2), Sir Robert Phillimore, at page 34, said:—

> There have been several instances in which a ship has been arrested or re-arrested in consequence of the bail becoming insolvent.

The *Hero* was approved by Jeune, J. in the case of the *Dictator* (3).

Cases in which application for re-arrest was made after trial and final judgment are inapplicable on this application. The present motion is made under circumstances, in principle, similar to those which were before Dr. Lushington in the case of the *Hero,* in which he said that the Court had power to allow the re-arrest. To do full justice to the plaintiff the re-arrest should be allowed.

The motion will therefore be granted, plaintiff paying the cost of the motion and the costs of the re-arrest.

Judgment accordingly.

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

Solicitors for the ship: *Messrs. Atwater, Bond & Beauregard.*

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(1) [1866] L.R. 1 Adm. & Ecc. 45. (2) [1879] L.R. 5 P.D. 28.
(3) [1892] P.D. 304, at p. 321.

HIS MAJESTY THE KING.....PLAINTIFF;

VS.

ERNEST POWERS .....DEFENDANT;

1923
March 24.

Constitutional Law—Power of Dominion Crown to exempt its property from the requirements of Provincial Law—Soldier Settlement Act—Sections 33 and 34 of 9-10 Geo. V, ch. 71.

Held that sections 33 and 34 of the Soldier Settlement Act providing that, in the absence of the Board's consent thereto, livestock sold to a settler by the Board, so long as any part of the sale price remains unpaid, is exempt from the provisions of any provincial law requiring the registration of deeds, judgments, bills of sale, etc., affecting the transfer, etc., of like property, and that the same cannot be, voluntarily or involuntarily, alienated or encumbered to the prejudice of the Board's claim thereon, are *intra vires* of the Dominion Crown.

2. That any one dealing with a settler under the Board was put upon his inquiry, and did so at his own risk and peril.

INFORMATION of the Attorney-General of Canada to recover a certain horse or its value from the defendant who had bought the same from a settler under the Soldier Settlement Act, and which was part security for the advance made by the Crown to the settler.

January 23rd, 1923.

Case now heard before the Honourable Mr. Justice Audette at St. Thomas, Ont.

T. D. Leonard for plaintiff.

W. H. Barnum for defendant.

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

AUDETTE J. now (March 24, 1923) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby the Crown claims the return of a grey percheron gelding, or the value thereof and damages for detention of the same. It is contended that the defendant wrongfully obtained possession of this gelding owned by the Soldier Settlement Board (9-10 Geo. V, ch. 71) from one Ernest S. Walker, a settler under the Act, and that upon demand he has refused and failed to deliver possession of the animal to the plaintiff or the Soldier Settlement Board.

The evidence discloses a long chain of minute facts, but, freed from all unnecessary details, it appears that Walker had at the origin a grey percheron gelding which,

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with other chattels, all subject to the Crown's lien, he had disposed of, contrary to the Act, having also run behind in his payment on the land. This grey percheron gelding, falsely stated to have been mired, was actually disposed of by Walker and found missing by some officials of the Board.

In March, 1919, Walker bought, with his own money, two grey percheron geldings, three years old. He bought one from Close and one from Percy. In March, 1920, the gelding bought from Percy died of distemper.

On 1st December, 1920 (exhibit No. 11), Walker wrote to the Soldier Settlement Board sending them, at their request, information as to his stock, and he then showed only one percheron gelding rising five which he valued at $170. Obviously that gelding was the one he purchased from Close and which he had called "Mark."

On the 17th December, 1920, he therefore executed a purchasing order, exhibit No. 3, whereby he turned over "Mark" to the Board as further security to cover the stock he had disposed of contrary to law and contrary to his own agreement with the Board—a bill of sale by way of security. In virtue of this new document the percheron gelding rising five years,—which is therein valued at $160 —became the property of the Crown. An order to repossess was subsequently issued, exhibit No. 7. This percheron gelding is obviously "Mark," the one he had purchased in 1919 from Close.

Walker, in his testimony, further stated that between December, 1920, and haying time in 1921,—that is latter end of June—he did not purchase any percheron gelding and at that date he bartered or sold this very gelding called "Mark" to the defendant Powers.

Powers in turn traded "Mark" to one Bonsor. But when the officers of the Board, accompanied with Powers, traced the horse to Bonsor, the trade was cancelled and Powers took back the horse and offered to settle the whole matter for $150 (exhibit No. 9). The horse had been clearly identified, as attested by several witnesses, including Walker himself. The offer being accepted Powers gave his post-dated cheque for that amount, but the payment of the same was stopped by him at the bank. When

the cheque was presented there were no funds. In the meantime he had sought legal advice and decided to contest the claim.

The defendant testified that when he traded "Mark" with Walker the latter told him the horse was free from any lien. This was a false statement on Walker's part and one from which the defendant cannot seek comfort or relief; because the moment he knew he was dealing with a settler under the Board, he was put upon his inquiry and he could easily ascertain the truth of the statement by asking the Board. *Caveat emptor.* He thus bought at his own risk and peril.

The Parliament of Canada when legislating with respect to its property,—under subsection 1 of section 91 of the B.N.A. Act—is undoubtedly legislating within its competence and jurisdiction. But even if there were any conflict between the Federal and Provincial jurisdiction in this case, which I do not find, the question must be regarded as disposed of by numerous decisions of the Judicial Committee of the Privy Council, the most recent one there being in the case of *McColl* v. *C.P.R. Co.* (1) in which the judgment of their Lordships was pronounced by the Right Honourable Mr. Justice Duff. His succinct statement of the rule of construction governing such cases may be quoted with advantage. Speaking particularly of the Dominion and Provincial enactments in question in that case, he says:—

> The enactments deal with different subject matter, although the circumstances of a particular case may bring it within the scope of both enactments, in which case, if a conflict arises, it is the Dominion legislation which prevails.

The security obtained by the Board, on the 17th December, 1920, (exhibit No. 3) under the document called "purchasing order" complies with the requirement of the Act and is within the ambit of section 32 thereof, as amended and repealed by 10-11 Geo. V, ch. 19, sec. 4 (1920), whereby, moreover, the forms of any agreement or of any document made thereunder is left to be settled by the Board itself, and exhibit No. 3 is one of these forms.

(1) [1923] 1 A.C. 126, at p. 135.

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Then by section 34 of the Act, 9-10 Geo. V, ch. 71, Parliament again, acting within its competence and jurisdiction, further enacted that, notwithstanding any provincial law to the contrary, while any liability remains unpaid upon the aggregate advances made to the settler, all his properties remain as security and cannot be alienated, unless the Board shall otherwise consent; and furthermore that no sale, barter, or other transactions by the settler, while the prices are unsatisfied, can be effective as against the Board.

Moreover, by section 33 of the Act, in the absence of the Board's consent, livestock sold to a settler by the Board, so long as any part of the sale price remains unpaid, is exempt from the provisions of any provincial law requiring registration of deeds, judgments, bills of sale, etc., affecting the transfer or mortgaging of like property.

Indeed, the Provincial Legislature cannot *proprio vigore* take away or abridge any privilege, any right of the Dominion Crown emanating from the royal prerogative or resting upon any competent legislation of the Parliament of Canada. See per Anglin J—re *Gauthier* v. *The King* (1); *Regina* v. *Davidson* (2); *Flory* v. *Denny* (3).

The prayer of the information asks for the return of the gelding, or in the alternative for the value thereof and $100 damages.

There is no evidence upon the record of the state in which the gelding is to-day, and as to whether it is still in the hands of the defendant. The evidence of damages is meagre and unsatisfactory. In the choice of this alternative I must confess I felt some hesitation; but after consideration I have come to the conclusion that justice will be done between the parties if I give judgment against the defendant for the value of the horse—with interest thereon from the day the horse came in his possession. The value of the horse I will take at the value ascertained between the Crown and Walker in exhibit No. 3.

(1) [1918] 56 S.C.R. 176, at p. 194.
(2) [1861] 21 U.C.Q.B.R. 41.
(3) [1852] W. H. & G. 7 Ex. R. 581.

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There were other incidental questions of minor importance raised at bar, but in the view I take of the case it is unnecessary to pass upon them.

Therefore, there will be judgment ordering and adjudging the plaintiff recover from the said defendant the sum of $160 with interest thereon from the 27th day of June, 1921, and costs.

Judgment accordingly.

Solicitors for plaintiff: *Messrs. Jones & Leonard.*
Solicitor for defendant: *Mr. W. Harold Barrum.*

1923
March 24.

THE HURLBUT COMPANY, LIMITED..PLAINTIFF;

VS.

THE HURLBURT SHOE COMPANY ....DEFENDANT.

Trade-mark—Person's own name—Fraudulent intention.

Held that, in the absence of any fraudulent intention to pass off his goods for those of another, any person may use his own name for the purposes of his trade, and no one bearing a similar name can arrogate to himself the exclusive use thereof.

ACTION by plaintiff to expunge defendant's trade-mark from the Canadian Register of Trade-Marks.

March 14th and 15th, 1923.

Case now heard before The Honourable Mr. Justice Audette, at Toronto.

F. B. Fetherstonhaugh K.C. and *H. G. Fox* for plaintiff.

M. A. Macdonald and *Frank Denton* for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now (24th March, 1923), delivered judgment.

The plaintiff, by his statement of claim, seeks to obtain an order to expunge from the Canadian Register of Trade-Marks a specific trade-mark

to be applied to the sale of footwear, and which consists of the representation of a musket and a bow and arrow surmounted by the name "Hurlburt's" and underneath the said representation is the word "Shoe."

This trade-mark was registered by the defendant company, of Barrie, Ontario, on the 5th September, 1919.

On the 2nd August, 1913, the plaintiff company, of Preston, Ontario, registered as a specific trade-mark

to be applied to the sale of boots, shoes, slippers, bootees, moccasins, shoepacks, and footwear generally of all kinds excepting hosiery, and which consists of a representation of the Hurlbut arms, comprising a shield quarterly argent and sable, in the sinister chief and dexter base each a lion rampant, and over all a bend gule charged with three annulets, below the shield being the word "Hurlbut" and surrounding it the words "Genuine-Welt."

Subsequently thereto, namely on the 11th November, 1921, the plaintiff company registered a second specific trade-mark to be applied to the sale of footwear and which consists of the word "Hurlbut."

REPORTER'S NOTE: Appeal has been taken to the Supreme Court of Canada.

The defendant company, by its amended statement in defence, asks, *inter alia,* that an order should be made to expunge, cancel and annul the plaintiff's specific trade-mark to be applied to the sale of footwear, consisting of the word "Hurlbut." Furthermore, by par. 9 thereof, it takes a very reasonable position in the matter, namely:—

9. As to the allegation contained in paragraph 11 of the said statement of claim this defendant has no desire to cause any confusion between the trade-marks and trade-names of the parties hereto and has offered to the plaintiff in writing to add to defendant's trade-mark and trade literature some language or expressions of a reasonable character for the purpose of further distinguishing the defendant company from the plaintiff company, and the defendant is still ready and willing so to do, though not admitting any legal or moral obligation or any practical necessity therefor.

An offer to the same effect or purpose was made by the defendant to the plaintiff before the institution of the present action on the 11th January, 1922, as shown by letter E 9, but refused.

The controversy arises from the fact that the parties hereto have taken trade-marks for two surnames, which being different only but for the letter "r," names involving the difference only of a single letter and when carelessly pronounced having practically no phonetic variance, the name used as plaintiff's mark is spelled Hurlbut, that of the defendant Hurlburt. In plaintiff's mark, however, the name is coupled with distinctive features, words and ornaments. Notwithstanding this latter difference, it is apparent that the two names are very much alike and resemble one another and that the consumer, the public, might very well take one for the other as identical even when not side by side.

Moreover, these specific trade-marks are used in connection with the sale of the same class of merchandise which would be an additional reason for confusion.

Therefore the case is complicated by this very fact that the most conspicuous part of each trade-mark—that part which appeals to the eye—is the name of the respective parties.

It cannot be denied that any person has the undoubted right to use his own name for the purpose of his trade and that no one bearing a similar name has a right to arrogate to himself the exclusive use of the same.

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However, that rule must be qualified under numerous judicial decisions, to the effect that where such person makes use of his own name for the purpose of fraud, and satisfactory evidence of fraudulent intention has been produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered. *Holloway* v. *Holloway* (1); *Burgess* v. *Burgess* (2); Sebastian, Law of Trade-Marks, 5th ed. 39-40; Smart, Law of Trade-Marks, 112; 27 Hals. 749; Kerly, 4th ed. 593; *Saunders* v. *Sun Life Ass'ce Co.* (3); *Brinsmead* v. *Brinsmead* (4).

There is not a tittle of evidence of fraud in the present case. Indeed, I was especially impressed by the genteel demeanour of both parties when in the witness box and by the manly and upright manner in which their respective testimony was given.

Under the circumstances, while I find that the parties are each entitled to use their own name to distinguish their goods,—in the interest of the public, I will accept the offer made by the defendant and vary its trade-mark, by substituting for the word "Hurlburt" the name of its company,—that is "The Hurlburt Shoe Company," which certainly I hope, will decrease to a degree of nullity the reasons for confusing both names and the merchandise of their respective firm. By so doing, the public, the consumer will obviously be protected, and power and jurisdiction to do so is specifically given to this court under section 42 of The Trade-Mark and Design Act.

Therefore, there will be judgment dismissing the action, with costs, and furthermore ordering to vary the registration of the defendant's specific trade-mark No. 106, Folio 25055, of the 5th September, 1919, by striking out therefrom the word "Hurlburt's" and substituting therefor the words "The Hurlburt Shoe Company."

Judgment accordingly.

Solicitors for plaintiff: *Fetherstonhaugh & Co.*
Solicitors for defendant: *Denton, Macdonald & Denton.*

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(1) [1850] 13 Beav. 209.
(2) [1853] 3 Deg. M. & G. 896.
(3) [1894] 1 Ch. D. 537.
(4) [1913] 30 R.P.C. 493.

1923
May 5.

MONTREAL TRANSPORTATION CO., LTD. ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Petition of Right—Loss of barge by explosion in Government Grain Elevator—Burden of proof—Application of maxim Res Ipsa Loquitur —Exchequer Court Act, section 20.

Held, where a suppliant by his Petition of Right claimed damages for the loss of a barge destroyed by an explosion in a government grain elevator, whilst it was being loaded with grain therefrom, and which explosion it alleged was due to the negligence of persons in charge thereof, the burden of proof is upon the suppliant, who must show affirmatively that there was such negligence.

The maxim *res ipsa loquitur* cannot be invoked to relieve the suppliant of the burden of proof in actions by Petition of Right charging negligence against officers or servants of the Crown under section 20, R.S.C. 1906, c. 140.

Dubé v. *The Queen* (1892) 3 Ex. C.R. 147; and *Western Assurance Co.* v. *The King* (1909) 12 Ex. C.R. 289 followed.

PETITION OF RIGHT seeking to recover $125,000 as damages for loss of suppliant's barge due to an explosion in Government Grain Elevator at Port Colbourne, whilst it was in dock for purposes of loading.

April 18, 19, 20, and 23 to 28 inclusively, 1923.

Case now heard before the Honourable Mr. Justice Audette at Toronto.

R. I. Towers, K.C. and *F. Wilkinson* for suppliant.

James E. Day, K.C. and *Fred. A. Day* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (May 5th, 1923) delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of $125,000 for damages alleged to have arisen from the disastrous explosion of the government grain elevator, at Port Colborne, Ont., in the year 1919. As the result of the explosion it is alleged that the barge *Quebec,* which was at the time being loaded with grain at the elevator dock, was sunk and destroyed.

The elevator in question was built by the Crown in 1908, enlarged in 1914 and had been in operation up to the date of the accident at about 10 minutes after one o'clock in the afternoon of the 9th day of August, 1919. It was of fireproof construction and of large capacity.

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Stating the facts of the case briefly, it appears that the loading of the barge had started that morning at about 11 a.m. and was proceeding most satisfactorily when at about twenty minutes to twelve, without any previous warning, Rambo, the assistant-shipper working on the ground floor, perceived dust issuing from the boot of No. 10 lofter. Surmising the boot was becoming plugged, he immediately ran and closed the valve or bin gate of bin No. 83 from which the conveyor was feeding No. 10 lofter, and thereafter ran and pulled the conveyor clutch, thereby stopping immediately any feed to No. 10. By the time he had pulled the clutch, which had to be untied, the conveyor was carrying no wheat and was empty—save, however, at the end, by the boot where wheat had already accumulated. There was a choke and the power was stopped. The choke was not apparent until it was too late to avoid it. The elevator had given entire satisfaction up to that day. There was nothing wrong that could be foreseen. There was no way to find the choke before it actually happened, but nothing was done to provoke it.

On prompt inspection by the electrician and the foreman it was ascertained, on reaching the motor gallery, that a motor had gone wrong and had heated. A fuse had blown and the motor was running on one phase, or two fuses, instead of two phases and three fuses. Later on it was found another fuse had also gone, it having worked for a short space of time on an arc.

When the men returned to the elevator after dinner, Pegato was sent to the lofter head for pails to be used in clearing the boot and on reaching the head he found smoke and heard a "roar like wind" in the casing of the lofter. It did make a roar like fire inside the casing and the lofter was not running. He at once gave notice to those associated with him in working the elevator. By ten minutes after one the lofter belt fell down the lofter, and the explosion took place.

One of the most reasonable causes of the accident, among the many causes suggested, at the trial, is that the power went down, two fuses burnt, and as a result the lofter belt slowed down in speed until it stopped and the pulley continuing to run, static electricity developed from the friction

of the belt on the lagging of the pulley. The belt became heated, ignited, and burnt until it parted and fell raising the dust and the ignited end of the belt coming in contact with the dust, the explosion took place. The whole matter seems purely accidental and not the result of any negligence.

A mixture of grain dust and air submitted to ignition is a higher explosive than gun powder, as said at trial. Dust cannot be avoided in a grain elevator and the air is always present.

" Chokes " or " pluggings " as otherwise called, will from time to time happen in a grain elevator—there is nothing unusual in a choke. The evidence further establishes that elevator lofter belts will burn, break and fall, and such belts had fallen before in this very elevator as well as in the Maple Leaf Elevator on the adjoining pier.

The foreman testified that they never had a choke before, that they did not ascertain the cause of it and that they never had a choke from the overfeed by the conveyor to the lofter, and that all chokes, up to that time, had always caused noise when in the process of formation. Laughlin, a witness heard on behalf of the suppliants, says among other things, that many things will produce a choke in a grain elevator and that chokes may develop when the grain has nothing to do with it.

A number of causes have been assigned for developing a choke, such as: 1. Filling of garners; but that was not the cause here. 2. We are told that on one occasion the power went off, when two lofter motors were running—one loaded and one light. The loaded one came to a standstill and the light one continued to run. That caused a choke when the power was applied again to the loaded one. 3. A choke was also caused by the heating of the main bearings of the main pulley, on the top floor, when the lofter was carrying a full load. 4. A choke will develop when power goes off. 5. Foreign substance, such as a bag, a piece of wood, iron, etc., in the grain will also produce a choke. 6. Buckets may come off the lofter belt and stop operation. 7. The burning or blowing of fuses will also produce

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chokes; and fuses will blow from many causes. 8. Motors slowing down for any reason will also provoke a choke. 9. A slackening of the belt will have the same effect, etc., etc.

Have the suppliants discharged the onus placed upon them to prove their case? The onus was not discharged by the evidence adduced, limited as it was to inferences and conjectures. The evidence did not negative the possibility of the accident being occasioned by other causes which might just as reasonably, if not more so, be accepted as plausible, than that adopted and relied upon by the suppliants, that is to say, an overfeed from the conveyor to the lofter, notwithstanding the capacity of the conveyor was less than that of the lofter, a cause which, under the evidence, I discard.

When a plaintiff is forced to prove his case from presumptive or circumstantial evidence, such evidence in order to prevail should not only give rise to a presumption in favour of the plaintiff's contention, but should also exclude the possibility of the accident having been occasioned by any other causes than those relied upon by the plaintiff. *The Quebec and Lake St. John Ry. Co.* v. *Julien* (1); *The Montreal Rolling Mills Co.* v. *Corcoran* (2); *Beck* v. *C.N.R.* (3); *The King* v. *Nashwaak Pulp and Paper Co.* (4).

Conceding for the purpose of argument that the maxim *res ipsa loquitur* could apply to the case at Bar, the Crown has amply discharged the burden of proof cast upon it by the operation of the maxim. The evidence of Aikens and Rambo conclusively negatives any active or passive carelessness on their part which would amount to negligence; and the same observation applies to the evidence of Upper, Roach, Harvey and the other officers or servants of the Crown upon whose conduct it is sought to predicate negligence in this case.

