REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

CHARLES MORSE, LL.B., BARRISTER-AT-LAW,

REPORTER.

PUBLISHED UNDER AUTHORITY BY

L. A. AUDETTE, LL.B., ADVOCATE,

REGISTRAR OF THE COURT.

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JUDGE

OF THE

EXCHEQUER COURT OF CANADA.

THE HONOURABLE GEO. W. BURBIDGE,

Appointed on the 1st day of October, 1887.

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA.*

The Honourable	GEORGE IRVINE, Q. C.	- -	Quebec District.
do	JAMES MCDONALD, C.J.S.C.	- - N. S.	do
do	WILLIAM HENRY TUCK, J.S.C.	- N. B.	do
do	WILLIAM W. SULLIVAN, C.J.S.C.	P. E. I.	do
do	SIR MATTHEW BAILLIE BEGBIE, C.J.S.C.		B. C. Dist.
His Honour Judge	MCDOUGALL	- -	Toronto District.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

THE HONOURABLE SIR JOHN S. D. THOMPSON, K.C.M.G., Q.C.

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* By virtue of 53-54 Vic. (U. K.) c. 27 and 54-55 Vic. (Can.) c. 29 the Exchequer Court became the Colonial Court of Admiralty for Canada, and the Judges of the Vice Admiralty Courts, on the 2nd day of October, 1891, became Local Judges in Admiralty of the Exchequer Court. His Honour Judge Watters, Judge of the Vice Admiralty Court of New Brunswick, died on the seventh day of August, 1891, and on the 13th day of October following the Honourable Mr. Justice Tuck was appointed Local Judge in Admiralty of the Exchequer Court for the New Brunswick District.

In the future the Admiralty decisions will be published in this series of Reports.

ERRATA.

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

Page 149, for *Port Hawkesbury, N. S.*, read *Point Tupper, N. S.*

Page 154, line 2, for *was* to be considered read *are* to be considered ; and in line 20 the word *of* immediately following the word *area* is surplusage.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

In pursuance of the provisions of the 55th section of *The Exchequer Court Act* (50-51 Victoria Chapter 16 and 52 Victoria Chapter 38), it is ordered that the following rules shall be in force in respect of any action, suit, matter or proceeding that may be had or taken in the Exchequer Court of Canada under or by virtue of *The Exchequer Court Amendment Act*, 1891, (54-55 Victoria Chapter 26):

1. The process, practice, pleadings, times for taking proceedings, forms and modes of procedure prescribed by the General Rules and Orders of the Exchequer Court of Canada of the fourth of March, 1876, and by subsequent General Rules and Orders of the said Court shall apply to any action, suit, matter or proceeding that may be had or taken in the said Court under or by virtue of *The Exchequer Court Amendment Act*, 1891, and such General Rules and Orders shall, notwithstanding any exception or limitation contained therein, apply as well to cases in which the cause of action arises in the Province of Quebec as to other cases.

2. Subject to such General Rules and Orders, the practice and procedure from time to time in force in Her Majesty's High Court of Justice in England in respect of like actions, suits, matters or proceedings shall apply to any action, suit, matter or proceeding that may be had or taken in the Exchequer Court of Canada under or by virtue of *The Exchequer Court Amendment Act*, 1891.

Dated at Ottawa, this 13th day of November, 1891.

(Sd) GEO. W. BURBIDGE,
J. E. C.

GENERAL ORDERS REGULATING THE PROCEDURE OF THE EXCHEQUER COURT OF CANADA.

General Order of March 7th, 1888.

In pursuance of the provisions contained in the 55th section of the Act 50-51 Victoria, chapter 16, intituled *An Act to amend the Supreme and Exchequer Courts Act, and to make better provision for the trial of claims against the Crown*, and of the 13th section of *The Expropriation Act*, it is ordered that the following Rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada.

Reference of Claim by Head of Department.

1. Whenever a claim is referred to the Court by the Head of any Department of the Government of Canada, the claimant shall file with the Registrar a statement of his claim, and shall leave at the office of Her Majesty's Attorney-General of Canada a copy thereof with an endorsement thereon in the form "A" in the schedule hereto, and the pleadings and procedure subsequent thereto shall be regulated by and conform, as near as may be, to the mode of pleading and procedure in proceedings against the Crown by petition of right.

2. Repealed.

3. Repealed.

Motion for Judgment by Default.

4. A motion for judgment by default, pursuant to rules 80 or 81 of The Exchequer Court, may be made *ex parte* if a copy of the information or statement of claim with an endorsement as provided by rule 14 of

The Exchequer Court is served personally upon the defendant.

DISCOVERY OF DOCUMENTS.

Rule 95 of The Exchequer Court is repealed and the following rule substituted therefor:—

5. The Attorney-General, plaintiff or petitioner after the time for delivering the defence has expired, and any party after the defence is delivered, may obtain an order of course, upon præcipe, directing any other party, or any officer of the Crown, to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action.

MATTERS PENDING BEFORE THE OFFICIAL ARBITRATORS.

6. Unless it is otherwise specially ordered, any matter pending before the Official Arbitrators when the Act first herein mentioned came into force which had then been heard or partly heard, or which has since been heard by them, shall be continued before them as Official Referees, and their report thereon shall be made to the court in like manner as if such matter has been by the court referred to them under the twenty-sixth section of the said Act.

7. The 255th rule of The Exchequer Court respecting the enlargement or abridgment of time shall apply to the doing of any act or the taking of any proceeding hereunder.

Dated this seventh day of March, 1888.

(Signed) GEO. W. BURBIDGE,
J. E. C.

SCHEDULE

—o—

FORM A.

The claimant prays for a statement in defence on behalf of Her Majesty within four weeks after the date

GENERAL ORDERS REGULATING THE PROCEDURE OF THE EXCHEQUER OF CANADA.