But the maxim is wholly inapplicable here. *Dubé* v. *The Queen* (5); *Western Assurance Co.* v. *The King* (6).

(1) [1906] 37 S.C.R. 632.
(2) [1896] 26 S.C.R. 595.
(3) [1910] 13 W.L.R. 140.
(4) [1922] 21 Ex. C.R. 434.
(5) [1892] 3 Ex. C.R. 147.
(6) [1909] 12 Ex. C.R. 289.

See also Annotation, 23 Can. Ry. Cases 305; *Belway* v. *Serota* (1); *C.N. Ry. Co.* v. *Horner* (2); *Landels* v. *Christie* (3); 21 Hals. 439-445.

Be all this as it may, the present action is one for damages, in tort and apart from special statutory authority such an action does not lie against the Crown. The suppliants to succeed must bring their case within the ambit of section 20 of the Exchequer Court Act, as amended by 7-8 Geo. V, ch. 23, section 2.

To bring this case within the provisions of the Act the evidence must disclose: 1st, a public work; 2nd, officers or servants of the Crown employed on the public work; and 3rd, negligence of such officers and servants while acting within the scope of their duties and employment.

The two first requirements have been established, but the third is missing.

The officers and servants of the Crown, who were called as witnesses, gave their evidence in a manner that redounded to their credit in a very marked degree. The statements of each and every one of them were impressed not only with that measure of sincerity and truth which carries conviction with it, but were also marked by intelligence and clarity of speech not usually met with in men of their class—and they were confronted by ingenious theories of carelessness throughout. They were not confused by cross-examination of a most skilful character, but maintained a logical continuity of statement that was most gratifying to the court. I reject any imputations of negligence on behalf of the employees.

I cannot leave the consideration of this important case without observing that it has been conducted with great skill and ability by counsel for the respective parties. During the trial facts were developed which required much technical and scientific knowledge in relating them to the issues, and to this task counsel responded in the fullest way. I may say that the case served to remind the court of the truth of Sir Henry Finch's view that the sparks of all the sciences are taken up on the ashes of the law. And while I say this, I cannot refrain from adding that much

(1) [1919] 47 D.L.R. 621. (2) [1921] 61 S.C.R. 547.
(3) [1923] S.C.R. 39.

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of the industrious theorizing of counsel must be disregarded if the court is to arrive at a sound conclusion upon the facts of the case. From a most careful consideration of the voluminous evidence adduced by the suppliants in support of their claim, I cannot find that there are any facts upon which negligence as above indicated may be predicated.

Therefore there will be judgment declaring and adjudging that the suppliants have failed to prove their case and that they are not entitled to any relief sought by their petition of right.

Judgment accordingly

1923
April 16.

CANADA CEMENT CO., LTD.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Revenue—Customs Act and Regulations—Tariff—Drawbacks—Discretion of Minister—Right of Court to revise—Interpretation—Constitutional law.

Suppliants imported coal into Canada and paid duty thereon and used the same in the manufacture of cement. In the course of such manufacture the coal is used for heating purposes and, when consumed, leaves about 12 per cent of ash which unavoidably remains and mixes with the cement. The cement so manufactured by the suppliants, having been exported, they claimed, under section 288 of the Customs Act and regulations made thereunder, a drawback upon this 12 per cent of the coal in ashes embodied in the cement so exported.

Held, that, upon a proper construction of section 288, as the article imported was coal, and as it was only such of the ash thereof as unavoidably remained in the cement, which was exported as part of the latter, said ash was not "such materials" within the intent and meaning of paragraph 2 of subparagraph (*a*) of the Regulations, upon which a drawback may be allowed on exporting the cement, and that suppliants' claim was unfounded.

2. That with the authority given by the use of the word "may" in section 288 of the Customs Act (R.S. 1906, c. 48) and in the Regulations made thereunder, to allow a drawback, on exportation of goods which have been imported into Canada, equal to the duty paid thereon, less certain deductions and under certain conditions therein mentioned, is not coupled the legal duty to exercise such authority. That whether such a drawback should be paid is entirely left to the discretion of the Minister who, should he fail in a proper case to grant such drawbacks, is answerable to council or Parliament, but not to a court of law.

PETITION OF RIGHT to recover from the Crown the sum of $808.15 for drawbacks on duties paid upon coal imported into Canada.

March 27, 28, 29, 1923.

Case now heard before the Honourable Mr. Justice Audette at Montreal.

George Montgomery, K.C. and *C. R. McKenzie* for suppliant.

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

The facts are stated in the reasons for judgment.

AUDETTE, J. now (April 16, 1923) delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of $808.15, as representing a drawback on duties paid by them upon imported coal used in the manufacture of cement; contending that 87½ per cent of the coal was consumed as fuel in such manufacture, leaving 12½

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per cent of ashes which, it is claimed, was wrought into the cement so manufactured by them in Canada and exported to the United States.

The claim rests primarily upon section 288 of the Customs Act (R.S.C. 1906, ch. 48) which reads as follows:

288. The Governor in Council may, under regulations made for that purpose, allow, on the exportation of goods which have been imported into Canada, and on which a duty of Customs has been paid, a drawback equal to the duty so paid with such deductions therefrom as is provided in such regulations.

2. In cases mentioned in such regulations, and subject to such provisions as are therein made, such drawback, or a specific sum in lieu thereof, may be allowed on duty paid goods manufactured or wrought in Canada into goods exported therefrom.

3. The period within which such drawback may be allowed, after the time when the duty was paid, shall be limited in such regulations.

This section was amended in 1914 by 4-5 Geo. V, ch. 25, whereby section 288a was added thereto providing for drawbacks on exported goods manufactured of pig iron.

The orders in council formulating the regulations governing drawbacks, pursuant to the provisions of section 288 of the Customs Act, have been filed as exhibits Nos. 7 and 8.

These two orders in council or regulations are of the same import, with, however, some inconsiderable differences, having no practical bearing upon the present controversy.

The determining clauses in exhibit No. 8, read as follows:

1. When imported materials on which duties have been paid are used, wrought into or attached to any article manufactured or produced in Canada, there may be allowed on the exportation of such articles beyond the limits of Canada a drawback of ninety-nine per cent of the duties paid on the materials used, wrought into or attached to the articles exported; provided that when both imported and domestic materials of the same class are used in the manufacture of the articles exported such drawback shall not be computed on a greater quantity of materials than entered into the exported goods; provided, further, that such drawbacks shall not be paid unless the duty has been paid on the materials so used as aforesaid within three years of the date of the exportation of the Canadian article, nor unless the claims as presented at any one time aggregate ten dollars.

2. The drawback on articles manufactured or produced in Canada and exported therefrom may be paid to the manufacturer, producer, or exporter, subject to the following conditions, viz:—

(*a*) The quantity of such materials used, and the amount of duties paid thereon, shall be ascertained (unless a specific sum has been authorized as drawback payable);

(*b*) Satisfactory evidence shall be furnished in respect of the manufacture or production of such articles in Canada and their exportation therefrom.

3. Upon the exportation of any article entitled to drawback, export entries, in triplicate, in the usual form (with the words "subject to drawback" marked on the face of the entry) shall be filed with the Collector of Customs at the port of exit from Canada, naming the conveyance by which, and the country or place to which the article is to be exported and fully describing the kind and quantity thereof and also the marks and numbers on the packages.

4. The claim for drawback shall be verified under oath, before a Collector of Customs, or Justice of the Peace, to the satisfaction of the Minister of Customs and Inland Revenue, in such form as he shall prescribe. The Minister of Customs and Inland Revenue may also require in any case, the production of such further evidence, in addition to the usual averments, as he deems necessary to establish the *bona fides* of the claim.

In addition to the above, reference may be had to subsection (*e*) of section 286 of the Customs Act which also provides for the granting of drawbacks.

The respondent filed of record a document admitting: 1st. That the cement referred to in the suppliants' six exhibits was exported; and 2nd, That the coal in respect of which drawback is claimed was imported.

Dealing first exclusively with the facts of the case, it appears that the suppliants imported coal for fuel, for heating purposes in the manufacture of cement.

The process of manufacturing cement by the suppliants will be readily understood by reference to exhibit No. 10 which shows the general arrangement of their 150-foot cement kiln.

Limestone and clay are the two principal ingredients required for the making of cement and constitute what is called the raw-mix, after having been dried and ground into an impalpable powder. This material is fed in the raw-mix bin and runs down by the conveyor and feed pipe into the cylinder—placed on a slight slope or grade towards the coal bin. The cylinder is rotated at a slow speed of probably two revolutions a minute, and this revolving movement works the raw material towards the coal bin, towards the clinkering zone, which extends from 25 to 35 feet from the other end and where the material comes to heat under a temperature of between 2,600° and 2,800° F., when it turns into a liquid state, a plastic condition, the rocks coming to clinkers.

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On the other hand, the pulverized coal is introduced at the other extremity of the coal bin, and is fed in through an 8-in. pipe with air pressure, probably 6 or 7 ounces. The coal which is thus introduced into the centre of the kiln, immediately ignites as it comes in and as the volatile matter and the carbon are burnt—generating the heat necessary to bind the raw-mix—the other component parts, the ashes, remain, come in contact with the raw-mix and form part of the clinkers, adhering more specially to the outside of the same, as contended by some chemists heard as witnesses.

The clinkers come out at the end of the cylinder and are afterwards mixed with gypsum and ground to an impalpable powder, thus producing what is called Portland cement.

The principal constituents found in the raw-mix of limestone and clay are silica, alumina and iron oxide; and as the ashes remain in the cement, after the volatile matter and carbon of the coal are burnt, it is contended that these ashes supply some silica, alumina and oxide of iron, and that, the result, if they did not have these ashes supplying such material, they would have to correct their raw-mix accordingly to obtain the same result.

Be that as it may, it would however appear, under a true analysis of the function of coal in manufacturing cement, that it was primarily imported and used for fuel and heating in their process of manufacturing; and that while the raw-mix (which, but for the ashes, it is contended would have to be adjusted), is composed of rock costing about 50 cents a ton and clay costing between $1 and $1.25 a ton, while coal costs up to $15 a ton, it seems to satisfy the sane economic consideration of the matter, and obviously determines that coal was not imported for the ingredients contained in its ashes, which constitute the residue of the coal, after being burnt and used as fuel and for heating purposes in the manufacture of cement.

The heating required in the manufacturing of cement could have been procured either by coal, wood, gas, oil or any other fuel. Ash is not properly speaking a desirable ingredient in the manufacture of cement,—coal having been used for heating the cement, the ashes unavoidably

remained in the cement and made it less pure as a Portland cement, being a disadvantage which cannot be avoided in such cases.

It is contended, and it was admitted by the respondent for the purposes of this case, that the coal in question had an ash content of 12½ per cent on an average, without admitting that any of these ashes went into the cement. The evidence further discloses that some of the ashes affected by the draft and moving gas are lost and go through the stack,—perhaps 3 per cent of the whole mix.

Still considering this claim for drawback outside of its forensic aspect and exclusively upon the facts, there can be no doubt that the imported coal was consumed in the manufacture of cement and that the claim made now is upon the 12½ per cent of ashes which remained after the coal was burnt. Ashes are what is termed mineral and non-combustible matters.

However, the fallacy in the suppliants' contention lies in the fact that it was coal,—a fuel required to heat their raw-mix—which was imported; and that it is its ashes which, in the process of manufacturing, finds its way into the cement, and is afterwards exported.

The duty has been paid on coal, not on ashes that may be found into it. The duty was not paid upon the silica, alumina and iron oxide in either the coal or the ashes. Moreover, there is no coal, *qua* coal, exported with the cement. There is no duty upon ashes.

Before the drawback can be ascertained, it is provided, under paragraph 2, subparagraph (*a*) of the Regulation above referred to, that "The quantity of such materials used" upon the exported article must be ascertained before fixing the drawbacks. In the present case, upon inquiry, it must be found that in the exported cement there was no "such materials"; there was no coal, which *qua* coal only was subject to duty.

The substance of the claim is neither meritorious nor reasonable, and challenges common sense.

Placing a proper construction upon section 288 of the Customs Act, guided by section 15 of the Interpretation Act, the conclusion must be arrived at that the suppliants' claim is not well founded. The legislator never contem-

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plated a claim such as the one set up in the present case, and there is no reason why one should depart from the general and plain meaning of the wording of the Act, for the convenience of a case, to extend to it a meaning which to every one would appear so strained as to amount almost to an absurdity.

Now the claim, upon its legal aspect, rests both upon the Statute and the Regulations. In both of them the language is permissive and facultative; it imports that the Crown is to exercise its discretion in paying or withholding the payment of the drawback. Nowhere do we find the word *shall;* the word *may* is used all through and there is no reason why it should be read otherwise than under its primary meaning. Under subsection 24 of section 34 of the Interpretation Act we find that, in every Act, unless the context otherwise requires, "shall" is to be construed as imperative and "may" as permissive, and I fail to see in the context of section 288 and in the Regulations above cited, anything that would induce any one to depart from such meaning. The claim is too distant and too remote.

In the case of *McHugh* v. *Union Bank* (1) Lord Moulton, speaking upon a similar enactment, says:

> It is true that (as is customary in interpretation clauses) these subsections are prefaced by the words "unless the context otherwise requires," but that does not take away from the authority of the express direction as to the construction of the words "shall" and "may." The court is bound to assume that the legislature when it used in the present instance the word "may" intended that the imposition of the penalties should be permissive as contrasted with obligatory unless such an interpretation would be inconsistent with the context, that is, would render the clause irrational or unmeaning. But there is nothing in the context which creates any difficulty in accepting this statutory interpretation of the word "may." The clause is just as intelligible with the one interpretation as with the other. So far from creating any difficulty the interpretation which leaves it permissive appears more reasonable seeing that there is no exception in the clause for cases where the excess has been taken either under mistake or by inadvertence, and it is not likely that the legislature would insist on penalties being enforced where no blame attached. Be this as it may, there is nothing in the clause which will permit their Lordships to depart from the express provision of the Interpretation Ordinance stating that "may" shall be construed as permissive.
>
> This being the case, it is not necessary to examine the English decisions which establish that in certain cases "may" must be taken as equivalent to "must." In the light of those decisions it is often difficult to decide the point, and in their Lordships' opinion the object and the

(1) [1913] A.C. 299, at p. 314.

effect of the insertion of the express provision as to the meaning of "may" and "shall" in the Interpretation Ordinance was to prevent such questions arising in the case of future statutes.

Therefore, the principle disclosed in the case of *Matton* v. *The Queen* (1) will be accepted in the present case. The present claim is not one in which to the authority given by the use of the word "may" is coupled a legal duty to exercise such authority, and that the granting of a drawback is an absolute discretionary matter left to the Minister of Customs.

Section 288 of the Customs Act states that

> the Governor in Council, . . . allow, . . . a drawback under Regulations made for that purpose.

This would seem primarily to vest the discretion with the Governor in Council and finally that the Executive, by the Regulations, vested this discretionary power in the Minister.

Then section 1 of the Regulations states when the drawback may be allowed. Section 2 thereof provides that the drawback on articles manufactured in Canada and exported therefrom may be paid subject to the condition of establishing the quantity of such material used and the amount of duties paid thereon.

Upon the latter point it has been found that coal was the article imported and that in the cement exported there is no "such material"; coal, *qua* coal, has disappeared, has been burnt; there is no coal exported with the cement. No coal returned to the United States from where it was originally imported. The material exported is not in the same condition or nature as when imported. There was no coal, *qua* coal, wrought into the cement, there was ash. The coal had been all burnt in the cement, not wrought in it. The duty was paid on commercial coal and no part of the duty, in the sense of the statute, was paid upon ashes.

If "sawn board, planks and deals" (Tariff item 505) had been imported into Canada and potash made with the ashes of this burnt material, could it be reasonably contended that Parliament intended that the duty paid on the importation of such lumber should be paid back, in the way of a drawback, under section 288, when the potash is exported? Stating the case is answering it, and there can

(1) [1897] 5 Ex. C.R. 401 at 408.

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hardly be any difference in principle with the present controversy. The value, if any, of the ashes is very negligible. Would it not come within the legal maxim of *de minimis non curat lex?*

Moreover, if the drawback on the cement were to be paid under the measure of comparative value of the coal when imported and the value of the ashes in the exported cement, the conclusion would obviously be that that coal, as fuel and for heating purposes was worth, say $15. This value of the coal " as fuel and for heating purposes " having gone, the value upon which the duty was paid, there remained no part of the value represented by the ashes and there could be no refund, no drawback.

Pursuing the reading of the Regulations, we find, under paragraph 4 thereof that the claim must be verified to the satisfaction of the Minister, in such form as he may prescribe and moreover that

> The Minister of Customs and Inland Revenue may also require in any case, the production of such further evidence, in addition to the usual averments, as he deems necessary to establish the *bona fides* of the claim.

And I find that this language clearly and conclusively indicates and establishes that the question of paying or refusing to pay drawbacks, under the present circumstances, is entirely left to the discretion of the Minister; and if he fails in a proper case to grant and pay the drawbacks, he must answer to the Governor in Council or to Parliament; but he is not answerable therefor in a court of law. *Hereford Ry. Co.* v. *The Queen* (1); *Julius* v. *Bishop of Oxford* (2); *Matton* v. *The Queen* (ubi supra.)

Therefore I have come to the conclusion that a Petition of Right will not lie for the payment of drawbacks if, in a proper case, the Minister refuses to exercise the power vested in him; and it is accordingly ordered, adjudged and declared that the suppliants are not entitled to the relief sought by their Petition of Right.

Judgment accordingly.

Solicitors for suppliants: *Brown, Montgomery & McMichael.*

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

(1) [1894] 24 S.C.R. 1. (2) [1880] 5 A.C. 214, at p. 223.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1923
Feb. 16.

RUMELY ..... PLAINTIFF;

AGAINST

THE SHIP *VERA*

AND

WESTERN MACHINE WORKS, LTD.....CLAIMANT.

Practice—Costs—Possessory Lien—Admiralty Rules 224 and 225 interpreted.

The value of the *res* was at least $600, and plaintiff's claim against it was for $354, wages, for which he obtained judgment. Immediately after judgment claimants moved to establish a prior possessory lien for $160, which claim was successfully contested by plaintiff. Plaintiff taxed its costs under this judgment and, on appeal from the Registrar's taxation.

Held, that rules 224 and 225 must be read together, and where there are two distinct claims against the same *res,* which in the aggregate exceed $500, "the sum in dispute," within the meaning of said rules, will be taken to be the aggregate of both sums claimed, at least, as in the present case, where the real point involved was the right to enforce a possessory lien in priority to plaintiff's maritime lien.

MOTION by way of appeal to the Judge in chambers from the taxation of the registrar.

February 16, 1923.

Application now heard before the Honourable Mr. Justice Martin at Vancouver.

E. A. Dickie for claimant-appellant.

Roy W. Ginn for the plaintiff.

The facts and questions of law are stated in the reasons for judgment.

MARTIN, L.J.A. (now February 16, 1923) delivered judgment.

This is a motion in chambers, by the claimant, to review the Registrar's taxation of the costs directed to be paid by the claimant to the plaintiff by the judgment pronounced herein on the 28th December, 1922, whereby the claimant's application to establish a possessory lien was dismissed, as reported in (1923) 1 W.W.R. 253) (1). Certain objections were taken to the formal notice of motion as not complying with Rules 80 and 82 but they were overruled, because, according to the long established practice of this court, applications to review taxation are heard in a summary way, the simple procedure being that if any party

(1) See also [1923] Ex. C.R. 36.

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wishes to appeal from the registrar's taxation, that officer will upon request arrange a convenient appointment with the judge for that purpose; and since no formal notice of motion was necessary, the fact that the appellant here did in fact give an unnecessary notice does not put him in a worse position than if he had properly given none at all.

Turning then to the merits of the appeal, the claimant invokes Rule 224, reading as follows:—

> 224. Where the sum in dispute does not exceed $200, or the value of the *res* does not exceed $400, one-half only of the fees (other than disbursements) set forth in the table hereto annexed shall be charged and allowed.

And submits that as its claim was for $160 only, half fees should have been taxed.

Rule 224 must here be read with the following Rule, viz,—

> 225. Where costs are awarded to a plaintiff, the expression "sum in dispute" shall mean the sum recovered by him in addition to the sum, if any counter-claimed from him by the defendant; and where costs are awarded to a defendant it shall mean the sum claimed from him in addition to the sum, if any, recovered by him.

The value of the *res* was at least $600 (for which it was sold) and the plaintiff's claim against it was for $354 wages, for which he got judgment and later successfully resisted the claimant's motion made immediately after judgment was pronounced, to establish a prior possessory lien for $160. In my opinion, I would not be justified in holding that where there are two distinct claims to the same *res* which in the aggregate exceed $500, that nevertheless the "sum in dispute" is only that claimed by one of the contestants, at least not in such a case as this where the real point involved was the right to enforce a possessory lien in priority to the plaintiff's maritime lien. I find myself unable to say that the registrar took a wrong view of rule 224, which is really not appropriate to the situation, and therefore the appeal is dismissed with costs.

Appeal dismissed.

1923
May 12.

TORONTO ADMIRALTY DISTRICT

STEAMER *HAMONIC* AND OWNERS CANADA STEAMSHIP LINES, LIMITED ..... } PLAINTIFFS;

AGAINST

THE SHIP *ROBERT L. FRYER*

Shipping—Collision—Breach of Rules—Onus of Proof—Speed, Handiness, Equipment and assistance a factor—Turning in a narrow channel—Right of way.

Held, that the right of way given to a vessel by virtue of Rule 25 of the Rules of the Road for the Great Lakes adopted by Order in Council of the 4th February, 1916, does not absolve a vessel from neglect to observe other rules governing the situation created by the circumstances surrounding the operation.

2. In a case of collision the condition of the vessels as to equipment, handiness, speed and assistance rendered by tugs should be taken into consideration in determining the responsibility of each vessel, especially when such conditions are known to the Masters of the vessels colliding.

ACTION brought by the plaintiffs against the Ship *Robert L. Fryer* for collision (1).

May 10 and 11, 1923.

Case now heard before the Honourable Mr. Justice Hodgins, L.J.A. at Port Arthur.

W. F. Langworthy K.C. and *F. W. Wilkinson* for plaintiffs.

W. A. Dowler for defendant.

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

HODGINS, L.J.A. now (May 12, 1923) delivered judgment.

This action is brought by the steamer *Hamonic* for $5,000 damages sustained, it is alleged, by collision between that vessel and the steamer *Robert L. Fryer* in the Kaministiquia River, which is part of the harbour of Fort William.

The *Hamonic* is a steel vessel of 5,269 tons register, 350 feet long and 52 feet beam.

The *Fryer* is a wooden vessel built in 1888 and used for transferring grain between elevators and is 280 feet long.

The *Hamonic* on the day of the accident, September 9, 1922, was taking on a cargo at the flour house of Ogilvie's

(1) REPORTER'S NOTE: An appeal herein has been taken to the Exchequer Court.

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Hodgins, L.J.A.

elevator on the west bank of the Kaministiquia River and was intending to leave that elevator and proceed to Port Arthur.

The *Fryer* had come into the Kaministiquia River—I believe from Port Arthur—and was intending to make her way up to the same dock until, at the office near the city Sub-Way, her instructions were changed and she was directed to another dock in the river.

The time when the accident occurred was some time shortly after 11 o'clock in the forenoon that day.

The Kaministiquia River is 480 feet wide just below its junction with the McKellar River, and from a line across the mouth of the McKellar River to the C.P.R. bridge further up that river, is 850 feet. The width across the mouth of the McKellar River at the junction of its banks with the Kaministiquia is 820 feet.

The question is was the *Fryer* to blame for the accident, because the action is against her, and it is now admitted that she suffered no damage and her counter-claim will therefore on that head be dismissed.

If she is not to blame it is perhaps unnecessary to go fully into whether the *Hamonic* is to blame, because a finding that the *Fryer* was not to blame would practically end the case.

The questions in the case are rather puzzling ones, owing to the fact that the *Hamonic* was required by regulations to turn before descending the Kaministiquia River from the point where she was lying.

The *Fryer* was proceeding at half speed up the Kaministiquia and stopped at point "D" on Exhibit 1 some distance below the C.P.R. Dock No. 5, when her master saw the jack-knife bridge on the Kaministiquia River up beyond Ogilvie's dock being raised, which indicated a descending vessel.

The *Fryer's* distance below the Ogilvie dock would then be about 2,500 feet. I take this figure and others from the blueprint Exhibit 2.

Owing to a wind, which the master of the *Fryer* describes as "fresh" and which was drifting her in towards the easterly bank of the Kaministiquia he began to proceed at half speed, which he says is three miles an hour, to

straighten up. He then noticed the *Hamonic* leaving the lower end of the Ogilvie elevator and apparently coming astern. This was at a distance from him of about 2,000 feet. He then stopped his engine, having gone 75 to 100 feet and being off the C.P.R. shed.

He heard no signal from the *Hamonic.*

Under Rule 27 the *Fryer* should then have signalled with one long blast, and so should the *Hamonic,* when her master saw the *Fryer* as he did, at the centre of the C.P.R. elevator marked " A " on Exhibit 1. This would be below point " D " in Exhibit 1 and therefore more than 2,500 feet away.

I cannot find on the evidence that this signal was given by the *Hamonic.* The onus is on her to establish that it was given, and there is no positive evidence that it was done, although one long blast was heard by a witness, who, however, cannot definitely connect it with the *Hamonic.*

The *Fryer* does not pretend to have sounded one.

Both ships therefore broke the first part of Rule 27 and I must consider whether this neglect on the part of the *Fryer* caused or contributed to the accident. The descending vessel, the *Hamonic* had the right of way under Rule 25—for that there is a current in the Kaministiquia River is proved by Mr. Harcourt and by Hogue and possibly one other,—although the current is slight—but this right of way does not absolve that vessel from neglect of the observance of Rule 27.

Nor did she give the passing signal required by Rule 25. This left the *Fryer* to make the signal, if she decided to pass up, but apparently her master, either assuming that the *Hamonic* would turn or that she would go back to the dock, did not do so. She continued to straighten up as the wind was forcing her to the east side of the river. During this operation her master noticed the *Hamonic* coming rapidly down the river stern foremost and he then knew that she must turn at the McKellar basin. He gave one signal for full speed astern and continued to go astern.

The alarm signal given by the *Hamonic* about that time was followed by two short blasts intended for the tug but the master of the *Fryer* thinking they were for him, and

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indicated that he should back up, answered them and continued to go astern and the vessels approaching each other collided.

The effect of the breach of the Rule 27 by the *Fryer* has given me some anxiety.

Rule 27 is intended for warning and Rule 25 for information of direction.

As the *Hamonic* was aware of the presence of the *Fryer* and the *Fryer* of the *Hamonic* at the time I have stated, the effect of the breach of the first part of Rule 27 becomes of little importance as they then were in a position governed by the passing Rule under the latter part of Rule 27.

These passing Rules direct that either vessel may give the signal electing the side.

Considering that the *Hamonic* was bound by regulation to turn before passing the *Fryer* it is difficult to apply the Rules. When the *Hamonic* had completed the turn she might be in such a position as to require to pass the *Fryer* port to port or starboard to starboard, depending on how far she had been thrust back into the McKellar River basin, and how quickly she could turn; and she would also have to regard the presence of the *Keewatin* lying at the C.P.R. Dock No. 5. Whether she would make a sharp or wide turn was for her to decide, and she could accomplish whichever she wished with the aid of her own power and the tug. She was descending the river, and according to much of the evidence her stern appears to have got so close to the east bank of the river as to preclude the *Fryer* from slipping through there.

The *Hamonic* might, I think, have stopped her way or backed up earlier or gone further into the basin, but instead of this she came on without completing her turn or getting her bow down the stream until the time of collision.

Till she made the turn, so as to leave room either astern or beyond her bow, the *Fryer* could not, as it seems to me, safely decide on her course. She was in a position of embarrassment until then and she was on the east side of the channel and could not go across the bow of the *Hamonic* until that vessel had straightened up enough to indicate that she would not edge in further towards the west bank.

I agree with the evidence which deprecates any effort, under the circumstances, to cross the bow of the *Hamonic*.

I have come to the conclusion that a signal from the *Fryer* might well have confused the *Hamonic* if given when she was just about to turn, especially if the election was to keep to the port side of the Kaministiquia, which would embarrass the usual turning movement and prevent her from being shoved far enough into the McKellar basin; and I am not convinced that if the *Fryer* had selected the other side, it would not have been equally dangerous to the *Hamonic* as well as to her herself.

It is, of course, more difficult for another and modern vessel to have to deal with a wooden vessel such as the *Fryer* is—35 years old—which cannot stop herself in less than 800 feet even going three miles an hour and which has not sufficient power to prevent her being drifted by the wind. The only safe course seems to be to keep out of her way when she appears in the river. But as she is well known here and her disabilities pretty well understood, all the more caution is demanded from a vessel which sees that her presence is or may be a factor in deciding what is to be done, especially when the vessel is as well equipped as the *Hamonic* to turn or stop quickly, while so large as almost to block the river when broadside to it.

The *Fryer,* of course, might have hugged the west side of the river or made fast to the C.P.R. dock had she been warned by the whistle of the *Hamonic* on casting off from the Ogilvie dock under the first part of Rule 27, or had she seen that vessel sooner. But having regard to the circumstances, I am unable to see wherein the *Fryer* was to blame for the actual collision, however much her lumbering gait and apparent sluggishness may have complicated a difficult situation.

I must therefore acquit her and dismiss the action against her.

It is perhaps unnecessary to consider and decide whether the *Hamonic* was at fault other than in the ways I have indicated, but in case the action goes further, I may say, that my conclusion from the evidence is that she was allowed, in view of the presence of the *Fryer* to come down too close to the lower side of the basin before getting her

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bow pointing in a down stream direction, and either in not earlier stopping her downward drift or in not forging ahead and making a quicker turn so as to avoid the *Fryer*. She had, according to various witnesses, from 125 to 300 feet of room ahead of her and is a powerful and speedy vessel, aided by a competent tug.

It seems that the *Fryer* received no damage but just rebounded from the side of the *Hamonic,* so that very little effort, on the part of the *Hamonic* would, as it seems to me, have avoided her altogether.

The result is that the action is dismissed and the counter-claim as well, as endorsed on the record, as follows:

The action will be dismissed with costs except the costs and expenses consequent on the seizure and possession of the *Fryer,* which are to be made the subject of a special application to me by either of the parties. Counter-claim dismissed with costs so far as they are attributable to the counter-claim to be set off.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT

1923
May 10.

STEAMER *WESTMOUNT* AND OWNERS CANADA STEAMSHIP LINES, LIMITED ..... } PLAINTIFFS;

AGAINST

THE SHIP *ROBERT L. FRYER.*

Shipping—Collision—Observance of Rules—Negligence of both vessels.

Held, that rules 27, 37 and 38 of the Rules of the Road for the Great Lakes adopted by Order in Council of February, 1916, apply to a case where vessels are working in and out of a narrow congested channel into a slip between docks or while within the water space between docks. These rules apply to vessels until they are clear of the slip and the dock next to which they were made fast.

2. When both colliding vessels are found equally blameable and damage results, each vessel is liable to pay one-half the damage sustained by the other.

ACTION by the plaintiffs against the ship *Robert L. Fryer* for damages caused by a collision (1).

May 7, 8, and 9, 1923.

Case now heard before the Honourable Mr. Justice Hodgins, L.J.A. at Port Arthur.

W. F. Langworthy, K.C. and *F. W. Wilkinson* for plaintiffs.

W. A. Dowler, K.C. for defendant.

The facts are stated in the reasons for judgment.

HODGINS, L.J.A. now (May 10, 1923) delivered judgment.

This action is brought by the owners of the ship *Westmount* and against the ship *Robert L. Fryer,* claiming damages by reason of a collision which occurred in the slip between the Davidson & Smith Elevator and the Government dock at Port Arthur.

The *Westmount* is a steel vessel of 7,392 tons and had in her at that time about 100,000 bushels of grain which she had just taken from the Davidson & Smith Elevator finishing there at 5.40 p.m. on the 17th of November, 1922.

The *Fryer* is a wooden ship 280 feet long and drawing 16 to 18 feet at that time, laden with from 55,000 to 60,000 bushels of grain.

The slip in which the collision occurred is a comparatively narrow one, 175 feet in width, narrowed at the entrance, by reason of the wreck of the SS. *Ritchie* lying

(1) REPORTER'S NOTE: An appeal herein has been taken to the Exchequer Court.

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there on the side of the Davidson & Smith Elevator dock, to about 155 feet. Beyond the wreck, in shore and on the same side of it, was a steamer, called the *Jedd*. She had been laid up and, when I saw it, was on the bottom.

The channel into the slip reaches out a little distance beyond the end of both these docks. On the south side, shallow water all along for about 1,000 feet; on the north, shallow water extends for about 200 feet out from the end of the Government dock. To the north there is a depth of some 23 feet.

The distance from the breakwater to the Government dock is said by the engineer, Mr. Harcourt, to be about 2,400 feet.

In the channel, or rather in the slip, at the time of the accident there was lying a vessel called the *F. B. Squires* moored some 450 feet in shore from the end of the Government dock.

In company with counsel for both parties and with their consent I visited the two docks between which the accident occurred.

The *Westmount* began to cast off and to get her stern out across the slip so as to work it backwards along the Government dock. She did not signal before starting and her lights were not lit, which, as is contended, indicated that she was not intending to move, or, perhaps, more accurately stated, that not having lit her lights the conclusion was that she did not purpose moving that evening. The officer on her saw the *Fryer* beyond the breakwater and the mate of the *Westmount* also said that he saw her when she was half way in between the breakwater and the dock, or, as he put it later on, some two or three hundred feet away.

The *Fryer* was coming in from Fort William to the Government dock and she did not signal either until a later period, which her captain gives as from a position about 100 to 125 feet outside of the end of the Government dock. She had seen the *Westmount* and the *Squire* for a considerable distance and came on in the channel.

Both these vessels contemplated some definite thing. The *Westmount* to work out along the Government dock and the *Fryer* to tie up at the same dock until he had discovered the intentions of the other two ships. This is

stated in the Preliminary Act filed on behalf of the *Fryer* and the master of that vessel agreed in its correctness.

In working in and out of such a narrow, congested channel it was incumbent on both ships to use caution and it is well to let it be known that Rule 27 in my judgment applies to such a case as well as Rule 37 and 38.

The grain-carrying vessels are sometimes in a hurry, as has been stated in evidence, and their intended manoeuvres cannot be divined by those approaching or even by those inside the slip itself, and so the rule applies not only to docks open to the fairway but to those which lie on each side of the slip where care is even more necessary. The rule covers the ships until they are clear of the slip and the dock next to which they were made fast.

In this case I think the *Westmount* was at fault in neglecting the rule and not giving the signal when moving from its dock or just before doing so and thus, in that way, contributing to the accident.

And I think the *Fryer* is equally to blame in this respect. She was the approaching ship and should have signalled one long blast, which would have indicated her intention to enter the slip. It is true that her captain says that he saw the *Westmount* taking in grain when he looked at her from the breakwater. I think he is wrong in this. But if he is right he must have been aware of the probable sudden movements of grain carriers and should have governed himself accordingly.

The *Fryer* is a vessel used in exchanging grain between elevators and so it ought to be familiar with what is done in the movement of grain. The circumstances were on each side special, having regard to that trade, and so was the use of slips therein such as this.

The neglect to signal by both ships induced a situation of danger and there therefore remains the question whether, each having neglected to conform to the rule, this situation as it afterward developed showed that the accident which happened was due to the further fault of either or both ships.

The manoeuvres of each of these ships were as follows as I find on the evidence. The *Westmount* swung across

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the slip, moving backward, while the *Fryer* when three hundred feet (300') out from the Government dock, according to her first mate, stopped her engines and reversed. She intended to go to the Government dock and had she continued on she could, in my opinion, have tied up there, in which case the *Westmount* if properly handled, could have passed out. The engineer of the *Fryer*—and he was on the dock and not on the vessel—on the Government dock—said that the *Fryer* had got half her length inside the Government dock when the stern of the *Westmount* was 75 feet away, while the master of the *Fryer* says that he lapped the dock to the second button; that is 75 feet from the outer end of the dock when the stern of the *Westmount* was about the fourth button or 150 feet from the end of the dock. This leaves 75 feet between the two ships, as both these men agree.

The *Fryer* could have made a landing at the dock even if she had to go astern so as to get more room and that is what she should have done. The evidence is that she was going at a slow rate of speed when she checked. According to her captain she was stationary, or about 65 to 80 feet from the end of that dock, as she went—according to him—35 or 40 feet after he stopped her engines 100 or 125 feet from the end of the dock. This indicates that she could have got near enough to put out a line and far enough up to lie safely, having regard to the overlapping of the end of the Government dock by her stern.

The fact that the *F. B. Squires* left 450 feet behind her indicates to my mind that there was space enough and there was a reasonable time to give the *Fryer* the chance to get to the dock in priority to the *Westmount* and thus force the latter to alter or stop her movements. The Harbour Master of Port Arthur confirms this view to a certain extent by saying that he would under the circumstances have tied up at the dock, and I may add in passing that the brother of the *Fryer's* master was on the end of the Government dock, ready to handle the line had she chosen to go in there and attempt to make a landing. Instead of this the *Fryer* blew two blasts, which is a passing signal, and by reversing threw her bow towards the dock, making it difficult if not impossible to go promptly to port of the

Westmount according to her signal. Why he gave this signal, which indicates a change of mind, I cannot say. If he thought he couldn't make the dock, as I have suggested, it was because he had come in too close. He could have stopped earlier than he did. He said on cross-examination that he could have stopped her at her slow speed at 20 or 25 feet, although shortly after he somewhat modified this statement by more than doubling the number of feet in which he thought he could have stopped. I think he could have stopped outside the channel where he would have had free water to the north of him. He drew only 16 to 18 feet and the fairway was 23 feet. He says he came on because he got no signal. The result of not checking in time landed him in an awkward position, with shallow water on either side—a position which he could have avoided. He was in too great a hurry to get inside.

I therefore find that the *Fryer* was to blame for not stopping earlier and for not attempting to make the Government dock and tie up to it, and that she allowed herself to get too far in to make a safe passage to port.

The *Westmount,* I find, endeavoured to make too hasty an exit from the slip and in so doing added unnecessarily to the complications of the situation. This is supported by the evidence of several witnesses, who speak of her speed as being too great and unnecessary and no one from the *Westmount* is called to deny it. The *Westmount* should have gone more slowly when it was found that the *Fryer* had entered the channel. Also, the master of the *Westmount* did not reply as he should have done to the first signal from the *Fryer.* He should have at once replied and his excuse that he was at a loss is not sufficient.

The officers of the *Westmount* seem to have been somewhat careless in observing the movements of the *Fryer* until too late to be of very much use.

I think also that the *Westmount* should have gone more slowly or stopped when she discovered, or should have discovered that the *Fryer* was inside the channel. Whether or not her backwash affected the *Fryer* I am unable to say but the action of her screw would tend to make her stern approach the *Fryer,* but the *Fryer* was in my judgment too

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far in by her own want of action and even if the current affected her she contributed to her contact with the *Westmount* by stopping too late and reversing her engines, thus throwing her bow into starboard.

The most that can be said about the current is that the backwash and the effect of her reversing altered her position for the worse.

The result of the movements of both vessels at this later stage contributed in my judgment to the accident.

As in all cases of this nature there is much conflicting evidence and there is a great difference as to distances, which some of the witnesses could not estimate with any degree of accuracy or fairness, but I think the causes of the accident are those which I have stated and are fairly clear.

In the result I find both vessels to blame and I condemn the *Fryer* to pay one-half the damage and one-half the costs, leaving the *Westmount* to pay the other half, and I refer the fixing of the damages to the Registrar.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT

1923
Sept. 19.

GEORGE HALL COAL CO. OF CANADA, LTD. ..... } PLAINTIFF;

AGAINST

THE STEAMER *MAPLEHURST*

AND

CANADA STEAMSHIP LINES LTD.....PLAINTIFF;

AGAINST

THE TUG *MARGARET HACKETT*

Shipping—Collision—Breach of rules—Fault of both parties—Liability proportionately divided.

The *M.* was proceeding from Montreal to Quebec with the barge *B.* in tow, without the regulation light equipment for steam vessels engaged in towing, having the usual mast head white light and red and green lights, but having only an ordinary anchor light of insufficient visibility and not properly placed for the additional white towing light required by article 3 of the Collision Regulations. When on Lake St. Peter, the tug *M. H.* upbound with barge *Gladys H.* in tow collided with the *B.* The tug foundered and the *B.* sustained damages and action and cross-action resulted.