GENERAL ORDER OF MARCH 7TH, 1888.

In pursuance of the provisions contained in the 55th section of the Act 50–51 Victoria, chapter 16, intituled *An Act to amend the Supreme and Exchequer Courts Act, and to make better provision for the trial of claims against the Crown*, and of the 13th section of *The Expropriation Act*, it is ordered that the following Rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada.

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1. Whenever a claim is referred to the court by the Head of any Department of the Government of Canada, the claimant shall file with the Registrar a statement of his claim, and shall leave at the office of Her Majesty's Attorney-General of Canada a copy thereof with an endorsement thereon in the form "A" in the schedule hereto, and the pleadings and procedure subsequent thereto shall be regulated by and conform, as near as may be, to the mode of pleading and procedure in proceedings against the Crown by petition of right.

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7. The 255th rule of The Exchequer Court respecting the enlargement or abridgment of time shall apply to the doing of any act or the taking of any proceeding hereunder.

Dated this seventh day of March, 1888.

(Signed) GEO. W. BURBIDGE,
J. E. C.

SCHEDULE

—o—

FORM A.

The claimant prays for a statement in defence on behalf of Her Majesty within four weeks after the date

of service hereof, or otherwise that the statement of claim may be taken as confessed.

GENERAL ORDER OF DECEMBER 15TH, 1888.

In pursuance of the provisions contained in the 55th section of the Act 50-51 Victoria, chapter 16, intituled *An Act to amend the Supreme and Exchequer Courts Act, and to make better provision for the trial of claims against the Crown*, it is ordered that the following Rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada.

REFERENCES UNDER THE 182ND AND 183RD SECTIONS OF *The Customs Act*.

1. Every reference to the court of any matter in pursuance of the 182nd section of *The Customs Act* shall be heard without pleadings, unless the Judge otherwise directs, but any question of law arising upon any such reference may, as in other cases, be stated in the form of a special case for the opinion of the court.

2. Every such matter shall be deemed ripe for hearing as soon as the reference of the Minister of Customs, and the papers and evidence referred, are filed with the Registrar of the court.

PROCEEDINGS *IN REM*.

3. In any proceeding *in rem* for the condemnation of any thing, the information shall be served by posting up a copy thereof in the office of the Registrar of the court, and by taking one of the following steps, that is to say:—

(*a*) If such thing is in the custody of any Collector of Customs or of Inland Revenue, or other officer or person for the Crown, one copy of such information shall be posted up in the office of such Collector, officer, or person, as the case may be, and another copy thereof posted up—

(1) On the door or some conspicuous part of the warehouse or building in which such thing is stored or kept ; or

(2) In the case of a vessel, railway carriage, car, or other thing not so stored or kept, on some conspicuous part thereof ;

(*b*) If such thing has been delivered up to the owner, or any person for him, a copy of the information shall be served upon such owner or person in like manner as in other cases ;

(*c*) If such thing has been sold under any law authorizing such sale, a copy of the information shall be posted up in the office of the Collector, officer, or person in whose custody the same was at the time of such sale.

4. In any case not provided for in the rule next preceding the Judge may make such order for service as to him seems just.

5. Every person who, after proceedings for the condemnation of any such thing may have been commenced, desires to claim the same shall—

(*a*) Give security to the satisfaction of the Judge by a bond in a penal sum of not less than two hundred dollars, or by a deposit of a sum of money not less than such amount, for the payment of the costs of the proceedings for condemnation ; and

(*b*) File a statement of his claim with the Registrar of the court, and serve a copy thereof upon Her Majesty's Attorney-General of Canada, and such statement of claim shall disclose the name, residence and occupation or calling of the person making it, and be accompanied by an affidavit of the claimant, or of his agent having knowledge of the facts, setting forth the nature of the claimant's title to such thing.

6. If within one month after the service of the information security for costs is not given and a claim

made, as hereinbefore mentioned, the Attorney-General may set down the action on motion for judgment, and such judgment shall be given upon the information as the court considers the Attorney-General entitled to.

JOINDER OF PROCEEDINGS *IN REM* AND *IN PERSONAM*.

7. Where by the commission of any offence any thing is liable to condemnation, and the offender is also liable to a penalty, such condemnation and penalty may be enforced and recovered in one and the same proceeding, but no judgment for any such penalty shall be given against any person who has not been served with the information, or made a claim to such thing as hereinbefore provided, or has otherwise been made or become a party to such proceeding.

SHORT-HAND WRITERS.

8. Every short-hand writer employed under authority of the court, shall, if directed by the Judge, Registrar, Referee or Commissioner before whom the examination of any witness is taken, or if requested by any party to the proceeding, furnish to such Registrar, Referee or Commissioner four copies of the notes of evidence, one of which shall be handed to the Judge, one filed of record in the court, and the others given to the plaintiff and defendant respectively.

9. On any such examination there shall, in addition to any fee now payable, be paid to the Registrar, acting Registrar, Referee or Commissioner, the following fees :—

(1)	By the party calling the witness for each hour occupied by such examination	$1 50
(2)	If notes of evidence are furnished, for each folio thereof, deducting	

any sum previously paid under the preceding item in respect of such examination..... 0 15

If such notes of evidence are furnished as hereinbefore provided by direction of the Judge, Registrar, Referee or Commissioner, the fee last mentioned shall be paid by the party who called the witness, but if furnished at the request of either party, then by such party.

10. If any fee herein mentioned is not paid by the party liable therefor, it may be paid by any other party to the proceeding and allowed as a necessary disbursement in the cause, or the Judge may make such order in respect of such evidence and the disposal of the action or proceeding as to him seems just.

11. Any acting Registrar, Referee or Commissioner to whom any such fee is paid shall forthwith transmit the same to the Registrar of the court.

(Signed,) GEO. W. BURBIDGE,
J. E. C.

DECEMBER 15th, 1888.

GENERAL ORDER OF JANUARY 12TH, 1891.

In pursuance of the provisions contained in the 55th section of *The Exchequer Court Act*, it is ordered that the following Rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:—

1. Rule 116 of the Exchequer Court of Canada is hereby repealed and the following substituted therefor:—

TRIALS.

Rule 116.

When any action is ripe for trial or hearing, a judge may, on application of any party and after

summons served on all parties to the suit, fix the time and place of trial and hearing, and may direct when and in what manner and upon whom notice of trial or hearing, together with a copy of the Judge's order, is to be served, and such notice and order shall be forthwith served accordingly.

Sittings of the Exchequer Court of Canada, at which any action ripe for trial or hearing may be set down for trial by either party thereto, upon giving the opposite party ten days' notice of trial, or by consent of parties, and without taking out any summons, or obtaining any directions as hereinbefore provided, may be held at any time and place appointed by a Judge, of which notice shall be published in the *Canada Gazette*.

Such sittings will be continued from day to day until the business coming before the court is disposed of.

On the first day of each of such sittings, the court will hear any argument of demurrer, special cases, motion for judgment, appeal from the Report of the Registrar or other officer of the court, or other motion, application or business which cannot be transacted by a Judge in Chambers.

2. Rule 120 of The Exchequer Court of Canada is hereby repealed and the following substituted therefor:—

Rule 120.

In case the Judge is unable from any cause to attend on the day fixed for any sitting or for the trial of any issue, such sitting or trial shall stand adjourned from day to day until he is able to attend.

Dated at Ottawa, this 12th day of January, A.D. 1891.

(Signed,) GEO. W. BURBIDGE,

J. E. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

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Mc.

P.

Q.

Q.

TABLE OF CASES CITED.

A

B

C

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

HOMELINE BOURGET..... CLAIMANT ; 1888

AND June 30.

HER MAJESTY THE QUEEN ..... RESPONDENT.

Compensation and damages—Dedication of highway—Similarity of the law of England and of the Province of Quebec respecting the doctrine of dedication or destination—18 *Vic. (Prov. Can.) c.* 100 *s.* 41, *sub-sec.* 9—*Construction of.*

Prior to the construction of the St. Charles Branch of the Intercolonial Railway, the claimant was in possession of property in the village of Lauzon, in the County of Lévis, P. Q., which was divided into 41 lots with a street laid out through them. A plan of the lots showing the location of the street, had been recorded in the Registry Office for the County of Lévis.

In the construction of the railway the Crown diverted this street, purchasing for that purpose one of the 41 lots in the claimant's property. Although the municipal corporation had never taken any steps to declare the said street a public way, it was used as such, was open at both ends, and formed a means of communication between two other streets in the village, and work had been done and repairs made thereon under the direction of the rural inspector of roads. The municipal council had also, at one time, passed a resolution for the construction of a side-walk on the street, but nothing was done thereunder.

Upon the hearing of the claim it was contended on behalf of the claimant that the street in question, at the time of the expropriation, was not a highway or public road within the meaning of *The Government Railways Act*, 1881 (44 Vic. c. 25), but was her private property, and that she was entitled to compensation for its expropriation.

The Crown's contention was that, at the date of the expropriation, the street was a highway or public road within the meaning

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of *The Government Railways Act*, 1881 (44 Vic. c. 25), and that the Crown had satisfied the provisions of sec. 5, sub-sec. 8 and sec. 49 thereof, by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was therefore not entitled to compensation.

Statement of Facts.

Held:—(1.) That the question was one of dedication rather than of prescription; that the evidence shewed that the claimant had dedicated the street to the public; and that it was not necessary for the Crown to prove user by the public for any particular time.

(2.) That the law of the Province of Quebec relating to the doctrine of dedication or destination is the same as the law of England.

Semble.—That 18 Vic. c. 100, sec. 41, sub-sec. 9 (Prov. Can.) is a temporary provision having reference to roads in existence on July 1st, 1855, which had been left open and used as such by the public without contestation during a period of ten years or upwards. *Myrand* v. *Légaré*, (6 Q. L. R. 120) and *Guy* v. *City of Montreal* (25 L. C. J. 132), referred to.

THIS was a claim arising out of an expropriation, for the purposes of the St. Charles Branch of the Intercolonial Railway, of a street whereof the property was alleged to be in the claimant, and for damages to other lands belonging to her caused by the construction thereof. The claim was originally referred to the full board of the Official Arbitrators, but being pending before them when *The Exchequer Court Act* (50-51 Vic. c. 16) came in force, it was transferred to the court under the provisions of the 59th section of said Act.

The facts of the case are fully set out in the judgment.

April 26th, 1888

Belleau, Q. C. for the claimant: The property in the street has never passed out of the claimant's hands. There are only two ways whereby the municipal corporation could have gained title to it, viz., either by grant from the claimant, or by prescription. (Cites *Quebec Municipal Code*) (1). There

(1) Art. 749.

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Argument of Counsel.

has been no grant ; but has there been a title acquired by prescription ? By statute passed by the Legislature of the Province of Canada in 1855 (18 Vic. c. 100, sub-sec. 9), there must be uninterrupted user by the public for ten years to give a prescriptive title to the municipal authorities. If this statute was repealed by the *Municipal Code* (it not being reproduced therein) then we go back to the old term of prescription of thirty years. There has been no title gained either by ten or thirty years prescription as the corporation has never taken any steps to declare the street a public way. Cites *Parent* v. *Daigle* (1), *Johnson* v. *Archambault* (2).