About 2,000 feet astern of the *M.* and tow, was a large steamer, and the master of the tug *M.H.*, as the lights did not show the *M.* had a tow, decided to go under her stern, cross diagonally to the other side of the channel and pass the large steamer to port. When between 200 and 300 feet away he saw the green light of the *B.* and took her to be a sailing vessel. He continued on his course and did not discover she was a tow till just before the collision. There was still time to have avoided the collision by starboarding, which the *M.H.* failed to do.

Held, on the facts, that although the *M.H.* could have avoided the collission by starboarding, yet, the failure of the *M.* to show the regulation towing lights primarily led to the collision, and both should be held liable in proportion to the degree in which each was in fault, which in this case, was fixed at 75 per cent for the *M.* and 25 per cent for the *M.H.*

Proof of the breach of the Collision Regulations casts the burden of proof upon the infringing vessel to establish that such breach did not cause or contribute to the collision.

ACTION AND CROSS ACTION to recover damages due to collision between the tug *Margaret Hackett* and the barge *Brookdale* (1).

July 23 and 30, 1920.

Case now heard before the Honourable Mr. Justice Maclennan at Montreal.

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(1) REPORTER'S NOTE: Judgment herein was affirmed on appeal to the Supreme Court of Canada. See [1923] Can. S.C.R. 507. Compare also report in cases of *Fraser* v. *Aztec* (19 Ex. C.R. 454), and *Geo. Hall Coal Co.* v. *Ship Parks Foster* [1923] Ex. C.R. 56.

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THE GEO. HALL COAL CO. v. SS. *Maplehurst.*

Maclennan L.J.A.

A. R. Holden, K.C. for the tug *Margaret Hackett.*

C. A. Barnard, K.C. for the barge *Brookdale.*

The facts are stated in the reasons for judgment.

MACLENNAN, L.J.A. now (19th September, 1921) delivered judgment.

These two actions were tried together and were submitted on the evidence taken before the Wreck Commissioner in an inquiry held by him into the collision between the tug *Margaret Hackett* and the barge *Brookdale* (in tow of the steamer *Maplehurst*) which took place in Lake St. Peter on the morning of July 16, 1920. As a result of the collision, the tug foundered and the barge sustained damage and the plaintiffs, as their respective owners, sue for the damages arising from the collision, each imputing fault and blame to the other.

The *Maplehurst* which was a lake steamer, having a net tonnage of 742 tons, left Montreal for Quebec on the evening of July 15, 1920, having in tow the barge *Brookdale,* both the property of the Canada Steamship Lines, Limited. The *Maplehurst* was not equipped for towing as she did not have the regulation towing lights. Her regulation masthead light was electric, as it was necessary that she should show a second light on her mast, the 2nd officer was instructed to provide the additional light, and for that purpose he used a vegetable tin box 12 to 14 inches square, part of which he cut away and in which he placed an anchor light, which was a coal oil lantern, which he found in the lamp room and which had not been previously used during that season. Neither the oil nor the wick were changed and this improvised light was attached to guide wires below the electric masthead light. The box which was used to hold this temporary anchor light was not produced at the investigation held in the Wreck Commissioners Court nor at the trial. It seems to have mysteriously disappeared and its absence and non-production have not been satisfactorily accounted for. There is conflict of evidence as to the position in which this anchor light was placed. According to the evidence of the first officer, under whose direction it was put up, the anchor light was 20 feet above the forecastle deck and the electric

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masthead light, by measurement, was bound to be 35 feet 9 inches above the forecastle light. The barge *Brookdale* had regulation red and green side lights. While the *Maplehurst* with her tow was proceeding down the channel through Lake St. Peter a collision occurred about 100 feet west of gas buoy No. 25 between the *Brookdale* and the tug *Margaret Hackett* upbound with the barge *Gladys H.* in tow.

Odilon Portelance, mate of the tug *Margaret Hackett,* was in charge of her navigation at the time of the collision about 3.20 a.m. He was approaching the main channel at gas buoy No. 25, where there is a curve, taking a short cut in the shallow water south of the dredged channel and passed the steamer *Maplehurst* to starboard. There was a large steamer coming down the main channel about 2,000 feet behind the *Maplehurst's* tow. Portelance saw the lights of this large steamer and, as the *Maplehurst's* lights as seen by him did not show that she had a tow, he decided to go under her stern and pass over to the north side of the channel and pass the large steamer coming down to port, and for this purpose he was directing his tug with her tow to diagonally cross the main channel. Portelance swears that when he first saw the green light of the *Brookdale* to his port he was at a distance of about 250 to 300 feet, he took her for a sailing vessel and, as there was a northwest wind he thought he could cross the bows of the *Brookdale* and get over to the north side of the channel before meeting the large steamer which was coming down stream. He did not discover the *Brookdale* was a tow until just before the collision between his tug and the *Brookdale.* After the collision he ordered his tow line cut and tried to reach shallow water, when the *Margaret Hackett* sank. The damage to the *Brookdale* was not so serious and she continued on her course to Quebec.

The plaintiff, George Hall Coal Company, the owner of the tug *Margaret Hackett,* submits that the collision which resulted in the sinking of its tug was caused by the absence of proper lights on the *Maplehurst* to indicate she had a tow and that the tug was thereby misled. The *Maplehurst* did not have the regulation light equipment for a steam vessel engaged in towing another vessel. She had the usual masthead white light and the red and green

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side lights—all electric—as required by Article 2 of the Regulations. The additional white towing light required by Article 3 was not electric but was an ordinary anchor light, a coal oil lamp, which if provided with good oil and wick, properly trimmed, would be visible for one mile, whereas the regulations require it to be of such a character as to be visible at a distance of five miles. Its position was not such as conformed with the Regulations as it was 15 feet below the electric masthead light and not six feet as required by Article 3. The regulations concerning lights are of the highest importance and particularly so in the navigation of the narrow and crowded waterway between Montreal and Quebec, and owners and masters are required by statute to obey these regulations and departure from them is only justified by necessity. Non-observance is *prima facie* negligence. The *Margaret Hackett* upbound was entitled to expect a vessel with a tow, which it might meet, would show the regulation lights, two bright white lights on the masthead and both of the same construction and character, both visible for five miles and not less than six feet apart, but certainly not over 15 feet apart as was the case here. I find the *Maplehurst* did not have the towing lights required by the regulation. The men in charge of the tug and her tow saw the bright electric light on the mast of the *Maplehurst* but not the second light. The light of the coal oil lantern was so dim and in such a position that it was no notice to the tug that the *Maplehurst* had a barge in tow. There were a number of other lights about the deck of the *Maplehurst* and what was intended as a second bright light was so poor and so far out of the position which it should occupy as a towing light that it is not surprising that the lights were misleading and that the officer in charge of the tug thought he was meeting a vessel unencumbered with a tow. Proof of the breach of the regulations casts the burden upon the infringing vessel to establish that the breach did not cause or contribute to the collision; *The Fenham* (1), and *The Gannet* (2). The owners of the *Maplehurst* are very much to blame for having undertaken to tow a vessel without

(1) [1870] L.R. 3 P.C. 212.

(2) [1900] A.C. 234; 69 L.J. Adm. 49.

having on board and using the proper towing lights in conformity with the regulations and they have failed to establish that their breach did not cause or contribute to the collision. The evidence is conclusive that if the lights of the *Maplehurst* had indicated she had a vessel behind her in tow, the tug *Margaret Hackett* had ample water and room to pass her, her tow and the large steamer following them, green to green, in which case no collision would have occurred. My assessor is of the same opinion as he advises me that the absence of the Regulation Towing Lights on the *Maplehurst* primarily led to the collision.

Is the mate of the *Margaret Hackett* free from blame and should her owners be held liable in whole or in part for the damage sustained by the barge *Brookdale*. When the mate of the *Margaret Hackett* saw the green light of the *Brookdale* to port he concluded she was a vessel under sail. There was a northwest wind on the port side of the *Brookdale* which would have a tendency, had she really been a sailing vessel, to carry her to the south or starboard and the intention of the tug's mate was to cross her bows to the north or starboard side of the channel and pass her and the large steamer in the distance red to red. The mate's conduct must be considered in the light of the knowledge which he then had or should have had from all the surrounding circumstances of the situation, and the rights and obligations imposed upon him by the regulations. My assessor advises me that the mate of the *Margaret Hackett*, supposing the *Brookdale* to have been a sailing vessel, was justified in this manoeuvre, but evidently failed to take into consideration his own tow and its great length. Further he advises me that had the tug been alone and had the *Brookdale* actually been a sailing vessel, he believes he could easily have crossed ahead and even at the last moment before the collision he could have signalled his own tow, eased his engines and passed starboard to starboard of the *Brookdale* and the large downbound steamer, there being plenty of water in the vicinity to allow this to be done. He also advises that the mate of the *Margaret Hackett* was guilty of a breach of the regulations in attempting to cross ahead of another vessel

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although there was justification for this and that he was guilty of a grievous error of judgment when he believed that his tow, considering its length, could cross the bow of the supposed sailing vessel. The regulations are clear on what should have been done in the circumstances. As the *Margaret Hackett* was about to re-enter the dredged channel, 450 or 500 feet wide, her mate saw ahead, apart from the *Maplehurst,* two vessels meeting him, the *Brookdale* near and a large steamer half a mile away. Article 25 provides that in narrow channels every steam vessel should, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies to the starboard side of such vessel. To comply with this article, the *Margaret Hackett* had to cross ahead of the other two vessels and her mate thought he could safely do so. Article 20 provides that when a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel, and Article 22 provides that every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. In my opinion Articles 20 and 22 apply to this case, as the *Margaret Hackett* and the *Brookdale* were proceeding in such directions as to involve risk of collision and there was ample room and water to permit the *Margaret Hackett* to allow the *Brookdale* and the large steamer to pass to starboard. Had the *Brookdale* heen a sailing vessel, it would have been the duty of the *Margaret Hackett* to have kept out of her way and she had ample room to avoid crossing ahead, to have gone under her stern, but as the *Brookdale* proved to have been a barge in tow, the attempt to cross her bows inevitably resulted in collision. The mate of the *Margaret Hackett* must be held to blame for his error of judgment and for his failure at the last moment to have starboarded which, in the opinion of my assessor, would have averted the collision. He was wrong in attempting to cross ahead of the tow when he should have kept out of the way and his owners must be held responsible in proportion to the degree in which he was in fault for breach of Articles 20 and 22 and which contributed to the collision.

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I find the collision resulted from the fault of both the steamer *Maplehurst* and the tug *Margaret Hackett*. Their liability to make good the damage or loss arising from said collision is in proportion to the degree in which each vessel was in fault. In my opinion, which is shared by my assessor, the *Maplehurst* was very much more to blame for the collision than the *Margaret Hackett*, as the failure to show proper towing lights lead the latter into the hazardous position where on the spur of the moment she attempted to cross the bows of the downbound tow. I find that three-quarters of the fault which resulted in the collision is attributable to the *Maplehurst* and one-quarter to the *Margaret Hackett*.

There will therefore be judgment in favour of the George Hall Coal Company of Canada, Limited, against the steamer *Maplehurst* and her bail for three-quarters of the damages to the tug *Margaret Hackett* and costs, and judgment in favour of the Canada Steamship Lines, Limited, against the tug *Margaret Hackett* and her bail for one-quarter the damages to the barge *Brookdale* and costs, with a reference to the District Registrar assisted by merchants as assessors to determine the damages due in each case.

Judgment accordingly.

1923
April 16.

W. LAMARRE & CIE LIMITEE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Constitutional Law—Crown—Order in Council authorizing payment is binding agreement—Contract—intra vires.

L. & Cie had a contract for the sale of coal to the Crown. At a given date the parliamentary appropriation for same became exhausted, payments to L. & Cie were stopped, and they were obliged to borrow from the bank to buy coal for the performance of their contract. For such accommodation they paid the bank $1,724.97 in interest, and that amount they now claim from the Crown.

On December 17, 1921, an Order in Council was passed accepting liability therefor and directing payment thereof to L. & Cie, this the Crown by its defence claimed to be *ultra vires*, null and void.

Held that the Order in Council ought to be regarded as a sufficient expression in writing of an agreement to pay on the part of the Crown, and that suppliants were entitled to recover.

PETITION OF RIGHT to recover $1,724.97 disbursed by suppliants for accommodation and which they were obliged to pay to the bank on account of the delay in payments by the Crown.

November 2, 1922, and March 27, 1923.

Case now heard before the Honourable Mr. Justice Audette at Montreal.

J. Sinai Lamarre for suppliant.

L. A. Rivet, K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (April 16, 1923) delivered judgment.

The suppliants by their Petition of Right seek to recover the sum of $1,724.97, disbursed by them at the Bank for accommodation, as a result of the Crown delaying making payment for coal sold and delivered,—the annual appropriation for the payment of the same having been exhausted, before the end of the then current fiscal year.

The suppliants sold and delivered to the Crown, under contract, a large quantity of coal. Payments for delivery during the months of August, September, October and November, 1920, were made in due time. However, by December the appropriation for the fiscal year ending 31st March, 1921, for the payment of coal, became exhausted

and payment for the coal delivered had to be delayed until further fund had been provided by Parliament.

The suppliants who had to make monthly payments for the coal at the mine, became seriously handicapped, as the amounts required to cover the cost of the coal so delivered rolled up in large figures, and they had to seek help, by way of accommodation, at their bank, paying the sum of $1,724.97 in interest, which they now claim upon the consideration that the Crown failed to pay for the coal under the usual custom of trade. They claim they should not be called upon to finance the Crown when its appropriations are exhausted.

For the recovery of such a claim, in the nature of interest or damages, a Petition of Right will not lie against the Crown. Interest is payable by the Crown only upon contract therefor or where its liability is fixed by statute. *Algoma Central Ry.* v. *The King* (1).

Section 48 of the Exchequer Court Act reads as follows:

(His Lordship here cites section 48 of the Exchequer Court Act).

The suppliants' claim for the recovery of monies in the nature of interest fails, unless the Crown admits liability.

However, the Executive, apparently moved by the equities of the claim, on the 17th December, 1921, passed an order in council (exhibits No. 2 and 14) reciting all the facts and circumstances of the case, accepting liability and directing the

payment of this sum of $1,724.97, due by the Crown for interest on deferred payments on coal purchased for the firing-season, 1920-21, for the Ottawa Public Buildings.

The suppliants filed this order in council and relied upon the same for asserting their claim, stating that it was mailed to them with a covering letter signed by Mr. Boudrault. This letter after search being made, cannot be found.

The original contract for the coal in question has been duly executed and performed and the Crown passed this order in council which is a sufficient expression in writing

(1) [1901] 7 Ex. C.R. 239.

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of an agreement to pay. *Millar* v. *The King* (1); affirmed on appeal to the Supreme Court of Canada (2).

The Crown can only speak with requisite authority through an order in council. It has done so in the present case, and it must be taken to have accepted liability under the circumstances of the case. *The King* v. *Vancouver Lumber Co.* (3); *The British American Fish Corporation* v. *The King* (4); *Livingston* v. *The King* (5); *Re Mackay and The Public Works Act* (6); *Stewart* v. *Jones* (7); *Casgrain* v. *School Commissioners* (8); *Gaston Williams* v. *The King* (9).

Therefore, there will be judgment adjudging and declaring that the suppliants are entitled to recover from the respondent the sum of $1,724.97, with interest thereon from the date upon which the Petition of Right was left with the Secretary of State, pursuant to section 4 of the Petition of Right Act (*St. Louis* v. *The Queen* (10); *Lainé* v. *The Queen* (11) followed) and costs.

Judgment accordingly.

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(1) [1921] 49 Ont. L.R. 93; 51 Ont. L.R. 246.
(2) [1922] 70 D.L.R. 254.
(3) [1914] 17 Ex. C.R. 329; 41 D.L.R. 617; 50 D.L.R. 6.
(4) [1918] 18 Ex. C.R. 230; 59 S.C.R. 651.
(5) [1919] 19 Ex. C.R. 321.
(6) [1921] 58 D.L.R. 332.
(7) [1900] 19 Ont. P.R. 227.
(8) [1895] Q.R. 9 S.C. 225.
(9) [1922] 21 Ex. C.R. 370, at p. 372.
(10) [1895] 25 S.C.R. 649, at p. 665.
(11) [1896] 5 Ex. C.R. 103.

ON APPEAL FROM THE NEW BRUNSWICK ADMIRALTY DISTRICT

1923
April 9.

THE SHIP *SENECA* (DEFENDANT).....APPELLANT;

AND

W. N. MACDONALD, OWNER OF THE SHIP *CURLEW* (PLAINTIFF).....} RESPONDENT

Shipping and seamen—Salvage services—Quantum—Discretion of Court —Appellate Court.

Held (affirming the decision of the Local Judge of the New Brunswick Admiralty District, reported p. 13, ante) that the services rendered by the respondent were in the nature of salvage services and entitled him to compensation assessed on that basis.

2. That the amount of salvage reward is in the discretion of the Court, and, unless the same is excessive, an appellate tribunal ought not to interfere.

APPEAL from the decision of the Local Judge of the New Brunswick Admiralty District (1) allowing salvage award for $4,081.35 against the appellant herein.

March 9, 1923.

Appeal now heard before the Honourable Mr. Justice Audette at Ottawa.

M. G. Teed, K.C. for appellant.

F. R. Taylor, K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (9th April, 1923) delivered judgment.

This is an appeal from the judgment of the Local Judge of the New Brunswick Admiralty District (1) pronounced in a salvage action, on the 10th day of November, 1922, and allowing a reward of $4,081.35.

The facts of the case and the circumstances under which the present claim arises are clearly set out in the reasons for judgment of the learned trial judge and I am therefore relieved from the necessity of repeating them here on appeal. (2).

The case, in the result, resolves itself into a comparatively narrow compass. The appellant sets out, *inter alia,* as an outstanding ground of appeal, that the amount awarded by the judgment *a quo* is excessive and assessed upon a wrong principle and that there is error in assessing on the basis of an engaged and not of a volunteer salving ship. However, in his reasons for judgment, the learned

(1) [1923] Ex. C.R. 13. (2) [1923] Ex. C.R., p. 13.

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THE SHIP *Seneca* v. *Macdonald.*

Audette J.

trial judge clearly states "that the services rendered were salvage services and that the *Curlew* is entitled to the ordinary salvage award on the usual salvage consideration."

The *Seneca* was a crippled vessel caught in the ice, with two blades of her propeller broken and unabled to extricate herself. The Government steamer, the *Montcalm,* endeavoured to free her from her critical position and did not at first succeed. The *Seneca* had no wireless equipment, but the *Montcalm* had. The *Seneca* directed her to send for the *Curlew* and the radio of the 4th May, 1922, recited in full in the trial judge's reasons, is sent. Then follows the second radio; the ice becoming too heavy, the *Curlew* is dissuaded or discouraged from venturing out.

The evidence of the delivery of the second radio is unsatisfactory and so found by the trial judge; and no solid or satisfactory conclusion can be built upon it.

However, be that as it may, in the result, we have all the elements of salvage and a distinct case made thereunder. The very word "salvage" connotes salvor's services and salvor's reward.

The *Seneca,* a vessel in distress is calling for help, is asking the *Curlew* to come to her rescue with a cable. Whether or not the second radio dissuading or discouraging the *Curlew* to come on account of heavy ice was duly delivered, matters not; because when the *Curlew* ultimately arrived alongside the *Seneca* she was not told that her services were not required; nor were they repudiated. Quite to the contrary, she was sent to the *Montcalm* to work in unison with her. Her cable is accepted, used and broken. She stands by, ready to perform any services or assistance that circumstances would suggest. Her cable used by the *Montcalm* proved of great service since the *Montcalm* was thereby able to start the *Seneca,* enabling her ultimately to be saved. 26 Hals. 562,564; Roscoe 4th ed. p. 158.

There was no contract of any kind entered into as between the *Seneca* and the *Curlew.* The services rendered by the latter were essentially independent of contract and performed with absolute voluntarism and were in their very essence in the nature of salvage and cannot be attributed to any legal obligation. Such services and assist-

ance were at no time refused or declined by the *Seneca* when in the ice. Had the second radio meant a refusal of the *Curlew's* services the *Seneca* could and would have followed it up, had she seen fit, by refusing and declining any assistance so actually proffered and rendered by the *Curlew*. Moreover, if the *Seneca* said nothing on the arrival of the *Curlew* and allowed her to render assistance, it is not now in the mouth of her owners to refuse to pay a proper remuneration.