Drouin, Q. C. for the respondent: There has been a dedication of the street by the claimant in asmuch as she deposited a plan of her property, showing the location of the street, in the Registry Office for the County of Lévis. The municipal council has also expended money on the road, presumably with the claimant's knowledge and consent, and so title has been gained by prescription as well. The claimant could not have closed the road up before the expropriation. It was a highway within the meaning of art. 749 of the Quebec *Municipal Code*, and within the meaning of *The Government Railways Act*, 1881. Cites *Myrand* v. *Légaré* (3), as to law of dedication of highways in the Province of Quebec.

Belleau, Q C., in reply : The case of *Myrand* v. *Légaré* did not decide that dedication of a highway was sufficient of itself to devest an owner of his property therein. There must also be user by the public, and title gained by prescription.

BURBIDGE, J., now (June 30th, 1888) delivered judgment.

(1) 4 Q.L.R. 154.

(2) 14 L.C.R. 222.

(3) 6 Q. L. R. 120.

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Reasons for Judgment.

This is a claim for $681.00 for 2,724 square feet of land in the village of Lauzon, County of Lévis, expropriated by the Crown for the purposes of the St. Charles Branch of the Intercolonial Railway, and for $1,350 for damages to other lands of the claimant caused by the construction of the said St. Charles Branch. Some time not later than the year 1877, the claimant, being possessed of property in the village of Lauzon, divided it into 41 lots, as shown by the plan thereof (exhibit No. 3). Through these lots a street named Couillard street was laid out, connecting St. Joseph street with Port Joliette, a small cove or harbour on the River St. Lawrence. The plan put in evidence (exhibit No. 3), on which this street is indicated, does not purport to be a copy of a plan on file in the registry office of the County of Lévis, but it is apparent that a plan or description of the division was recorded, for the lots shown on the copy bear the numbers of the cadastre of the village of Lauzon, and Mr. Carrier, the registrar, gave from the books of reference in his office a list and the numbers of the lots which still belong to the claimant.

Of the 41 lots, all of which front upon Couillard street, the claimant sold 13 before the year 1880. From that date to 1882, when the St. Charles Branch Railway was built, none appear to have been sold. In the construction of the railway, the Crown diverted Couillard street, purchasing for that purpose from the claimant the lot indicated on exhibit No. 3 by the cadastral number 271, and opened a way to Joliette street, also indicated thereon, the grade and character of the way from Joliette street to the Port being very considerably improved.

It appears that the village corporation had never taken any steps to declare Couillard street a public way. It was, however, used as such, was open at both ends, formed a means of communication between

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Reasons for Judgment.

St. Joseph street and Port Joliette, and work had been done and repairs made thereon under the direction of the inspector of streets. The village council, it also appears, had at one time passed a resolution for the construction of a sidewalk on the street, but nothing was done thereunder.

The claimant's contention was that Couillard street, in 1882, was not a highway or public road within the meaning of *The Government Railways Act*, 1881 (44 Vic. c. 25), but was her private property, for the expropriation of which she is entitled to compensation; and that as the street formed part of the whole property, she is entitled to be indemnified for any depreciation in value of the 27 lots still held by her, caused by the construction of the railway. The lots immediately adjoining the railway she had previously parted with, and unless Couillard street at the time belonged to her, no part of her property was expropriated; and it was admitted that, in that case, there was no damage caused thereto by the construction of the railway for which she would be entitled to compensation.

The Crown's contention was that, at the date of the expropriation, Couillard street was a highway or public road within the meaning of *The Government Railways Act*, 1881, which authorized the acts complained of, and that the Crown had satisfied the provisions of the statute (44 Vic., c. 25, sec. 5, sub.-sec. 8, and sec. 49) by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was, therefore, not entitled to compensation. That, I think, would be the result if Couillard street, in 1882, was a highway or public road within the meaning of the act referred to; and if the law of the Province of Quebec is, in respect of the doctrine of dedication, the same as the law of England, I shall have no difficulty in coming to the conclusion that it was at that time a public and not a private way.

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Reasons for Judgment.

The facts and circumstances of the case disclose, I think, most clearly an intention on the part of the owner to dedicate the street to the public use as a public highway, and in such a case use by the public for any particular time is not necessary. (*Woodyer* v. *Hadden*) (1). The question is not primarily one of prescription, but of dedication. An intent to dedicate may, speaking generally, be presumed from the user by the public for a period corresponding with the statutory limitation of real actions, and such a user for a period less than that may be important in connection with other facts concurring to show an intent to dedicate. (*Dillon on Municipal Corporations*) (2). The public right in such cases, however, rests upon a dedication actual or implied.

For the claimant, it was urged that the law of Quebec with respect to dedication was not the same as that of England, and that, in such a case as the present, a prescription of ten years was necessary to create the public right, and that at any time before the expiry of that period the claimant could, so far as the public is concerned, have closed the street. In this connection I was referred to *Parent* v. *Daigle* 1871, (3), in which Meredith, C.J., and Stuart, J. held, (Casault, J. *dissenting*) that the road in question which had been enjoyed as such for 30 years and upwards by the plaintiff, the defendant and others having occasion to use it, was to be deemed a public road within the meaning of sub-sec. 9, sec. 41, of the *Lower Canada Municipal and Road Act of* 1855 (18 Vic. c. 100). By that sub-sec. it is provided that:

> Any road left open to and used as such by the public, without contestation of their right, during a period of ten years or upwards, shall be held to have been legally declared a Public Highway by some competent authority as aforesaid, and to be a road within the meaning of the Act.

(1) 5 Taun. 125; 2 Sm. Lead. Cas. 9th ed. 165.
(2) 3rd ed. ss. 637-8.
(3) 4 Q. L. R., 154.