The *Curlew* went out of harbour in a fog, when large and thick sheets of ice were to be encountered at a dangerous season, and at great risk to herself and crew. Having at great risk, time and expense, rendered continuous salvage services, the *Curlew*, under the very spirit of Admiralty Law, is entitled to compensation assessed on the usual basis in such cases. The reward involves a mixed question of private rights and public policy. Kennedy, 2nd ed. 7. And

> upon public consideration the interest of commerce, the benefit and security of navigation, the lives of seamen

operate in favour of allowing a reward upon a more enlarged and liberal scale. Idem 17. Even in doubtful cases as to the effectiveness of the services rendered, the courts, upon the policy of encouraging salvage services, lean to the view that the services were of some benefit. But here, the services were so beneficial that they contributed to the successful result which might not have been attained without such services, and no doubt arises in this respect. Maclaghlan, on Merchant Shipping, 5th ed. 704; *The Melpomene* (1). Furthermore, when a vessel like the *Curlew* is especially equipped and maintained for the purposes of rendering prompt and efficient services, the broad principles recognized by the court as a guidance in assessing salvage remuneration—the general interests of navigation and commerce of the country—will lead to a consequent increase in the award. Roscoe, 4th ed. 177.

Moreover, the amount of salvage reward is entirely in the discretion of the court and unless the remuneration is excessive, an appellate tribunal ought not to interfere. The remuneration should not leave the salvor any poorer than he was before and he should be compensated for his ser-

(1) [1873] L.R. 4 A & E. 129.

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THE SHIP *Seneca* *v.* *Macdonald.*

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vices and assistance. SS. *Baku Standard,* (Master and owners of) and SS. *Angèle,* (Masters and owners of) (1).

In the result I am of opinion that the learned trial judge was justified upon all the facts and the law in fixing the amount of the salvage award at the sum of $4,081.35, and that the judgment appealed from should stand. The appeal is dismissed with costs.

Appeal dismissed.

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(1) [1901] A.C. 549.

1923
March 20.

CONGOLEUM COMPANY OF CANADA..PETITIONER;

AND

THE CANADIAN LINOLEUMS & OILCLOTHS, LTD. ..... } OBJECTING PARTY.

Trade-mark—Registration without sufficient cause—Similarity of marks—Deception on the public—Expunging—Public interest—Trade-Mark and Design Act, section 11, subsection B and section 42.

Petitioner's trade-mark "Congoleum" was registered in Canada in 1913, having been adopted in 1909 by petitioner's predecessors, in connection with their business of felt base floor coverings which were extensively sold in the United States and in Canada between 1913 and 1920. The objecting party registered the word "Kingoleum" in Canada, as a trade-mark in 1920, to be applied to the same class of merchandise. The two marks resembling each other, being alike in sound, and applied to the same class of merchandise, it was held, that as the public was liable to be deceived, the trade-mark "Kingoleum" was registered "without sufficient cause" and should be expunged from the Register.

2. That in such a case the interests of the public must be considered before those of the parties.

ACTION by petitioner to have the trade-mark consisting of the word "Kingoleum," expunged.

February 16, 1923.

Case now heard before the Honourable Mr. Justice Audette at Ottawa.

W. L. Scott, K.C. for petitioner.

G. A. Stiles, K.C. for objecting party.

The facts are stated in the reasons for judgment.

AUDETTE, J. this (March 20, 1923) delivered judgment.

This is an application to expunge from the Canadian Register a specific trade-mark

to be applied to the sale of floor coverings, particularly those generally known as felt base floor coverings of all kinds, and similar articles used for the same or like purposes, and which consists of the word "Kingoleum."

At the opening of the trial the parties filed (exhibit No. 1) an admission reading as follows:—

The Canadian Linoleums and Oil Cloths, Limited, admits that Barrett Manufacturing Company, Inc., the predecessors in title of Congoleum Company, Inc., of the United States, referred to in the petition herein was one of the pioneer companies engaged in the felt base floor covering business in the United States and also in Canada and that it began carrying on business in Canada in 1913 and continued to do so until such business was handed over to the Congoleum Company of Canada, Limited, the petitioner herein on the 1st day of May, A.D. 1920.

It was further admitted

that R. E. Kingley was in the business since 1904, but that he was not carrying on business under his own name, and was an officer of the company.

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Audette J.

The petitioner's predecessors adopted the trade-mark "Congoleum," in the year 1909, in respect of their business of felt base floor coverings, which they extensively sold both in the United States and in Canada between the years 1913 and 1920, and on the 31st March, 1913, they registered the same in Canada, in register No. 74, folio 18164, as a specific trade-mark to be applied to the sale of prepared floor coverings.

The objecting party's trade-mark "Kingoleum" was registered in Canada on the 13th day of October, 1920, as a specific trade-mark for the class of business above set forth.

Section 4 of the Trade-Mark and Design Act defines as a "general" trade-mark one which is used in connection with the sale of various articles in which a proprietor deals in his trade and business generally; while a "specific" trade-mark is one used in connection with the sale of a class of merchandise of a particular description. *Re Gebr. Noelle* (1).

Now it cannot be denied that "Congoleum" and "Kingoleum" seen side by side show a certain resemblance to one another; but that is not the test. One has to bear in mind that the danger to be guarded against is that the person seeing one mark by itself will think it to be the same as another which he has seen before, and that the purchaser will not see the two marks side by side so as to note the small differences.

These two specific marks are used in connection with the sale of the same class of merchandise, and that fact alone will greatly add to the possibility of taking the goods of one trader for those of another, creating confusion and, therefore, the use thereof will become liable to deceive the public.

Moreover, the general principle to be adopted in deciding such cases is to consider the impression produced by the mark as a whole. It is the appeal to the eye which is to be considered. It is by the eye the buyer judges. And in this case one must not overlook the similarity in the phonetics of the two words, which, while not exactly *idem sonans* maintain a certain analogy in sound which

(1) [1913] 14 Ex. C.R. 499.

may easily lead to mistake in the identity of the goods, particularly where both words relate to the same class of goods. Re application of *Egg Products, Ltd.* (1).

The two marks resemble one another; they sound alike; they are applied to the same class of merchandise. To allow such similarity in trade-marks is baneful to trade in that it is liable to deceive the public whose interest must be considered before the relative rights of the parties. 27 Hals.; 698 to 700. In re *Gebr Noelle's Trade-Mark "Albaloid"* (2); *Barsalou* v. *Darling* (3); *Melchers, J. J.* v. *John de Kuyper* (4); *Eno v. Dunn* (5); *Aunt Jemima Mills Co.* v. *Blair Milling Co.* (6); *William Waltke Co.* v. *Schafer* (7); *Northwestern Consol Milling Co.* v. *Mauser* (8).

Having found that the two marks resemble one another and reading subsection (*b*) of section 11 of the Trade-Mark and Design Act which enacts that the Minister may refuse to register any trade-mark which resembles any trade-mark already registered. I have come to the conclusion that the trade-mark "Kingoleum" was registered without sufficient cause (see section 42). *Billings & Spencer* v. *Canadian Billings* (9).

The essence of a trade-mark is distinctiveness and this cardinal requirement is wanting as between the two marks in question.

Is not the very name of this trade-mark as having reference to the character of the goods descriptive or suggestive of the origin of the class of goods in connection with which it is used?

I have therefore come to the conclusion, for the reasons above mentioned, to order and adjudge to expunge from the Canadian Register of Trade-Marks, vol. 117, folio 27,350 the specific trade-mark "Kingoleum" as applied to the sale of floor coverings, etc., the whole with costs in favour of the petitioner.

Judgment accordingly.

(1) [1922] 39 R.P.C. 155.
(2) [1913] 14 Ex. C.R. 499.
(3) [1881] 9 S.C.R. 677.
(4) [1898] 6 Ex. C.R. 82.
(5) [1890] 15 A.C. 252.
(6) [1921] 270 Fed. R. 1021.
(7) [1920] 263 Fed. R. 650.
(8) [1908] 162 Fed. R. 1004.
(9) [1921] 20 Ex. C.R. 405.

1923
April 23.

TORONTO ADMIRALTY DISTRICT

CANADA STEAMSHIP LINES, LTD.....PLAINTIFF;

AND

CANADIAN NORTHERN RAILWAY.....DEFENDANT.

Shipping—Collision—Negligence caused by using a protection for a dock for purpose not intended—Risk thereby undertaken.

The Master of the ship *Emperor* in making a landing at the defendant's dock came purposely in contact with a cluster of piles placed in the water by the defendant to protect the angle of the dock and about three feet distant therefrom, intending to use them to shove the bow of his ship outward so as to clear the angle, with the result that the ship and dock were both injured.

Held, such an obstruction to navigation cannot be made use of by the Master of a ship for a purpose other than that for which it was intended, except at his own risk, and the Master is not absolved from blame by the fact that the obstruction is insufficient to fulfill the object for which it was designed. In the result the plaintiff's action failed and the plaintiff was held liable for the damage to the dock.

ACTION (in personam) for damages by the plaintiff against the defendant, suffered by reason of one of the plaintiff's vessels coming into collision with the defendant's dock in Port Arthur, with a counter-claim by the defendant for resultant damages to the dock.

April 19, 1923.

The case was heard before the Honourable Mr. Justice Hodgins at Toronto.

Francis King, K.C. for plaintiff.

D. L. McCarthy, K.C. and *A. J. Reid, K.C.* for defendant.

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

HODGINS, L.J.A. now (April 23, 1923) delivered judgment.

On the 16th May, 1921, the SS. *Emperor* of the plaintiff's line, a ship of 525 feet in length, 56 beam, and 31 feet in depth, with 180,000 bushels of wheat, when coming into dock in Port Arthur harbour for the balance of her cargo (about 170,000 bushels) came into collision with the defendant's dock. For the damage she suffered this action is brought while the defendants counter-claim for the injury done to their dock. I agree that under these circumstances the defendants invited the ship to come to their

dock and their duties are set out in such cases as the *Bearn* (1); *The Moorcock* (2) per Butt J.; *The Queen* v. *Williams* (3); *The Calliope* (4) per Lord Watson; *Butler* v. *McAlpine* (5) per Fitzgibbon L.J., and *Scrutton* v. *Attorney General of Trinidad* (6), all of which were recently considered by the Divisional Court here in the action of *Great Lakes SS. Co.* v. *Maple Leaf Milling Co.* (7).

The dock to which the ship was proceeding was a new cement dock reinforced by 80-pound steel rails embedded in its face below the top, the ball of each rail protruding three-quarters of an inch along the face. As it was intended to continue this dock the ends of the rails were cut off sheer with the side of the dock. According to plan Exhibit 2 a narrow water passage ran between that side and the old dock which does not appear in Exhibit 4, but in each the alignment of the old dock is shown not so far out as the new dock by about seven feet. About three feet from the corner of the new dock, and opposite the line of division between the docks, the defendants as owners of the new cement dock, for the purpose of protecting the angle of that corner had planted in the soil of the harbour a cluster of about 30 wooden piles which came out slightly beyond the line of the dock produced or about three feet. These piles were tied together by a steel cable tightly clinched and clamped, and were a prominent object.

The ship after some manoeuvring on her way in got alongside and close enough to the old dock to land some seamen on it by means of a 14-foot boom from the ship's side. This boom came out from the same part of the ship as that damaged by the collision which part I shall for convenience call the "shoulder" of the ship. It is about 75 feet from the stem and where the beam was the full 56 feet, but just beginning to turn in towards the stem. The distance of the shoulder from the old dock at that moment is given by the mate as six or seven feet, and the stern or near the stern as 10 or 12 feet. He says the boat was gradually coming in. The second mate who was standing 75 feet from the stern says that the side where he stood

(1) [1906] P.D. 48.
(2) [1889] 14 P.D. 64.
(3) [1884] 9 A.C. 418.
(4) [1891] A.C. 11.
(5) [1904] 2 Ir. R., Q.B.D. 445.
(6) [1920] 90 L.J.P.C. (N.S.) 30.
(7) [1922] Ont. W.N. 203; [1923] 3 D.L.R. 308.

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was about 10 feet from the old dock. It will thus be seen that the shoulder of the bow would be about in line with the face of the new dock produced, the ship lying at an angle to the face of the old dock.

Having landed the men in this fashion the ship continued to go forward and the master intended that she should rub the piles so that her bow should get a shove off sufficient to take her past the angle of the new dock when she would have to be straightened up to lie alongside it. The master said he could not from his position on the bridge see the water space between his ship and the old dock, but the mate could. He, however, did not shout loud enough to inform the master. He appears, as does the master, to have acted on the belief that the piles were stout enough to fend them off. Instead of this being the case they bent well back from the impact and the ship came on and into the corner of the new dock. It damaged the cement there and one rail came away sufficiently to pierce the hull of the vessel and run in under where the mate was standing about 16 feet. This is the damage sued for, and the negligence is said to be the misleading position and appearance of the piles inducing the master in effect to assume an invitation for their use as a fender to assist his ship to avoid contact with the dock. It is suggested that they were really part of the dock and the invitation as including the use to which they were put by the master in what he did. Evidence was given that similar clusters of piles were used in different lake ports for this purpose. The master frankly says that in his then position he would have struck the end of the dock if the piling was not there and that there was nothing accidental about it; he ran against it to push the ship out. The mate agrees in this.

My conclusion on the facts is that the master was desirous of landing his men on the old dock and manoeuvred his ship for that purpose, getting her into a somewhat awkward position with respect to the new dock alongside which he intended to lie. This position was with his shoulder in a line with the face of the new dock, and his stern outside that line so that he would have in some way to get the ship's bow and shoulder past the end of the new dock. To do this he used the piles for a purpose for which

they were neither designed nor sufficient, resulting in the ship coming in contact with the new dock. If the experience of Albinson, master of the *Laketon* is to be considered the *Emperor* must have struck the piles a severe blow, as the *Laketon* on the occasion referred to rubbed against them and they only bent back one foot or 18 inches, and then came back, allowing the ship to scrape along the cement dock.

The mistakes amounting to negligence which the master of the *Emperor* made, were, to my mind, four in number; first in laying his ship opposite the old dock in a bad position for the new dock due to his desire to get close enough to drop his men on it; secondly in coming in contact with the piles with such force as to bend them aside, and push past to the new dock; thirdly in not reversing his course till he could make his way past the corner of the new dock on a fairly straight course instead of using the piles to assist him when he was unaware of their resisting power or the purpose which they were intended to serve; fourthly, though there is little evidence on this point, in not approaching the new dock, which he admits he regarded as one usually dangerous to a steel ship, and therefore difficult to approach, by a different and, therefore, safer course, a manoeuvre which is not shown to be impossible to accomplish in that harbour, the channel alongside the dock being about 200 feet wide.

I know of no rule or practice which allows a ship to use for its own purposes an obstruction to navigation placed separate and distinct from the dock which the ship intends to use without experience of its strength, or knowledge of why it is there. I conceive that the duty of the master under these circumstances is to avoid such an obstruction and to so handle his ship as to make his contact with the dock to which he is going without striking or rubbing along such a projection above the water of the harbour unless he is prepared to take the risk of what may happen.

For these reasons I think the action fails and must be dismissed with costs.

For the same reason it seems to me that the counterclaim of the defendants should succeed.

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The fact that the piles were insufficient to fulfil their purpose of protecting the end of the dock is not one that can be urged by a ship as absolving it from blame where the user of them is for quite a different object and where the ship's course and momentum cause them to be struck so forcibly as to require greater strength and resisting power than such a protection usually calls for.

There should be judgment on the counter-claim for damages to be assessed by the Registrar to whom it is referred to ascertain the damages. The costs of the counter-claim down to and including the trial will be paid by the plaintiffs in so far as the ordinary costs of the action do not cover them, as, however, they must do in this case to a very large extent.

Judgment may be entered for these damages and the costs of the reference upon the making of the Registrar's report.

Judgment accordingly.

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April 26.

TORONTO ADMIRALTY DISTRICT

CANADIAN DREDGING COMPANY.....PLAINTIFF;

VS.

THE NORTHERN NAVIGATION CO. AND THE CANADIAN TOWING & WRECKING CO. ..... } DEFENDANTS.

Shipping—Collision—Negligence—"One Ship"—Joint Liability—Necessity for proper lookout.

Held that in cases of collision the active and vigilant services of the man on the lookout, under circumstances when those propelling the ship necessarily rely upon him, are indispensable and necessary.

2. When two vessels are to blame for inflicting damage on a third vessel they are jointly liable for the whole damage and where, as in this case, the action is *in personam,* the defendants, the owners of the ships, are jointly liable.

Note: The expression "one ship" (ship and her tug) discussed.

ACTION (in personam) brought by the plaintiff against the defendants for damages resulting from the collision of a ship of the defendant navigation company, towed or propelled by a tug owned by the defendant, the Canadian Towing and Wrecking Company, with a dredge owned by the plaintiff company.

April 20, 21 and 23, 1923.

Case now heard before the Honourable Mr. Justice Hodgins at Toronto.

F. W. Grant and *W. G. F. Grant* for plaintiff;

F. Wilkinson for the Northern Navigation Company.

S. C. Wood K.C., and *G. M. Jarvis* for the Canadian Towing and Wrecking Company, Ltd.

The facts are set out in the reasons for judgment.

HODGINS, L.J.A. now (April 26, 1923) delivered judgment.

On the 19th August, 1919, the SS. *Huronic* belonging to the defendant navigation company, was in the Port Arthur Dry Dock. The tug *Sarnia,* belonging to the defendant towing company was sent to assist her out of the dock, and to tow her to the passenger dock in Port Arthur harbour.

These two vessels on their way from that dock, came into a position which resulted in a collision with the dredge *Excelsior* owned by the plaintiffs, and for the damage caused to her thereby this action is brought. The action

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is *in personam,* and each defendant endeavours to throw the blame on the other.

The dredge was rightly working on what was then known as the "middle ground," performing a contract with the Government. Her position was seen by the master of the *Sarnia* on his way to the dry dock on the day of the collision, and she could be seen from the *Huronic* from the dry dock.

The channel from the dry dock runs in a straight line, in a southeasterly direction, until it joins what is spoken of as the "Saskatchewan Channel," which runs, roughly, northeasterly and southwesterly. This latter channel leads out to the harbour past the "middle ground," while to continue on the dry dock channel course involves crossing the "middle ground" into the waters of the harbour beyond. There was sufficient water on the "middle ground" and beyond for the *Huronic.*

When the collision took place, the arm or crane of the dredge was struck by the *Huronic* and scraped along the whole length of her starboard side, and was injured, as was the dredge itself. When the collision happened the master of the dredge was endeavouring to get up her anchors, but he had not succeeded when struck. He anticipated trouble when he saw that the *Huronic* did not turn southward into the "Saskatchewan channel." His bucket was down in the mud. It was urged that if he had got that up, and was then enabled to swing his crane, no accident would have happened.

For the reasons pointed out by the master of the dredge, I think his action was entirely proper, and intended to advantage both his dredge and the colliding vessel in case contact could not be avoided.

I cannot find that the dredge was in any way negligent. She was on her proper ground; her presence was known to the officers of both ships; her slow but usual movement in dredging was common knowledge, and there was no reason why her master should have anticipated what occurred under the circumstances existing that day. He acted when he saw that the turn into the "Saskatchewan channel"—which he says is usual for ships being taken out of dry dock—was not being made. His determination to

get up the anchors and to shift the dredge's position if possible, in preference to lifting her bucket, indicates good judgment, as, if the dredge had been struck with all her anchors down and they had broken, the damage would have been very seriously increased. These anchors, of which there are three, are not ordinary anchors, but are like staves or piles driven into the ground, and cannot be raised rapidly.

The defences filed by the defendants indicate that each vessel considered itself to be the servant of the other; but I have come to the conclusion, upon the facts before me, that the operation of taking the *Huronic* from the dry dock to the passenger dock at Port Arthur was a joint or combined operation, and not one in which either vessel can be said to have had the entire charge or control, or if one had it, that the other was not bound to co-operate actively. My reasons for thinking so are as follows:—

When the *Sarnia* made fast to the *Huronic* on the latter coming out of the dry dock, she laid up against the port bow of the *Huronic,* pointing her bow in a different direction from the bow of that vessel, and with her stern just about at the *Huronic's* stem. A line led from the bow of the *Huronic* to the bow of the tug. The method then contemplated and put in operation was that the *Huronic* should be shoved stern first by the *Sarnia,* and under the *Sarnia's* power in the position that I have described. There were two courses, as mentioned, which might have been taken, and it appears that before the vessels moved off from the dry dock and down the channel there was no communication between the masters of the vessels as to which course was to be pursued. This was a matter of very considerable importance, because, owing to the position of the *Sarnia* her range of vision was limited to the port side of the *Huronic* and to the southern face of the "Saskatchewan" and "Richardson" elevators, and the black buoy at the junction of the dry dock channel and the "Saskatchewan Channel." She could, therefore, see nothing on the starboard side of the *Huronic* as the huge vessel cut her off completely on that side. At the end of the dry dock channel and to the south of it there was a considerable amount of pile protection, and a red buoy, both as shown on Exhibit 1; and there was also the dredge on

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the "middle ground." These could not be seen by any one on the *Sarnia*.

In a combined operation such as this, it is clear that the lookout would have to be kept on the *Huronic*, as from that vessel alone the course in front could be seen, as well as any obstructions on the starboard side. Owing to the absence of any communication between the masters as to the course to be taken, the tug assumed that its course would be straight out along the dry dock channel and across the "middle ground"; while the master of the *Huronic* assumed that when they reached the "Saskatchewan channel" a turn would be made to take the *Huronic* out that way.

I do not think it is material to determine whether or not the engines of the *Huronic* were sufficiently warmed up when in the dry dock to enable her to work her propellers effectively when she came out. If I had to decide this I think I should give a Scotch verdict of "not proven"; but the fact is that the propellers of the *Huronic* were not in use, and that the propelling power was with the *Sarnia*. The vessels having proceeded in this position through the dry dock channel and begun to cross the "Saskatchewan channel" it occurred to the lookout on the stern of the *Huronic* that they were in danger of striking the dredge, and he signalled to his captain, who communicated with the master of the *Sarnia*. What was done then was ineffectual as it was then impossible to avoid the collision, the responsibility for which must, I think, rest upon both vessels. The negligence of the *Sarnia* was to my mind (1), failing to communicate with the master of the *Huronic* as to the course to be taken in view of the fact that from the *Sarnia's* position no part of the course could be seen, but only obstructions which lay to the north or west of the proposed line of movement, and (2) in propelling a vessel, the obstacles in the course of which her master could not see, without any information being conveyed to the lookout which would enable him to be of any use,—that is, such knowledge of the proposed course as would enable him to realize what were obstacles to be expected in that course and to be avoided. The negligence, in respect of the *Huronic* is (1) in not ascertaining the course proposed

to be taken by the tug, and (2) in stationing a lookout without proper information as to the course, thereby permitting the ship to get into a position of danger too late to avert the collision; and (3), as following from the other two, that the services of the lookout were rendered useless, or so little useful as to amount to negligence by these errors of the masters of the *Huronic* and of the *Sarnia.*

I have said that the operation was in its practical carrying out a joint one, and the acts of negligence or the omissions which were negligent of the officers of each ship, appear to be similar in character and effect. Undoubtedly the operation could not be performed without there being a lookout, which lookout must necessarily be stationed upon the *Huronic,* nor could the *Huronic* be moved as it was proposed to move her without the steam power of the *Sarnia.* The course determined upon by the *Sarnia* was one which ought to have dictated to its master the necessity of communicating particulars to the lookout, in order that he might through the master of the *Huronic* advise the master of the tug as to his speed and direction. And this duty applied equally to the master of the *Huronic.* I think Lord Watson in the *Niobe* (1) expresses the condition imposed on these two ships by the necessities of the case, during the operation on which they were engaged, namely, that they were in effect "one ship," an expression which he says has been borrowed by text writers and is familiar to persons conversant with maritime law. He then proceeds:—

> The expression is figurative, and must not be strained beyond the meaning which the learned judges who have employed it intended that it should bear. As I understand their use of the expression, it signifies that the ship and her tug must be regarded as identical, in so far as the two vessels, with their connecting tackle, must be navigated as if they were one ship, and the motive power being with the tug must, in order to comply with the regulations for preventing collision at sea, be steered and manoeuvred as if they formed a single steamship.

I am inclined to think that the language of Lord Shaw of Dunfermline in SS. *Alexander Shukoff* v. *Gothland* (2), contains a principle which can be profitably used as applicable in defining the relation and duty of the lookout in a case of this kind. He says:—

(1) [1891] A.C. 401, at p. 407. (2) [1921] 1 A.C. 216, at p. 237.

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My Lords, when a ship is put under compulsory pilotage it is no doubt true that the entire control of her movements is under the command of the pilot so charged with the vessel. It is not, however, in any sense true that the pilot is thus charged with a vessel deprived of the ordinary and proper services of her crew. It would be a strange result if it were so. The testing instance is the case of the man on the lookout. His responsibility as the servant of the vessel remains, and if there were degrees in such a case it is of course specially acute when the vessel is under compulsory pilotage. If it were not so the situation in law would indeed be peculiar, because it would place the pilot, who presumably is in a position where exceptional skill and knowledge are required for the navigation of the vessel, in a situation in which he had to render those services to it, deprived of the ordinary and elementary facilities for navigation which are afforded by the active and vigilant services of the men on the lookout.

Having come to the conclusion that both ships were at fault, what is the proper judgment as between the two.

The English cases of *The Avon and the Thomas Joliffe* (1) and of *The Englishman and the Australia* (2) show that where both vessels are to blame for inflicting injury on a third vessel, they are jointly liable for the whole damage.

In the Canadian case of the *A. L. Smith, et al* v. *Ontario Gravel Co.* (3), Mr. Justice Duff expresses the opinion that the effect of the judgment of the Court of Appeal in *The Gemma* [1899] P. 285, and of Sir Francis Jeune in *The Dictator* [1892] P. 304, is that the owners of the appellant ships, by appearing and contesting the liability of the vessels, became parties to the action and subject to have personal judgment pronounced against them in the action for the full amount of damages for which according to the principles of law appropriate for the decision of the case they are personally liable.

Having regard to these cases, I cannot divide the damage between the two ships, and must give judgment holding the defendants jointly liable for the full amount of the damage. There will be a reference to the Registrar of this Court to assess the damages. The defendants will pay the costs of the action and of the reference.

Judgment accordingly.

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(1) [1891] P. 7. (2) [1894] P. 239.

(3) [1914] 51 S.C.R. 39.

WARNER QUINLAN ASPHALT COMPANY ..... CLAIMANT; 1923 June 28.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Requisition—War Measures Act 1914, 5 Geo. V, c. 2—Compensation—Rights of charterer, without demise—Interpretation.

Held, that at common law a time charterer, without demise, had no right of action against the Crown for the damages he may have suffered from the deprivation of his contractual rights under the charter, arising from the requisition of the vessel; the right of action against the Crown being in the owner and not in the charterer.

2. That the true intent, meaning and spirit of section 7 of the War Measures Act, 1914, is to maintain and preserve to the subject any rights possessed by him at common law and which he previously had, notwithstanding the said Act; and that the said section does not confer upon him any new rights to compensation in addition to those which he otherwise enjoyed.

REFERENCE by the Minister of Justice for Canada, under provisions of section 7 of the War Measures Act, 1914, of a claim for compensation for damages arising from the requisition of the steamship *G. R. Crowe.*

April 17, 1923.

Case now heard before the Honourable Mr. Justice Audette at Ottawa.

The Hon. N. A. Belcourt, K.C. and *J. Genest* for claimant.

E. L. Newcombe, K.C. and *J. P. Bill* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J. this 28th June, 1923, delivered judgment.

This is a reference, made to this Court by the Minister of Justice for Canada, under the provisions of section 7 of The War Measures Act, 1914, (5 Geo. V, ch. 2) of a claim by a charterer for the sum of $1,269,074.48 as compensation for alleged damages arising from the requisition by the Crown, during the war, of the chartered steamship *G. R. Crowe.*

The trial of the case was proceeded with, upon admissions and documentary evidence, to determine the question of liability of the Crown,—the question of the assessment of damages being postponed pending the final determination of the issue as to liability.

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The reference which is framed in a language that safeguards the immunity of the Crown from liability at every point, reads as follows, viz:—

Alleging that there is no jurisdiction in the Exchequer Court of Canada to adjudicate under section seven of The War Measures Act, 1914, upon the claim hereinafter mentioned and that the Warner Quinlan Asphalt Company which has preferred the said claim has no right or title to any compensation, and reserving the right to plead and maintain the absence of any authority on my part to refer or on the part of the Court to adjudicate upon the said claim and also to plead and maintain that the said company is not entitled to any compensation, I hereby at the request of the said company refer to the Exchequer Court of Canada under the powers, if any, conferred by said section seven the annexed claim of the said company for compensation alleged to be due by reason of the alleged appropriation by His Majesty of the steamship *G. R. Crowe.*

Dated at Ottawa, this 15th day of February, 1921.

(Sgd.) CHAS. DOHERTY,
Minister of Justice.

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

The requisition in question was made in 1917 in the usual manner, under the authority of the Governor in Council pursuant to the powers conferred by the War Measures Act, 1914. The requisition appears to be similar to the one I had occasion to consider in the case of *Gaston Williams et al* v. *The King* (1).

The claim of the charterer is based upon the charter-party filed as exhibit No. 2.

This is a time charter, without demise. The hire was for 5 years from 1916 to 1921, with option to renew for a similar period. The owners of the vessel were settled with by the Crown by the payment of $157,007.52, as set out in the admission filed as exhibit No. 10. A complete release (exhibit No. 8) was duly executed by the owners and the vessel placed back by them into the hands of the charterer in 1919. The Crown never had any dealings, either directly or indirectly, with the charterers. Under the decision of the American Supreme Court in re *United States* v. *Russel* (2) the requisition of a vessel, in its relation to the owners, does not amount to appropriation, but is only a taking of the use of the vessel from the owners; and in the present case, the latter received satisfactory compensation.

(1) [1922] 21 Ex. C.R. 370.

(2) [1871] 13 Wall. (80 U.S.) 623.

The charterer has no title in the vessel as he derives all his rights from the owner alone.

At common law, a time charterer, without demise, has no right of action against the Crown for any damages arising from the requisition of the vessel, he may have suffered from the deprivation of his contractual rights under his charter. The right of action as against the Crown is in the owner and not in the charterer; but the latter may have a right of action against the owner. The possession of the vessel always remained in the owner and never passed to the charterer. *Dominion Coal Co.* v. *Maskinongé SS. Co.* (1); 26 Hals. 86.

The contractual rights of the charterer are no more interfered with by the requisition made under the statute than would be the rights of a third person resulting from the breach of any freighting contract with the owner of a vessel.

All the charterer acquired, under his charter, is the right to have the use of the vessel for certain purposes, to have his goods conveyed by this particular vessel with certain limitations hereinafter mentioned, and, as subsidiary thereto, to have the use of the vessel and the services of the owner's master and crew. The ownership and also the possession of the vessel remained in the original owners, through the master, officers, and crew, who continued to be his servants. Scrutton, On Charterparties, 9th ed. p. 4.

In the case of *Elliott Steam Tug Co.* v. *The Shipping Controller* (2), Warrington, L.J., at p. 135, says:

As charterers they had no property in the ship nor had they the possession thereof and they could not at common law have maintained an action against the officers of the Crown who took possession of the ship.

And further on Scrutton L.J., who dissented on some points, says, at p. 139:

The question now is as to the rights of the charterers against the Government.

At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for the purposes of making profits or gains without possession of or property in the chattel.

(1) [1922] 38 T.L.R. 591, at p. 594; [1922] 2 K.B. 132.

(2) [1922] 1 K.B. 127.

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Citing on this point the judgment of Mr. Justice Blackburn in *Cattle* v. *Stockton Waterworks Co.* (1),

where a contractor making a tunnel on K's land claimed against a wrong-doer to K's land, whose wrong made his contract less profitable, and was held not entitled to recover. (2)

. . . . At p. 141:

The charterer then has no common law right against a person who deprives him of the opportunity of earning profits by his contractual rights, by taking away the ship in respect of which he had a contract.

In the case of *Federated Coal & Shipping Co.* v. *The King* (3), Bailhache, J., at p. 46, said, speaking of a charterer:

They were not in possession of her. Their charter party was not by demise. They had not even a lien upon her. They merely had a contractual right to order her master to perform voyages with her for their benefit and profit. The use or abuse by a third party of the chattel over which such rights exist and the consequent injury to these rights give rise to no claim at law by the persons possessing those rights.

See also *London-American Maritime Trading Co.* v. *Rio de Janeiro Tramway, etc.* (4).

Now, as already said, the claimant has only contractual rights flowing from a charterparty with the all important clause providing that certain perils should be excepted; and these perils included "arrest and restraint of Princes, Rulers and People." The effect of the clause being that if and to the extent to which the perils mentioned interfered with the fulfilment of their obligations, the parties are exempted from liability for non-performance. *F. A Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Company, Ltd.* (5).

The charterer thereby contracted himself out of any right to recover for any loss he might suffer resulting from the requisition of the vessel by the Crown, because, obviously the requisition itself is nothing but the exercise of the "arrest and restraint of Princes, etc." . . . If the charterer was not granted the use of the vessel during the period she was taken under the arrest and restraint of Princes, he cannot recover. The owners did not

Agree to give the use of the vessel absolutely and unconditionally; but only unless prevented, amongst other things, by the restraint of princes

(1) [1875] L.R. 10 Q.B. 453.
(2) [1922] 1 K.B. at p. 139.
(3) [1922] 2 K.B. 42.
(4) [1917] 86 L.J. K.B. 1470.
(5) [1916] 2 A.C. 397, at p. 409.

Modern Transport Co., Ltd. v. *Duneric Steamship Co.* (1); See also: *Russian Bank for Foreign Trade* v. *Excess Insurance Co.* (2); *Arthur P. Friend et al* v. *United States* (3).

The requisition was not made as against the charterer, nor was he notified of it. It was not necessary, as he only possessed rights when the vessel was not under requisition, one of the limitations provided by the charterparty itself.

Having discussed the rights of the charterer under the common law, consideration must now be given to the question as to whether or not the claimant can recover under section 7 of The War Measures Act, 1914.

In the construction of statutes, the principle is recognized that an intent to alter the common law beyond the evident purpose of the Act is not to be presumed, and it nas been expressly laid down that statutes are not presumed to make any alteration in the common law beyond what the enactment explicitly declares, either in express terms or by unmistakable implication. In all general matters beyond, the law remains undisturbed. It is not to be assumed that the legislature would overthrow fundamental principles, infringe rights, or depart from, or alter the general principles of law, without expressing itself with irresistible clearness.

Maxwell, Interpretation of Statutes, 6th ed. 149 and 235; Craies, Statute Law, 2nd ed. 126 and 188; Endlich, Interpretation of Statutes, 95,153 and 173.

Section 7 of the War Measures Act, 1914, reads as follows:

> 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a Superior or County Court, of the province within which the claim arises, or to a judge of any such court.

In the present case the Crown did not appropriate in the sense of expropriating and acquiring the ownership of the vessel in question; but it appropriated the use of the property, i.e., the "use of" the vessel and accounted to the owners thereof for the same.

(1) [1917] 1 K.B. 370 at 377. (2) [1918] 2 K.B. 123, at p. 126.
(3) [1921] 56 Court of Claims R. 423.

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Moreover, the section proceeds to state that in such case, i.e., where the Crown has appropriated the use of such property "and compensation is to be made therefor," etc., the case shall be referred for adjustment. But the Act does not say that in such cases compensation shall be paid therefor. The Act must be construed to include only cases where compensation was provided for by common law or statute at the time the Act was passed. There is also a total absence of any provision respecting the contractual rights of a charterer.

In other words the true intent, meaning and spirit of the section—relied upon at bar—is to maintain and preserve to the subject any right possessed by him at common law, and which he previously had, notwithstanding the Act. The section does not confer upon him any new right to compensation in addition to those which he theretofore had and enjoyed at common law. It recognized liabilities *in esse*—already existing—but does not create any new ones.

The Act did not alter the law, but merely maintained it as it stood at the time of the passing of the statute, in respect of all matters therein referred to.

Counsel for the claimant further argued at bar that if no remedy were available to him under the War Measures Act, the court had jurisdiction to entertain his claim under section 38 and subsections (*a*), (*b*) and (*d*) of section 20 of the Exchequer Court Act. A sufficient answer to this contention is that the reference is expressly made under the provisions of The War Measures Act, and the jurisdiction of the Court to hear and determine this case arises upon the reference.

Under the decision of the case of *Piggott* v. *The King* (1) it would seem that the present specific statutory claim referred to the court under special provisions would not come within the ambit of subsections (*a*) and (*b*) of section 20. Nor would it seem to come within the scope of subsection (*d*) where the common law would have to be applied, and the same may be said of a case arising under the provisions of section 38 of the Act. It would further seem that this tribunal cannot, in regard to a case submitted under the

(1) [1916] 53 S.C.R. 626.

special provisions of one statute, find its jurisdiction to consider the same under the provisions of another statute, especially where either a fiat or a proper reference by the head of the department in connection with the administration of which the claim arises would seem to be required as a condition precedent to give the court the necessary jurisdiction. See *Gauthier* v. *The King* (1); *Brooke* v. *The King* (2).

There were other questions of minor importance raised at the trial which in the view I have taken of the case, need not be passed upon.

Therefore, there will be judgment, declaring and adjudging that the claimant is not entitled to any portion of the relief sought and the action is dismissed.

Judgment accordingly.

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(1) [1917] 56 S.C.R. 176.

(2) [1921] 90 L.J. K.B. 521.

1923
April 24.

TORONTO ADMIRALTY DISTRICT

THE LAKES & ST. LAWRENCE TRANSIT CO. ..... } PLAINTIFF;

v.

NIAGARA, ST. CATHARINES & TORONTO RAILWAY CO. ..... } DEFENDANT.

Shipping—Collision—Negligence by failure to use best means provided in view of circumstances immediately preceding accident—Effect of Rules of Railway Board—Error of judgment.

Held, that where the circumstances and conditions existing immediately prior to the time of the happening of a collision suggest extreme caution and promptitude, and effective use of the best means which had been provided for preventing an accident such as occurred was not made, this can not be deemed to be a mere error of judgment, but negligence and want of reasonable forethought must be inferred.

The Rules made by the Railway Commissioners on May 8, 1914, with respect to the passage of vessels through bridges on the old Welland Canal, are not warranted by the terms of sections 30 and 232 of the Railway Act then in force. If they were to be regarded as binding, a breach thereof would not involve a presumption of blame under Canadian Admiralty Law, and the fact that the breach caused or contributed to an accident would have to be proved.

ACTION (in personam) for damages by the plaintiff against the defendant which occurred by reason of the bridge (controlled and operated by the defendant) over the old Welland Canal swinging back while being opened to permit the passage of one of the plaintiff's vessels, and the supervening accident which occurred by reason thereof.

March 21 and 22 and April 14, 1923.

Case now heard before the Honourable Mr. Justice Hodgins at Toronto.

S. C. Wood, K.C. and *G. M. Jarvis* for plaintiff;

D. L. McCarthy, K.C. and *A. J. Reid, K.C.* for defendant.

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

HODGINS, L.J.A. now (April 24, 1923) delivered judgment.

The ship *Lakeport,* 643 tons, laden with block stone, on the 20th April, 1922, made the usual signal for the opening of the defendant's swing bridge, over the old Welland Canal near Thorold. She then, at about 9 a.m. came out of lock No. 24 which was about 1,600 feet from the bridge

and moved south to pass through the bridge opening. According to Harrison, the defendant's engineer, it was customary for ships to proceed as soon as the small highway bridge about 100 feet from lock No. 24 was opened and to go through the opening at the defendant's bridge made by the swing, before it was fully open, and this course was followed here by the *Lakeport*. I have no doubt that till the accident happened everything went on normally and in customary sequence. The bridgetender's evidence as to the usual practice being to open the bridge fully may be true but he had only a very short experience (5 days) and full opening is quite consistent with ships beginning to enter before it is accomplished. It is said by plaintiff's witnesses that the bridge was seen to be entirely open before they left the lock or before they came near the bridge. The master, however, admits, that it stood out a little over the water though not enough to be dangerous in any way. This is the view also of his watchman and assistant engineer, and of a witness Lowe called by the defendants. The bridge was being opened—a slow process on a windy day,—and it is quite possible that as it takes five to six minutes to get to it from the lock, and five to six or eight minutes to open it, the bridge had not quite completed its movement when the ship arrived opposite the first rest pier. The defendants urge that as it was not entirely open the ship took the risk of what might happen, and that in so doing she disobeyed certain rules of the Railway Commission. In order to decide this it will be necessary to determine just what that risk was, and to do this the cause of the accident must be ascertained and its bearing on the ship's action defined. The evidence of the bridge tender, who operated the motor, is in effect that while opening the bridge, and when it was about two-thirds open, a gust of wind struck the arm of it, and stopped its progress; that it stopped, trembled, and then began to go backward. On its stoppage he applied the hand brake, and the wheel brake, but failed to check the backward movement which had then begun, and when he at once put on the rail brake the momentum prevented it from attaching itself to the rail. The bridge consequently

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continued to swing back and struck the ship, doing considerable damage.