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Referring to this provision Ramsay, J. in *Guy* v. *The City of Montreal* (1), says:

By the 18th Vic., cap. 100, sec. 41, s-s. 9, a special statutory prescription of ten years was given to all roads left open and used by the public for ten years. That is to say, a right of way or servitude was established in favor of the public by ten years enjoyment. But in the Act of 1860, which was an Act to consolidate the Act of the 18th Vic. and its amendments, the section giving the prescription was omitted, and it does not appear in any subsequent Act. There was however, no clause repealing the section referred to. It may be a question whether the 18th Vic. was not impliedly repealed by the consolidating Act. But this does not appear to be applicable to roads in towns, and, therefore, we must hold that the only prescription that can accrue to the public in towns is that of 30 years: It may be a fair enough inference from the judgment of *Myrand* v. *Légaré* (2), that we had decided that the 18th Vic. was still in force. I am not prepared to say that I feel bound by that dictum. There was a sixty years possession; the road being perfectly cut off from the rest of the property, and I see by my notes, which are not printed in the report, that this was the view I expressed. It can hardly be seriously contended that there is evidence in the case before us of a prescription of 30 years. We have, therefore, only to enquire whether, as matter of fact, there was an abandonment of the continuation of the street by Mr. Guy, the father, and subsequently by the children, to the public.

It is further to be observed that the competent authority mentioned in sub-sec. 9, is defined in sub-sec. 8, which reads as follows:

Every road declared a Public Highway by any *Process-Verbal*, By-law, or Order of any Grand Voyer, Warden, Commissioner or Municipal Council, legally made, and in force when this Act shall commence, shall be held to be a Road within the meaning of this Act, until it be otherwise ordered by competent authority.

Sub-section 8 is clearly a temporary provision having reference to roads in existence at the date of the coming into force of the Act, and I am inclined to the opinion that sub-sec. 9 is to be read with it, and construed as limited to roads which had, on the 1st July, 1855, been left open and used as such by the public, without contestation of their right, during a period of

(1) 25 L. C. J. at p. 136. (2) 6 Q. L. R. 120.

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Reasons for Judgment.

ten years or upwards. That view of the scope of the provision affords a reason for its not appearing in any later statute.

But even if the 18th Vic. c. 100 sec. 41 sub-sec. 9 is still in force, I do not think that it is conclusive of the proposition that, in the Province of Quebec, there can be no dedication of the public way without a prescription of ten years. It is said in *Angell on Highways* (1), that the doctrine of dedication is of purely common law origin. I think, however, that the dicta of Sir A. A. Dorion, C. J., and of Ramsay, J. in *Myrand* v. *Légaré* (2), and in *Guy* v. *City of Montreal* (3), justify me in concluding that, in reference to the doctrine of dedication or destination, the law of Quebec does not differ from the law of England, as will be seen from the following extracts. In *Myrand* v. *Légaré* (4) (*ut supra*), Sir A. A. Dorion C.J. says:—

Une propriété privée peut devenir propriété publique, lorsqu'elle est déclarée telle par une autorité compétente ou encore par la dédication que le propriétaire en fait pour l'usage du public. Un chemin ou une route peuvent être établis par un procès-verbal ou autre acte émanant des autorités municipales, (autrefois des officiers de voiries) conformément aux dispositions de la loi, ou ils peuvent l'être par tout acte du propriétaire indiquant clairement son intention de le céder au public. Ainsi lorsqu'un propriétaire ouvre sur sa propriété une rue ou une place publique et qu'il y concède des terrains en les désignant comme attenant à telle rue ou place publique, sans aucune réserve de son droit de propriété, il n'y a aucun doute, que par l'usage que le public en fait, cette rue ou place publique ne devienne propriété publique, à l'usage non seulement de ceux qui y ont acquis des terrains riverains, mais à l'égard de tous ceux qui peuvent avoir à y passer, c'est-à-dire, à l'égard du public en général. Cet effet ne résulte pas de la convention faite avec les acquéreurs des terrains cédés, car alors il n'y aurait qu'eux et leurs ayants-cause qui pourraient exiger l'accomplissement des conventions portées dans leurs contrats, ni de la prescription qui acquiert toujours une possession pendant une période déterminée par la loi, pour qu'elle puisse conférer un droit quelconque ; ce qui imprime ce caractère de rue ou de place publique au terrain

(1) § 133.
(2) 6 Q. L. R. p. 120.
(3) 25 L. C. J. p. 132.
(4) Page 122.

Reasons for Judgment.

indiqué comme tel par le propriétaire, c'est la dédication ou l'abandon qu'il en a fait au public par une déclaration expresse et qui reçoit son exécution par l'ouverture de telle rue ou place à l'usage du public.

Page 123 :

Il n'est pas même nécessaire que cette dédication soit faite par écrit ; il suffit que les circonstances soient telles, qu'elles indiquent clairement que l'intention du propriétaire a été de faire un abandon de son terrain au public, pour qu'il ne puisse plus s'opposer à ce que le public s'en serve conformément à sa destination.

Page 123 :

Comme l'on voit cet arrêt n'a pas été fondé sur la prescription, mais sur l'abandon que le propriétaire avait fait de partie de sa propriété en reconstruisant son mur de clôture.

Les auteurs reconnaissent du reste que le public peut, comme un particulier, acquérir par la prescription la propriété d'un chemin. En effet si un particulier acquiert, par trente ans de possession exclusive, la propriété d'un terrain qui appartient à autrui, on ne voit pas pourquoi la possession non interrompue du public, pendant trente ans, ne lui ferait pas également acquérir la propriété d'un chemin, d'une rue ou d'une place publique.

Page 124 :

Cependant comme ce n'est pas tant par la prescription que par l'abandon que le propriétaire est censé avoir fait de sa propriété que le chemin devient chemin public, il n'est pas nécessaire que le public en ait eu la possession pendant trente ans.

Il n'est pas question dans ces citations de la possession de trente ans. C'est aux tribunaux à juger, si d'après les circonstances, le public a joui d'un chemin assez longtemps pour faire présumer que le propriétaire en a fait l'abandon.