If the bridge had been fully open before the ship reached it then instead of being clamped by the rail brake (as usual) that brake must have failed to hold it against the wind. The evidence of the helper on the bridge is pointed to by the plaintiffs as being corroborative of this theory because he says he was struck on the head and stunned by the capstan bar which was snatched in some way out of his hand, and after revolving away from him hit him on the back of the head. I do not attach much importance to his evidence as his injury rendered him unconscious, and he is hardly a trustworthy witness as to how it all happened.

The conclusion I have come to on the whole evidence is that the bridge was not fully open when the ship began to pass it, and that what happened occurred substantially as the bridge-tender relates.

The question is whether negligence caused the accident, and if so whose negligence was it, and what was its effect.

The weather on the day in question was stormy, and the wind, which was west, is stated by Harrison, the defendant's engineer, to have had a velocity of about 80 miles an hour about half an hour after the accident. The weather reports at Buffalo show a velocity diminishing that morning to 57 from 65 miles. But Buffalo is an exceptionally windy place. The witness who gave these figures thought 25 per cent should be deducted from them to arrive at Welland Canal force. The master of the ship puts it at 30 to 35 miles an hour, and he is corroborated by the master and wheelsman of the *Iselin,* which was tied up in the canal that day, and by his own officers.

But conditions did not appear to be so bad, if the actions of both parties are considered, as to cause either the bridge-tenders or the master of the ship any apprehension, at all events, none sufficiently strong to make them take extra precautions. These might have been, on the part of the bridge-tender, sending for extra help or signalling a warning with the flags kept for that purpose, or, on the part of the master, waiting for a lull, or till the bridge was swung clear. This is important as indicating that neither side anticipated any disaster. It is to be noted that almost all

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the witnesses speak of the wind not as being gusty, but rather as being strong, and as it appears that two ships had been locked through the bridge earlier in the morning, this disposes of the excuse that an extra man was needed to assist on the bridge. The bridge-tender seems to have thought, and so expressed himself before me, that if it was safe for the oncoming ship it was safe for him.

The bridge is equipped with what is called a rail brake, in addition to a hand and wheel brake. When the bridge is open the ends reach over, but are not in contact with what are called the "rest piers," locks on which are non-existent. Steadiness is secured by clamping this rail brake down upon the rail when the bridge is fully opened, and this is kept set until it is time to close the bridge again. It affords the only real provision for stability, the other brakes not being depended upon for either final action in holding the bridge open or as in any way superseding the use of the rail brake in accomplishing the locking of the bridge. The latter had been used during the five days since navigation opened but only to hold the bridge open and not to do so while the bridge was moving. It is upon the use made of this rail brake that the case should turn. Ward, the electrician of the defendants at St. Catharines, who on the 15th April, 1922, instructed the bridge-tender, says that the rail brake would stop all motion. The defendant's engineer Harrison testified that it was sufficient even against a wind of 80 miles an hour. According to the bridge-tender operating the motor, and who had little experience in this kind of work and began his employment there five days before, his opportunity to use it effectively was defeated by the backward motion of the bridge when caught by what he thought was a gust. But this excuse must be tested by the conditions existing then. These were, to sum them up shortly, that while two vessels had already passed through safely during that morning when the wind was stronger, the wheel of the motor slipped on the track when the bridge started to open for the *Lakeport,* that there was great difficulty in making headway against the wind, that there was an oncoming vessel, and the final pause and trembling of the bridge. These were enough to have suggested extreme caution and promptitude when the motor ceased to be able to shove the bridge

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forward. They demanded the use at once of the best and surest means of holding the bridge and preventing it slipping. The use by the bridge-tender of the hand brake, and the wheel brake, resulted in just enough loss of time to miss the effectual stoppage and locking of the bridge by the rail brake. Under ordinary conditions this might be classed as an error of judgment, but having regard to the considerations I have enumerated it amounts to negligence and want of reasonable forethought from which the entire consequences flowed.

But the defendants contend that the ship broke the rules made by the Board of Railway Commissioners on May 8, 1914, one of which reads as follows:

No . . . . . vessel shall pass through the bridge until the swing or draw is fully open.

Under sections 30 and 232 of the Railway Act this rule must be read as meaning, in order to be within the powers conferred on the Railway Board, that

No vessel shall *be permitted to pass*

etc., as the sections deal wholly with the operation of the bridge and are not intended to govern the navigation of the canal past such obstructions as this swing bridge, etc. They indicate a change of the law since *Turner v. G.W. Ry. Co.* (1) was decided in 1857. Even if the rule was effective and there was a breach there would be no presumption of blame under Canadian Admiralty Law, and the fact that the breach caused or contributed to the accident would have to be proved, and it is not proved here. See *Fraser* v. *SS. Aztec* (2), and *Geo. Hall Coal Co.* v. *SS. Parks Foster* (3).

The regulations issued by the Department of Railways and Canals for the guidance of ships navigating the canals pursuant to R.S.C., c. 115, s. 10, contain the following:—

21. At least half a mile before a vessel reaches any lock, or swing-bridge, a steam whistle, bell or horn shall be sounded as an approach signal from the vessel; provided, however, that such signal shall be given to such extent only as, in the opinion of the Superintending Engineer, or Superintendent, is necessary to give the lockmaster or bridge-tender timely warning to make preparation to receive the vessel at the lock, or to allow it to pass through the bridge opening. Any violation of these provisions shall subject the owner, or person in charge of such vessel to a penalty of not less than two dollars and not exceeding twenty dollars.

(1) [1857] 6 U.C. C.P. 536.

(2) [1920] 19 Ex. C.R. 454, at p. 467-8.

(3) [1923] Ex. C.R. 56-63.

22. (*a*) It shall be the duty of every master or person in charge of any vessel on approaching any lock or bridge to ascertain for themselves by careful observation, whether the lock or bridge is prepared to allow them to enter or pass, and to be careful to stop the speed of any such vessel in sufficient time to avoid a collision with the lock or its gates, or with the bridge or other canal works; any violation of this regulation shall subject the owner or person in charge of such vessel to a penalty of not less than five dollars and not exceeding one hundred dollars.

The bridge-tender is subject to the directions of the Superintending Engineer, and I find that on September 20, 1912, he issued the following instructions:—

NOTICE TO BRIDGE-TENDERS

WELLAND CANAL

Bridge-tenders are to bear in mind that it is difficult to manoeuvre vessels navigating the canal, and when from any cause, it is found that a bridge cannot be operated, they are to quickly display, where it can be readily seen by the Master of an approaching vessel, a red flag during the daylight, and a red lantern at night, to warn him that the bridge cannot be opened.

W. H. Sullivan,
Superintending Engineer.

Welland Canal Office,
St. Catharines, Ont.,
September 20, 1921.

What is the bearing of these rules upon the action of the plaintiff's ship having regard to my finding? Is it that the master of the *Lakeport* should have reasonably foreseen such an occurrence as happened so as to make his action negligent in entering the area over which the bridge swung before it was fully open? I am unable to reach that conclusion. It was fairly to be assumed, I think, by the master that the operation, then almost completed, would be finished, and that the appearances were sufficient to lead him to think so. The wind had not up to this point stopped the swing—indeed the very swinging of the bridge almost to the parallel position indicated that all would be well. No signals warned him, and what finally caused the disaster was the neglect to promptly use the thing provided to lock the bridge at any point, so as to avoid the very accident that happened. This the master could not in my judgment reasonably foresee or apprehend.

The result is that there must be judgment for the plaintiffs for damages, and a reference to the Registrar at Toronto to assess them, with costs of the action and reference.

Judgment accordingly.

1923
July 4.

QUEBEC ADMIRALTY DISTRICT

J. P. FERNS.....PLAINTIFF;

AGAINST

THE S.S. *INGELBY*

Shipping and Seamen—Stevedore's Claim—Jurisdiction—Force of Imperial Statute in Canada—53-54 Vict., c. 27 (Imp.)—54-55 Vict., c. 29 (Can.) —1-2 Geo. V., c. 41 (Imp.).

By section 2 subsection 2 of the Colonial Courts of Admiralty Act, 1890 (Imp.) jurisdiction was given to the Colonial Courts of Admiralty over "like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England." Sections 3 and 4 of the Admiralty Act, 1891 (Can.), declares the Exchequer Court of Canada to be such Colonial Court of Admiralty in Canada. The Merchant Shipping (Stevedores and Trimmers) Act, 1911, (1-2 Geo. V, c. 41), for the first time confers jurisdiction in stevedores' claims upon "all courts having jurisdiction in Admiralty."

Held, that, as The Merchant Shipping Act, 1911, aforesaid does not exclude His Majesty's Dominions from its operations, it is in force in Canada, and the Exchequer Court of Canada is thereby given jurisdiction over stevedores' claims.

The Ship D. C. Whitney v. *St. Clair Navigation Company* 38 S.C.R. 303 and *Bow McLachlan & Co.* v. *Camuson* 1909 A.C. 597; 79 L.J. P.C. 17, compared and discussed.

MOTION to dismiss plaintiff's action for want of jurisdiction.

June 25 and July 4, 1923.

Motion heard before the Honourable Mr. Justice Maclennan at Montreal.

Antoine Garneau for plaintiff.

Lucien Beauregard for the ship *Ingleby.*

The facts and questions of law raised are stated in the reasons for judgment.

MACLENNAN L.J.A. now, this 4th July, 1923, delivered judgment.

The plaintiff, a stevedore, sues for $642.57, balance of an account for work done on board the S.S. *Ingelby* in the Port of Montreal in connection with the stowing of cargo on board that ship. The defendant moves for the dismissal of the action on the ground that the court has no jurisdiction to hear a case of this nature.

In order to determine the question it is necessary to consider the nature and extent of the jurisdiction of the Exchequer Court of Canada in Admiralty matters. Its

admiralty jurisdiction is derived under the Colonial Courts of Admiralty Act, 1890 (1) and the Admiralty Act 1891 (2).

Section 2, subsection 2, of the Colonial Courts of Admiralty Act, 1890, is as follows:—

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, whether existing by virtue of any statute or otherwise, 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.

The sections of the Admiralty Act, 1891 (Canada) which are material are as follows:—

3. The Exchequer Court is and shall be, within Canada, a Colonial Court of Admiralty, and, as a Court of Admiralty, shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890, and by this Act.

4. Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty court as elsewhere therein, have all rights and remedies in all matters, including cases of contract and tort and proceedings *in rem* and *in personam*, arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under the Colonial Courts of Admiralty Act, 1890.

1 Halsbury's Laws of England, par. 323 says:—

Within the limitations, if any, laid down by the colonial legislatures the Colonial Courts of Admiralty have similar jurisdiction and powers to those exercised in Admiralty by the High Court in England.

Roscoe's Admiralty Practice, 4th Ed., p. 1, note (*a*) says:—

The effect of the Colonial Courts Act is to assimilate the jurisdiction of the Admiralty Courts of the colonies to that of the High Court in England (section 2, subsection 2).

Clement's Canadian Constitution, 3rd Ed., 1916, p. 238, observes:—

Now under the legislation of 1890, it (the jurisdiction of this Court) is as wide as that of the High Court of Admiralty in England.

It is clear that, subject to the provisions of The Colonial Courts of Admiralty Act, 1890, the Exchequer Court, as a Court of Admiralty in Canada, is given the same jurisdiction as the admiralty jurisdiction of the High Court in

(1) 53-54 Vict., c. 27 (Imperial). (2) 54-55 Vict., c. 29 (Canada), now R.S.C. [1906] ch. 141.

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England and that when the latter court has jurisdiction over any person, matter or thing, whether by virtue of any statute or otherwise, the Exchequer Court has throughout Canada jurisdiction over like persons, matters and things, in like manner and to as full an extent as the High Court in England.

The admiralty jurisdiction of the High Court in England at the time when the Colonial Courts of Admiralty Act was passed in 1890 did not extend to a claim such as forms the basis of the present action. In 1911, the Imperial Parliament passed The Merchant Shipping (Stevedores and Trimmers) Act, 1911 (1), intituled an Act to enlarge the remedies of persons having claims for work done in connection with the stowing or discharging of ships' cargoes or the trimming of coal on board ships. The statute applies to claims for work done in connection with the stowing, discharging or trimming of foreign ships. Section 3 of the statute is as follows:—

> Any person having a claim to which this Act applies may, if he so desires, instead of proceeding under the foregoing provisions of this Act institute proceedings in Admiralty for enforcing the claim, and all courts having jurisdiction in Admiralty shall, if proceedings are so instituted, have the same jurisdiction for the purpose of enforcing the claim as if the claim were a claim for necessaries supplied to the ship.

This statute gives jurisdiction to "all courts having jurisdiction in Admiralty." Its purpose was to enlarge the remedies of stevedores and to enable them to bring their actions in the Admiralty Court. If the statute of 1911 is in force in Canada, this court has jurisdiction equal to that of the High Court in England over a claim of this kind. The statute in terms does not exclude His Majesty's Dominions from its operation and, on the other hand, there is nothing in the statute stating that its provisions shall extend to the Dominions, unless the words "all courts having jurisdiction in Admiralty" are to be held to include Colonial Courts under the legislation providing for such courts. Tarring's Laws relating to the Colonies, 4th Ed., gives a long list of Imperial Statutes relating to the colonies in general, which at page 174 includes this statute.

So far as I have been able to ascertain there is no Canadian case dealing with the effect on the jurisdiction of this

(1) 1-2 Geo. V, ch. 41.

court of new or enlarged jurisdiction given by statute to the High Court in England since the passing of the Colonial Courts of Admiralty Act, 1890.

I have examined the cases of The ship *D. C. Whitney* v. *St. Clair Navigation Co.* (1), and *Bow McLachlan & Co.* v. *Camuson* (2), but neither deals with the precise question which I have to decide and the *dicta* in these cases, so far as admiralty jurisdiction from a new statute is concerned, were not necessary for the decision arrived at and therefore are not conclusive on the matter which is before me. There is nothing, in my opinion, in the statute of 1890 which excludes from a Colonial Court of Admiralty the new jurisdiction in admiralty subsequently given by the statute of 1911 to the High Court in England. If a Colonial Court is to exercise a jurisdiction in like manner and to as full an extent as the High Court in England, the jurisdiction of both courts must be the same over like persons, matters and things. The High Court in England, as a court having jurisdiction in admiralty, has jurisdiction over a stevedore's claim and, in my opinion, the Exchequer Court also has like jurisdiction over a claim of that kind. If the Imperial Parliament did not intend the statute of 1911 to apply to His Majesty's Dominions, a few words would have made such intention plain, as was done in the Maritime Conventions Act, 1911 (3).

In my opinion, the Imperial Statute of 1911 is in force in Canada and this court has jurisdiction over the claim in this action, and the defendant's motion to dismiss will be rejected with costs.

Judgment accordingly.

Solicitors for plaintiff: *Trudeau & Guerin.*

Solicitors for defendant: *Atwater, Bond & Beauregard.*

(1) [1906] 38 S.C.R. 303.

(2) 1909 A.C. 597; 79 L.J. P.C. 17.

(3) 1-2 Geo. V, ch. 57 (Imp.)

1923
March 8.

NOVA SCOTIA ADMIRALTY DISTRICT

J. H. LAVALLEE ET AL.....PLAINTIFFS;

AGAINST

THE SHIP *ISTAR* AND HER CARGO

Shipping—Jurisdiction—Breach of Contract—Sections 6 and 35 of the Admiralty Court Act, 1861.

Plaintiffs agreed to purchase from certain parties in England a quantity of whisky, the shippers to deliver the same at an agreed point not less than 20 miles off the Atlantic Coast of U.S.A. or at St. Pierre, Miquelon, etc., such point of delivery to be between latitudes 22 and 50, etc.

The contract did not purport to be made by or on behalf of the ship, but by the shippers, with the plaintiffs.

Plaintiffs now claim damages for breach of contract for non-delivery, and at their request a warrant to arrest the ship *Istar* and her cargo was issued, and she was thereupon arrested, to satisfy such claim.

Held, that the plaintiffs not having been shewn to be "the owners, or consignees or assignees" of the Bill of Lading of the cargo, within the meaning of section 6 of the Admiralty Court Act, this court had no jurisdiction in the matter, and that the warrant of arrest should be set aside.

2. That the contract referred to in said section 6 contemplates an obligation on the part of the ship, and that the contract sued on herein imposes no such obligation.

3. That the *res* referred to in said section 6 is the ship and not the cargo.

MOTION on behalf of the ship *Istar* to have it declared that the Court has no jurisdiction herein and to have the warrant of arrest set aside.

March 8, 1923.

Motion now heard before the Honourable Mr. Justice Mellish at Halifax.

L. A. Lovett, K.C. for the ship *Istar*.

W. A. Henry, K.C. for the plaintiffs contra.

The facts and questions of law involved are stated in the reasons for judgment.

MELLISH, L.J.A. now this (8th March, 1923) delivered judgment.

In this action the endorsement of claim on the writ is as follows:—

The plaintiffs claim the sum of $300,000 against the ship *Istar* and her cargo for damages for breach of a contract for the carriage and delivery of the cargo, now in the port of Halifax of the ship *Istar* consisting of about twenty thousand cases of whisky, the said contract being in writing and dated the 7th day of December, 1922.

The writ is dated 5th March, 1923. On this date the plaintiff James Henry Lavallée made the following affidavit.

I, James Henry Lavallée at present at Halifax in the county of Halifax, merchant, make oath and say that I the said James Henry Lavallée and Albert Brosseau have a claim against the ship *Istar* and her cargo now in the port of Halifax for damages for breach of contract dated 7th December, 1922, for delivery of the said cargo.

And I further make oath and say that the said claim has not been satisfied and that the aid of this court is required to enforce it.

Albert Brosseau mentioned in this affidavit is the other plaintiff.

Upon the same day (March 5) the ship was arrested under a warrant issued by the Registrar on the said affidavit and is now held by the Marshal of the court under the said warrant with her cargo.

An appearance was entered on behalf of the owners of the ship and her cargo and a summary motion was made on notice before me on behalf of such owners to set aside the writ and warrant and to release the ship and cargo without bail.

The grounds upon which this motion is made are the following.

1. Because this honourable court has no jurisdiction herein.

2. Because there is no allegation that the plaintiffs are or that either of them is the owner, consignee or assignee of any bill of lading of the goods or any part thereof carried into the port of Halifax or any port in Canada in said ship *Istar,* and because the fact is that said plaintiffs are not nor is either of them such owner, consignee or assignee.

3. Because there is no allegation of any breach of any contract on the part of the owner, master or crew of said ship *Istar,* and because the fact is that there has been no breach of any contract by the owner, master or crew of said ship.

4. Because the writ of summons herein and the endorsement of claim thereon does not state any cause of action over which this honourable court has jurisdiction.

5. Because the affidavit to lead warrant does not state the nature of any claim of plaintiffs within the jurisdiction of this honourable court.

6. Because of other defects appearing on the face of the proceedings herein.

The action is *in rem* against the ship and cargo.

If the court has jurisdiction to entertain the action it must I think admittedly be conferred by sections 6 and 35 of the Admiralty Court Act, 1861.

Section 6 as quoted in Mayers Admiralty Law and Practice (1916) at p. 159 is as follows, in so far as relevant:—

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The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in (Canada) in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship . . . .

And section 35 provides:—

The jurisdiction conferred by this act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam.*

Having regard to the provisions of section 6 above quoted the *res* referred to in section 35 is clearly I think the ship and not the cargo.

The contract referred to in the endorsement of claim and in the affidavit leading to the warrant of arrest was produced on the hearing and is as follows:—

An agreement made this seventh day of December, 1922,

Between: William John Herival and Sidney Peck Herival and Warwick Brookes (hereinafter called the shippers) of the one part, and James Henry Lavallee and Albert Brosseau (hereinafter called the purchasers) of the other part. Whereas the shippers have made arrangements to acquire and ship quantities of whisky and to have the same landed in certain ports or transhipped at sea, it is hereby agreed:—

1. The purchasers agree to purchase from the shippers a quantity of whisky which shall not be less than ten thousand cases (a case shall mean twelve bottles of reputed quarts) and not more than twenty thousand cases of the quantity within these limits to be at the option of the shippers (hereinafter called the cargo) at the price of $16.25 (sixteen dollars and twenty-five cents) United States currency per case which price shall include the price of the whisky and the freight.