And in *Guy* v. *City of Montreal* (*ut supra*) the learned Chief Justice remarks (1) :—

C'est ce que cette cour a décidé à Québec, dans une cause de *Myrand* v. *Légaré*, en s'appuyant sur des principes du droit français qui, sur ce point, ne diffèrent guère des règles indiquées par Dillon. Nous avons même déclaré dans cette cause, qui est rapportée au 6e vol. des rapports judiciaires de Québec, p. 120, où toutes les autorités sont citées, qu'il n'était pas nécessaire que la destination du propriétaire fut établie par écrit, mais qu'elle pouvait s'inférer des circonstances sous lesquelles le public avait joui du terrain en litige.

In the latter case Ramsay, J. says (2) :

(1) Page 134. (2) Page 136.

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The law of England and that of France appear to agree, although Mr. Dillon calls the doctrine anomalous (1), and the Supreme Court of the United States has likewise adopted it. This indicates, I think, that some great principle justifies the existence of the doctrine, and I don't think it is difficult to discover it. When the law requires that a donation shall be in writing, it is a rule of positive law that it declares, and not what is essential to the contract. A donation might quite well exist without a writing, and certain donations without writings are maintained.

Dillon (2) says that the doctrine of dedication is founded in public convenience and has been sanctioned by the experience of ages, that without such a principle it would be difficult, if not impracticable, for society in a state of advanced civilization to enjoy the advantages which belong to its condition and which are essential to its accommodation, that the importance of the principle may not always be appreciated, but we are in a great degree dependent on it for our highways and streets and the grounds appropriated as places of amusement or of public business.

I am, therefore, of opinion that, at the date of expropriation of the land in question in this matter, Couillard street was a public highway, and that the claimant is not entitled to compensation.

Judgment for respondent, with costs.

Solicitors for claimant: *Belleau, Stafford & Belleau.*

Solicitors for respondent: *Casgrain, Angers & Hamel.*

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(1) *Mun. Corp.* 3rd ed. § 630. (2) *Mun. Corp.* 3rd ed. § 627.

JEAN VÉZINA.....CLAIMANT; 1888

June 30.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Government railway—Damages from operation of railway—Expropriation—Depreciation in value of land to owner—Market value.

It is the real value of the land to the owner at the time of the expropriation that must be taken as the basis of compensation; and where claimant sought to recover damages in respect of a portion of his farm as a gravel pit, but failed to show that it had a value *quoad hoc* at the time of the taking, the court declined to assess its value otherwise than as farm land.

(2). A portion of the claimant's property, although not damaged by the construction of the railway, was injuriously affected by its operation, inasmuch as near a certain point thereon trains emerged suddenly and without warning from a snow-shed, frightening the claimant's horses, and thereby interfering with the prosecution of his work.

Held: That this was a proper subject for compensation.

(3). Where certain land remaining to the owner was not appreciably affected in respect of the value it had to him for the purposes of occupation, the damages were ascertained and assessed in respect of its depreciation in market value.

THIS was a case arising out of an expropriation, for the purposes of the St. Charles Branch of the Intercolonial Railway, of certain farm property owned and occupied by the claimant Vézina in the parish of St. Joseph, county of Lévis, P.Q.

The facts of the case are fully set out in the judgment.

June 4th, 1888.

Belleau, Q. C. for claimant;

Drouin, Q. C for respondent.

BURBIDGE, J. now (June 30th, 1888) delivered judgment.

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Reasons for Judgment.

On the 18th August, 1882, the date of the expropriation in this matter, the claimant was in possession of a farm in the Parish of St. Joseph, in the County of Lévis, Province of Quebec, containing, according to the deed under which he holds, one hundred and thirty-three (133) arpents, and according to Mr. Louis Napoléon Carrier—one of the witnesses for the claimant—about one hundred and forty (140) arpents. This farm, with the buildings then thereon, the claimant purchased in March, 1876, subject to certain seigneurial rights, for the sum of $3,650.00. Subsequently, he built thereon a house costing about $1,200.00, and a shed at a cost of about $100.00. The claimant used this farm principally for dairy purposes, and with, it appears, success and profit. It does not appear that the value of farms in this neighborhood generally, or this one in particular, increased between 1876 and 1882. Mr. Onésime Carrier—one of the claimant's witnesses—speaking on this point, said that he did not see any reason why the lands in that place would have decreased or increased in value since fifteen years before the construction of the railway. According to this evidence, the property would, in 1882, have been worth about $5,000.00; though the witnesses for the claimant placed its value, including buildings, at a date immediately preceding its expropriation, at sums ranging from $7,000.00 to $8,000.00.

The St. Charles Branch of the Intercolonial Railway crosses this property in two places, as shown in exhibits B and D,—the total area expropriated being 8.077 arpents.

In the record will be found a statement of a claim for compensation made by the claimant against the Crown in August, 1885, for $22,784.00. This is not material, however, except as showing how such claims as these are sometimes exaggerated, because the claim-

ant's attorney, on the hearing, abandoned it and proceeded upon a statement filed by him, which is as follows:

Land expropriated, 5 arpents and 10 perches	$ 800.00
44,606 cubic yards of gravel at 6 cts.	2,676.00
Damages	4,000.00
	$7,476.00

The 44,606 cubic yards of gravel were taken from a portion of the land expropriated in 1882 adjoining the right of way, and containing 2.977 arpents; and in respect thereof the question arose as to whether or not the claimant was to be paid for this land by the acre, as farming land, or by the cubic yard of contents as a gravel pit. If the claimant could have used this piece of land as a gravel pit to any more advantage than he could have used it as farming land, he would, I think, be entitled to be allowed its value as a gravel pit. But there is no evidence that it was ever so used by the claimant, or any reason to believe that it would ever have been of any use to him for that purpose. Looking, therefore, to its value to the owner at the time of the expropriation, and apart from the evidence that the land, for the purposes of a gravel pit, was worth from $80 to $100 per acre, I see no reason to allow the claimant any thing more for the piece of land than I shall allow for that immediately adjoining it, which was taken at the same time for the line of railway.

For land such as that expropriated in this case, $40 or $50 per acre would, I think, be a fair price if a considerable number of acres were so taken as not seriously to injure the balance by the manner of severance. But, taken in the place and manner in which this was taken, I am of opinion that $100 per acre is not an unreasonable value to put upon it.

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With reference to the depreciation in value of the property, the claimant's witnesses agreed generally in stating that by reason of the construction of the railway, the value of the farm had depreciated two-thirds. Two of them stated the amount of depreciation at $4,000.00,—the sum claimed in the statement of claim. I understand them to reach that amount by taking the value of the farm (probably excluding the buildings) at $6,000.00, and allowing two-thirds of that amount.

On this branch of the case, little or no assistance is given by the evidence of the witnesses called for the Crown; and were it not very clear that the witnesses for the claimant have seriously and greatly misapprehended the inconveniences occasioned by the construction of the railway, it might be that I would feel justified in allowing the claimant the amount of their estimate.

By reference to the plan and the evidence it will be seen that the farm is divided by the railway into three parts nearly equal in extent. On the north-westerly part are the claimant's house, barn and other buildings. The highway and the railway separate this part from the centre portion, and the latter is separated from the south-easterly portion by the railway, where, near the river L'Allemand, it again crosses the farm. I shall hereafter refer to these three parts respectively, and in the order mentioned, as parts 1, 2 and 3.

Part 1 is injuriously affected, not by the construction, but by the operation of the railway. The injury, as stated by the witnesses, consists in the proximity of the railway to the claimant's buildings. In addition, at a point near the claimant's barn, is the western end of a long snow-shed from which trains emerge suddenly and without notice or warning, causing the claimant's horses to be much frightened.

From part 1 to part 2, which was used principally as

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a pasture, the claimant has convenient access by a subway. The injury to part 2 consists in this, that by the construction of the railway a well and spring at the westerly end thereof were destroyed, and that access therefrom to the river L'Allemand was cut off. The claimant's cattle, before the expropriation, were accustomed to drink either at the spring or at the river; and the fences of the pasture were always so arranged as to give them access to one or the other. The witnesses for the claimant all agreed that there is not on part 2 any other spring or natural water course, and that the cattle cannot now be driven to the river L'Allemand which is on part 3. They have, I think, however, greatly magnified any difficulty there is in procuring water for the cattle.

It appears from the evidence of the claimant's son that there is at the easterly end of part 2, a ditch which is filled with water except in the dry season. When I visited the property, in the present month, there was a good stream of water running from this ditch, and it was evident, I think, from the character of the land that there would be no difficulty—at least by digging a well—in finding, at any time, an ample supply of water on part 2.

Then again, in regard to the means of access to the river L'Allemand, the witnesses who stated that there were none, are entirely mistaken. It appears that until last winter, when the snow-shed was extended, the claimant had a crossing, but that by its extension that crossing was destroyed; and witness after witness stated that there is now no way of crossing the railway because of the ballast pit. One of the witnesses, Mr. Simard, speaks of making a crossing by constructing a bridge 110 feet long by 13½ feet high. It will be observed, however, that the claimant's son does not state that there is no crossing now, and the fact is that

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there is a fair road across the ballast-pit with a reasonable grade, and a good crossing over the railway. These I saw in the presence of the claimant's attorney, and they bore evidence of having been in use. Part 2, then, is depreciated in value by the fact that the claimant must either dig a well and pump water for the cattle pasturing there, or drive them across the railway tracks for water during the dry season.

Part 3 is injuriously affected, according to the evidence of the claimant's witnesses, by the absence of any means of communication between it and part 2. In this, as I have already stated, they are manifestly mistaken. The means of communication are very good, and the depreciation is not, I think, very considerable.

It is clear, I think, from their own evidence, that the witnesses for the claimant have greatly magnified the inconveniences under which parts 2 and 3 of the claimant's property are used; and, consequently, have greatly exaggerated the depreciation thereof in value. I have no doubt, however, that the depreciation is considerable—more perhaps in the market value of the property than in its real value to the owner for the purposes of occupation. I find some difficulty in concluding how much I should allow for this depreciation. On the whole, I do not think from the circumstances of the case that it can be more than one-half of the estimate given by the claimant's witnesses; and I shall assess the compensation to be made to the claimant for the depreciation in market value of the property left to him, at one-third of that value; and, for the purpose of assessing such compensation, I find the value of the whole property before the expropriation to have been $7,000. I think the sum is large, but entirely in accordance with the evidence.

I allow the claimant:

For 8.077 arpents of land expropriated at $100 per arpent	$ 807.70
For depreciation in market value of remaining property ($7,000—$807.70=$6,192.30...	2064.10
	$2,871.80

There is no evidence of any tender and the claimant is entitled to interest from the date of expropriation, and to his costs.

The sum mentioned is, however, assessed in reference to every interest in the said property; and it is to be paid to the claimant upon his procuring for the Crown an acquittance from all persons who may have any interest therein. If this should not be possible, the right is reserved to any party interested to apply to have such sum apportioned according to such several interests.*

Solicitors for claimant; *Belleau, Stafford & Belleau.*

Solicitors for respondent; *Casgrain, Angers & Hamel.*

*On appeal to the Supreme Court of Canada by the claimant, the amount of compensation awarded him by the Exchequer Court was increased upon the assumption that damages resulting from the operation of the railway had been excluded from consideration by the latter court.

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June 30.

BENONI GUAY.....CLAIMANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Expropriation of land for Government railway—Damage occasioned by want of crossing.

Where, upon the expropriation of land for the right of way of a Government railway through a claimant's property, a crossing over the railway is not provided by the Crown, damages will be allowed for the depreciation of his property resulting from the absence of such crossing.