2. The shippers will deliver the cargo at an agreed point not less than twenty miles off the Atlantic Coast of the United States of America and/or St. Pierre, Miquelon or a Newfoundland port or Nassau in the Bahamas, but no point of delivery or port shall be north of latitude fifty or south of latitude twenty-two, provided always that the point of delivery shall be in any case in a latitude free of ice.

3. The price of $16.25 (sixteen dollars and twenty-five cents) shall be an inclusive price to the point of discharge whether it be transhipped at sea or discharged at a port, but shall not include the cost of unloading or transhipment beyond the ordinary work required to put the cases over the side of the shippers' vessel, and the delivery of the cargo shall be deemed to be completed when the ship has arrived at the point or port as directed within the limits mentioned in clause 2.

4. The cases of whisky shall be paid for in United States gold certificates before any of the same are lifted from the ship.

5. The shippers have rendered to the purchasers an invoice for the last two thousand five hundred cases, a copy of which is attached to this agreement and marked schedule 2 and the purchasers shall pay to the shippers a sum of £7,000 (seven thousand pounds sterling) on account of the said invoice on the signing of this agreement receipt of which is hereby acknowledged.

6. The cargo is to be composed of as many of the brands of whisky and in quantities as nearly as possible as those specified by the purchasers in the schedule 1 hereto, always provided that no brands shall be selected that shall cost the shippers more than fifty shillings per case out of bond, and should any of the whisky selected cost the shippers more than fifty (50) shillings out of bond (one thousand cases of Peter Dawson Old Curio brand excepted) the purchasers shall pay to the shippers in sterling or in United States currency at the rate of the exchange of the day, the difference between the price of fifty shillings and the purchase price as and when the original purchase price is paid.

7. The purchasers shall be allowed twenty-one clear days in which to take delivery after the arrival of the ship at the agreed point (or ten clear days in the case of unloading in a port) and if at the end of this, delivery has not been taken by the purchasers the shippers shall have the right in conjunction with the representative of the purchaser on board to dispose of the cargo or balance of the cargo as they think fit and any loss that may be incurred to the shippers, owing to the cargo not being delivered as originally provided for, shall be made good by the purchasers to the shippers out of the money paid them under clause 5 against the last part of the cargo.

8. When delivery has been taken by the purchasers of fifteen thousand cases or more the shippers will at the purchaser's request return to England with the remaining cases on board (not exceeding five thousand) and re-deliver them at a point of discharge on the ship's next voyage and store them during the interval on the ship free of any charge or freight, or failing the ship not making a second voyage on this business, deposit them in a bonded warehouse at an English or Scotch port or tranship them to another ship in the same port free of charge on the condition that the purchase price of the same $16.25 (sixteen dollars twenty-five cents) per case is paid by the purchasers to the shippers within forty-eight hours of the ship arriving at an English or Scotch port immediately after the voyage, the subject of this agreement always providing that any custom charges shall be paid by the purchasers.

[His Lordship here recites the schedules to the agreement.]

This contract it will be observed does not purport to be made by or on behalf of the ship but by the shippers with the plaintiffs.

The claim is for damages for breach of contract and under section 6 of the Admiralty Court Act above quoted the breach must be on the part of the owner or of the master or crew of the ship for whose acts the owner might be responsible, but there is apparently no contract between the plaintiffs and the owner of the ship.

It is I think a pre-essential under said section 6 that the plaintiffs should be the owners or consignees or assignees of the bill of lading of the cargo.

In answer to the motion an affidavit of the plaintiff

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v.
SHIP *Istar*.

Mellish
L.J.A.

Lavallee was read stating that the plaintiffs claim to be owners of the cargo, but it does not appear that there is any bill of lading showing any interest in the plaintiffs and I cannot conclude that such a claim is well founded. There is also a clause in this affidavit to the effect that the *Istar* is owned as deponent verily believes by two of the three shippers, but the ship's register was produced showing that the ship is owned by Jeremiah Brown & Company, Limited.

Exception was taken to the appearance on the ground that it did not give the names of the owners of the ship and cargo, I would allow an amendment to this if necessary, but I think the motion could be made without entering an appearance.

The plaintiffs asked to amend the endorsement on the writ, and it was suggested on plaintiffs' behalf that I should allow the action to proceed leaving it open to plaintiffs to supply later if they could, evidence which might justify the proceedings.

As the facts stand before the court the action is one which I think cannot be entertained. The contract referred to in said section 6 contemplates, I think, an obligation on the part of the ship-owners to some one interested in the cargo, and is not, I think, such a contract as is relied on as the basis of this action. And I think to justify the arrest the plaintiff should be in a position to furnish such facts as would at least show *primâ facie* a case within the jurisdiction of the court.

Under these circumstances I think I have no alternative but to set aside the warrant of arrest.

If the plaintiffs in view of the foregoing nevertheless still desire to amend the endorsement on the writ I will hear the parties further as to this, but in the meantime the ship and cargo will be released.

The ship-owners will have the costs of the application.

Judgment accordingly.

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QUEBEC ADMIRALTY DISTRICT

THE HARRIS ABATTOIR CO., LTD.....PLAINTIFF;

AGAINST

THE SS. *ALEDO* AND HER OWNERS....DEFENDANTS.

Shipping—Jurisdiction—The Admiralty Act, 1861, section 6—Goods carried out of Canada—Action for damage thereto—Practice.

On July 7th plaintiff delivered a quantity of cheese to the steamship *A* at Montreal for shipment to Copenhagen. The ship did not sail until the 19th, and plaintiff claimed that, owing to this delay, the cheese was damaged by exposure and heat and by failure of the defendant to protect it. To avoid further loss the cheese was removed from the vessel and a new lot of cheese shipped. Action was brought for the loss thereby occasioned.

Held, that although section 6 of the Admiralty Court Act, 1861 (applicable to Canada) is to be liberally construed, the jurisdiction it confers upon the court is clearly confined to cases of damage to goods carried by ships into a Canadian port, and does not extend to the case of goods shipped from Canada to foreign ports.

2. That a mere technical objection to an informality or irregularity in procedure may be waived by appearance, by the giving of bail or by taking a step in the action; but if in fact the court has no jurisdiction over the subject matter of the claim, no delay on the part of the defendant and no step in the action taken by him can give the court jurisdiction.

MOTION to set aside the warrant of arrest and to dismiss action for want of jurisdiction.

September 28, 1923.

Motion now heard before the Honourable Mr. Justice Maclennan at Montreal.

R. C. Holden, Jr. for defendants.

W. L. Bond, K.C. for plaintiff.

The facts of the case and points of law involved are stated in the reasons for judgment.

MACLENNAN L.J.A. now, October 2, 1923, delivered judgment.

This is an action *in rem* for damages against the SS. *Aledo* owned by the United States Shipping Board.

In the statement of claim the plaintiff alleges that on 7th July, 1922, at the port of Montreal, it delivered a quantity of cheese to the SS. *Aledo* for shipment from Montreal to Copenhagen, Denmark, the ship's agents having informed plaintiff that the ship would sail on July 10. On July 11 plaintiff was informed that the ship had not sailed the day before but would leave on the following day,

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Maclennan L.J.A.

July 12. On July 15 plaintiff discovered that the ship was still at her dock, although no notification had been received from her agents that sailing had been postponed, and as a matter of fact she did not sail until July 19, and as a consequence of such delay it was found that the cheese had been damaged from exposure and heat and the failure of defendants to take the necessary steps to protect it, and in order to avoid further loss the cheese was removed from the ship and replaced by a fresh quantity of like nature and quantity. The cheese so removed was reconditioned and was subsequently sold at a loss of $2,577.20, which the plaintiff alleges is solely attributable to the neglect and default of the defendants in not carrying out their representations, in not sailing with the said cargo at an earlier date and in not protecting the cheese while under their care and control.

The defendants move to set aside all proceedings and for the dismissal of the action for want of jurisdiction, as it appears by plaintiff's statement of claim, that the present action is for alleged damage to goods shipped on board the SS. *Aledo* at Montreal for conveyance to Copenhagen; that the goods were not carried in the said vessel but were discharged at Montreal prior to her departure therefrom and that the goods were not carried into any port in Canada in the SS. *Aledo*.

The question whether or not this court has jurisdiction to arrest the vessel depends upon the construction of section 6 of the Admiralty Court Act, 1861. That section reads as follows:—

> The High Court of Admiralty shall have jurisdiction over any claim by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shewn to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales . . . .

Section 35 of the same Act enacts that the jurisdiction conferred by the Act may be exercised either by proceedings *in rem* or by proceedings *in personam*.

The provisions of the Admiralty Court Act, 1861, are made applicable to Canada under the Colonial Courts of

Admiralty Act, 1890, and are to be read as if the name Canada were therein substituted for England and Wales.

Section 6 above referred to has been the subject of many judicial decisions in the English Court of Admiralty, and being remedial of grievances which British merchants had against the owners of foreign ships for short delivery of goods brought to England in foreign ships or their delivery in a damaged state, ought to be construed with as great latitude as possible so as to afford the utmost relief which the fair meaning of its language will allow; *The St. Cloud* (1); *The Piève Superiore* (2), and *The Cap Blanco* (3).

The plaintiff's claim is not in respect of goods carried into any port in Canada, but in respect of a proposed shipment from Montreal to Denmark. The section in terms clearly relates to goods carried into any port in England or Wales and, when applied to this country, into any port in Canada. It makes no provision respecting a claim for damage to goods to be carried out of the country and no liberal construction of the statute could cover a shipment of goods going abroad. This was the view expressed by Dr. Lushington in *The Kazan* (4), where he said at page 3:—

> The meaning of the section is quite plain. It is confined to the case of goods carried into England or Wales; even Scotland and Ireland are not included. It has nothing to do with goods exported and by contract deliverable abroad.

No case has been cited and my own diligent search has disclosed no case in England or Canada where it has been held that the jurisdiction given to the court as aforesaid extends to a claim in connection with goods carried or to be carried from any port in England or Canada to a foreign country. The claim for damages of that character must be made before some other court having jurisdiction over the subject matter.

The plaintiff submits that defendants having appeared and given bail for the release of the ship after her arrest are not entitled now to raise any question of want of jurisdiction. The objection raised by defendants is not a mere technical objection based on any irregularity or informality in the procedure by which plaintiff entered action or arrested the ship.

(1) [1863] Br. & Lush 4.
(2) [1874] L.R. 5 P.C. 482.
(3) [1913] P. 130; 83 L.J. Adm. 23.
(4) [1863] Br. & Lush 1.

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The issue of the writ of summons, of the warrant of arrest and giving of bail are matters of procedure and not of jurisdiction and irregularities or informalities in the procedure are mere matters of practice and do not go to the root of jurisdiction. Matters of practice and questions of jurisdiction are two separate and distinct things. A mere technical objection to an informality or irregularity in procedure may be waived by appearance, by the giving of bail or by taking a step in the action, but if in fact the court has no jurisdiction over the subject matter of the claim, no delay on the part of the defendant and no step in the action taken by him can give the court jurisdiction. I had occasion to deal with this phase of the question in *Stack* v. *The Leopold* (1), and in *Finnigan* v. *SS. Northwest* (2), where I acted upon the principle that absolute absence of jurisdiction under a statute is quite a different thing from a mere technical objection which could be waived by appearance and other procedure.

I am therefore of opinion that the jurisdiction of the court over the claim in question in this action never attached and that the matter should be left to be settled in a court having jurisdiction to entertain it. There will therefore be judgment setting aside the writ of summons, the warrant and the arrest of the SS. *Aledo*, releasing the bail furnished on her behalf and dismissing plaintiff's action with costs.

Judgment accordingly.

Solicitors for plaintiff: *Messrs Atwater, Bond & Beauregard.*

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

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(1) [1918] 18 Ex. C.R. 325.

(2) [1920] 20 Ex. C.R. 180.

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did not deprive it of its jurisdiction. On the other hand the court, under proper circumstances, may exercise its discretion to decline to proceed with such an action. ROULEAU *v.* SS. *Aledo*..... **10**

2 —— *Salvage services — Conditions required for volunteer or requested services.*] The *S.*, a steamship, was caught in the ice off Louisburg, N.S., and the Government steamer *M.* went to her assistance. The *M.* was unable to tow the *S.* to a safe place owing to ice conditions, but with the approval of the *S.* wired the agent of the Marine Department at Sydney, N.S., for further aid. The tug *C.* was engaged for the purpose by such agent. Taking a heavy hawser the *C.* started to render assistance. She was unable to reach the *S.* on that day or the next day owing to ice and fog, but finally reached her. The *S.* sent the tug to the *M.* who told the *C.* to "stand by." On the morning following the day on which she got in touch with the *S.* and while using the hawser brought by the *C.*, the *M.* endeavoured to tow the *S.* After going a few hundred feet the hawser broke, but the *M.* was able to go ahead, clearing the way, and the *S.* was able to follow under her own steam. By this means the *S.* was brought into harbour. A wireless was sent by the *M.* to the marine agent, at Sydney, after the *C.* had left, saying it was useless for the *C.* to try and give assistance, ice being too heavy.— *Held*, that the *C.* had rendered salvage services to the *S.* and that she was entitled to the ordinary salvage award.—*Semble:* That a wireless message, contramanding an earlier one requesting the services of a tug, received after the tug had left to render assistance, whether the latter message was or was not communicated to its owners, cannot alter the nature of the services, and change them from requested services to that of volunteer services. MCDONALD *v.* SS. *Seneca*..... **13**

3——*Possessory lien for repairs to vessel—Loss thereof to claimant by arrest of vessel.*] Where a shipwright, having repaired a vessel, takes action to recover the cost of such work and has the vessel arrested by the marshal at his suit, he will be deemed to have relinquished his possession of the vessel to the marshal, and his lien for said services is thereby destroyed. RUMELY VS. SHIP *Vera M.* & WESTERN MACHINE WORKS LTD.....**36**

4——*Arrest of ship—Mala fides—Sham proceedings—Value of de facto arrest as basis for jurisdiction.*] A ship was arrested at the suit of H.E. who, at the time of said suit, was a member of the firm of Eriksen Brothers, one of the plaintiffs herein. His claim for wages as ship's carpenter on board the ship, was in fact only a part of his firm's claim sued on herein, and the day following such arrest of the ship the firm's action was instituted.—The other plaintiffs finding the ship under arrest took action in the Court for work done by them upon the said ship.— *Held*, that the facts disclosing *mala fides* and an abuse of the process of the court, the arrest could only be viewed as a sham proceeding, and without legal existence as regards Eriksen Brothers who improperly sought to profit by it, but, that the other claimants, being in good faith and innocent of any wrong-doing at the time of instituting their suits, and relying upon the records of the court which, on their face, showed jurisdiction could be invoked, are entitled to rely upon such arrest to give jurisdiction to entertain and support their suit. ERIKSEN BROS. *v.* the *Maple Leaf*.**39**

5——*Collision—Canal Rules and Regulations No.* 19 *and* 22*b and Rules of the Road for Great Lakes—Burden of Proof—No presumption of contributing to accident by non-observance of Rule.*] The collision took place in the Cornwall Canal, above Lock 18. The *P.F.* coming down, tied to the south bank to permit of the *S.D.* coming out of the lock to pass. The *S.D.* started out of the lock at slow speed, and when her bow was about opposite that of the *P.F.* the down current (between 2 and 2½ miles an hour) caught her port bow, causing her to sheer to starboard, and her master signalled for half speed ahead to give her steerage way. She was allowing for all possible space between the vessels.—As the *S.D.* left the lock, the mate of the *P.F.* went astern to look after the stern line. A second line was lying on the deck, but was not used. As he arrived aft, the *P.F.* began to surge ahead and he eased the stern line which was attached to the capstan. The *P.F.* moved ahead about 10 feet and stopped, and thereupon the mate took the line off the capstan, and had a deck hand on the bank remove the line from snubbing post and carry it forward to the next, 75 feet distant. In the meantime he was hauling in the slack by hand, and placed his end on the bollard. While this change was being made, the stern of the *P.F.* swung out into the canal, and, as the *S.D.* was passing, she began to surge astern, the mate slackening on the stern line; her stern went out 15 to 20 feet from the bank and her port quarter came into collision with the rail of the *S.D.*— *Held*, upon the facts, that the breach of Rule 19 of the Canal Rules and Regulations by the *S.D.*, in not stopping her engines while passing, did not cause or contribute to the collision, but that

were unseamanlike and unskilful and were the cause of the sheer to port and the consequent collision.—2. Where a defendant alleges that the collision was inevitable, the burden of proof is upon him to show, not only that at the moment, in the agony of collision, or immediately before it took place, he had done all that ordinary care or maritime skill could suggest to avoid it, but also that all antecedent manoeuvres had been adopted which might have prevented it or rendered the risk of it less probable, and that the position in which the vessels found themselves at or just before collision, and which made it inevitable, was not due to any error in manoeuvring on its part. EXPORT STEAMSHIPS LTD. *v.* SHIP *Iocomo*..... **119**

10——*Damages due to collision—Practice—Motion to amend writ by increasing amount—Re-arrest—Costs.*] Plaintiffs by their action claimed $4,000 damages, by reason of a collision between one of their barges and the *B.* The *B.* was arrested and the bail fixed at the said sum of $4,000, the then estimated cost of the repairs. Later, but before trial of the action, it was found that the actual cost of the repairs amounted to $5,512.94. The gross register tonnage of the *B.* was 1366.96 tons and the bond for $4,000 was insufficient. Plaintiffs now move to amend their writ by adding to the amount claimed and for the issue of a warrant to re-arrest the *B.*—*Held,* that the court may direct measures to be taken to do full justice to plaintiffs, and to that end may permit the amendment and the issue of a warrant for the re-arrest of the ship, but with costs of the motion and of the re-arrest against the plaintiff. (The *Hero,* 1865 Br. & L. 447 followed). GEORGE HALL COAL CO. *vs* THE SHIP *Bayusona*..... **128**

11——*Practice—Costs Possessory Lien—Admiralty Rules 224, and 225 interpreted.*] The value of the *res* was at least $600, and plaintiff's claim against it was for $354, wages, for which he obtained judgement. Immediately after judgement claimants moved to establish a prior possessory lien for $160, which claim was successfully contested by plaintiff. Plaintiff taxed its costs under this judgement and, on appeal from the Registrar's taxation.
Held, that rules 224 and 225 must be read together, and where there are two distinct claims against the same *res,* which in the aggregate exceed $500, "the sum in dispute," within the meaning of said rules, will be taken to be the aggregate of both sums claimed, at least, as in the present case, where the real point involved was

the right to enforce a possessory lien in priority to plaintiff's maritime lien.
RUMELY *vs* SS. *Vera* & WESTERN MACHINE WORKS..... **153**

12 —— *Collision — Breach of Rules — Onus of Proof—Speed, Handiness, Equipment and assistance a factor—Turning in a narrow channel—Right of way.*] *Held,* that the right of way given to a vessel by virtue of Rule 25 of the Rules of the Road for the Great Lakes adopted by Order in Council of the 4th February, 1916, does not absolve a vessel from neglect to observe other rules governing the situation created by the circumstances surrounding the operation.—2. In a case of collision the condition of the vessels as to equipment, handiness, speed and assistance rendered by tugs should be taken into consideration in determining the responsibility of each vessel, especially when such conditions are known to the Masters of the vessels colliding. SS. *Hamonic* AND CANADA SS. LINES (OWNERS) *v.* THE SHIP *Robert L. Fryer*..... **155**

13 —— *Collision — Observance of Rules—Negligence of both vessels.*]—*Held,* that rules 27, 37 and 38 of the Rules of the Road for the Great Lakes adopted by Order in Council of February, 1916, apply to a case where vessels are working in and out of a narrow congested channel into a slip between docks or while within the water space between docks. These rules apply to vessels until they are clear of the slip and the dock next to which they were made fast.—2. When both colliding vessels are found equally blameable and damage results, each vessel is liable to pay one-half the damage sustained by the other. SS. *Westmount* AND CANADA SS. LINES (OWNERS) *vs* SHIP *Robert L. Fryer*..... **161**

14 —— *Collision — Breach of rules — Fault of both parties—Liability proportionately divided.*] The *M.* was proceeding from Montreal to Quebec with the barge *B.* in tow, without the regulation light equipment for steam vessels engaged in towing, having the usual mast head white light and read and green lights, but having only an ordinary anchor light of insufficient visibility and not properly placed for the additional white towing light required by article 3 of the Collision Regulations. When on Lake St. Peter, the tug *M.H.* upbound with barge *Gladys H.* in tow collided with the *B.* The tug foundered and the *B.* sustained damages and action and cross-action resulted.—About 2,000 feet astern of the *M.* and tow, was a large steamer, and the master of the tug *M.H.*, as the lights did