THIS was a claim for damages arising out of the expropriation of a certain portion of land, belonging to the claimant Guay, situate in the Parish of St. Joseph, County of Lévis, P.Q, for the purposes of the St. Charles Branch of the Intercolonial Railway, and the consequent depreciation of adjoining lands of the claimant. The facts of the case are sufficiently stated in the judgment.

June 5th, 1888.

Belleau, Q. C. for claimant;

Drouin, Q. C. and *Angers* for respondent.

BURBIDGE, J. now (June 30th, 1888) delivered judgment.

Two properties in the possession of the claimant were crossed by the St. Charles Branch of the Intercolonial Railway. One, that upon which his house and barn were situated, in two places; the other, a woodlot, only in one. The property first mentioned contained about thirty-nine arpents; the latter about forty-five. The former was, for a consecutive number of years except one, valued for the purposes of assessment at $1,000; the latter at $300. Only one witness,

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David Charest, put a value on the first property as a whole, and he estimated its value at $4,000. I hesitate, however, to follow his opinion, as he, at the same time, estimated the depreciation of the property by the construction of the railway at an amount exceeding the sum which the claimant demands for land and damages together, by nearly one-half of that sum. For the two pieces of land taken from this property, amounting in all to 1.77 arpents, the claimant, in his statement of claim, demands a sum of $200, which I allow. I also allow him $120, the amount claimed for 1.90 arpents of land expropriated on the other property.

With reference to the depreciation of the property just mentioned, and apart from the evidence of Charest before referred to, one witness for the claimant estimated it at $900 to $,1000 ; one for the Crown, at $200 ; two at $500, and one at $520.

The chief inconvenience is the difficulty in using the sub-way, which is constructed on the side of the hill, but, as one of the witnesses suggested, the hill is not steeper than it was before, though there must be considerable inconvenience as the passage must be made directly, and in a narrow place. I do not attach any considerable importance to what is said by some of the witnesses as to the difficulty in getting water for the cattle.

The depreciation of the wood-lot is caused by the absence of a crossing (1). The reason why the claimant was not given any crossing is not disclosed by the evidence. I think he was entitled to one, and that it could have been constructed for a sum much less than the lowest estimate of the depreciation in value of this property for the want thereof given by the

(1) REPORTER'S NOTE.—Under 52 Vic. c. 38, s. 3, passed since the above judgment was delivered, the court, upon an undertaking by the Crown to such effect, may order a crossing to be constructed, and the same shall go in mitigation of damages.

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witnesses. With a crossing the depreciation would have been inconsiderable. This depreciation is estimated by the Crown's witnesses at sums varying from $200 to $300, and by two witnesses for the claimant at $500, including therein as well the value of the land taken.

I assess the compensation to be made in this case as follows :—

1.77 arpents of land taken from property, 1st range	$ 200.00
Depreciation of said property	500.00
1.90 arpents land taken from property in 3rd range	$ 120.00
Depreciation of last mentioned property	250.00
	$1,070.00

To this sum will be added interest from June 8th, 1882, the date of the expropriation. There is no evidence of any tender, and the claimant is entitled to costs.

The compensation is, however, assessed in respect of an estate free from any charge or incumbrance ; and the amount of such compensation is to be paid to the claimant upon his giving a good acquittance for all interests that may happen to exist in or to the said property. Leave is reserved for either party, or any person interested, in case a satisfactory apportionment of the compensation money cannot otherwise be arrived at, to apply to the court for a distribution of the same.*

Solicitors for claimant : *Belleau, Stafford & Belleau.*

Solicitors for respondent : *Casgrain, Angers & Hamel.*

*On appeal to the Supreme Court of Canada by the claimant, the amount of compensation awarded by the Exchequer Court was increased by the sum of $100., the majority of the court being of opinion that damages had not been allowed for the depreciation resulting from the absence of a crossing.

MARIA E. KEARNEY.....CLAIMANT; 1888

AND Sept. 24.

HER MAJESTY THE QUEEN.....DEFENDANT.

Expropriation of land for railway purposes—Value of land for building purposes—Damages resulting from want of crossing.

The Crown had expropriated a certain portion of land which the claimant contended was held for sale as building lots. It was established in evidence that such land had not been laid off into lots prior to the expropriation, and that none of it had theretofore been sold for building purposes. There was evidence, however, to show that there was a remote probability that the land would become available for such purposes upon the extension of the limits of an adjoining town.

Held, that while such remote probability added something to the value which the property would otherwise have had, compensation should not be based on any supposed value of the land for building purposes at the time of the expropriation.

2. By the absence of a crossing over the railway, claimant was deprived of access to the shore, and thereby suffered loss in the use and occupation of the property remaining to her.

Held, that claimant was entitled to compensation in respect of the damage resulting from the want of a crossing.

THIS was a claim for damages consequent upon the expropriation of a portion of the claimant Kearney's land for the right of way of the Dartmouth Branch of the Intercolonial Railway.

The property was situated on the shore of the harbor of Halifax (N.S.), near the town of Dartmouth, but not within the limits of that town.

At the hearing it was contended, on behalf of the claimant, that the property was held for sale as building lots at the time of the expropriation. The evidence, however, failed to establish this as a fact; but it appeared that part of the property bordering on the harbor had a certain value at the time of the expropriation

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Statement of Facts.

for bathing purposes, and that other portions of the shore were used by the claimant for various purposes from which profits were derived by her.

The evidence of damage to the property for its present purposes was confined to the matters above stated, and it was proved that:—

(*a*). It was injured as a bathing-house property by the railway overlooking the bathing beach.

(*b*). By reason of the Government not having constructed a crossing, it was not as convenient to obtain from the shore sea manure and drift wood which the sea cast up on the shore, nor to deliver to ballast-boats, as in the past, ballast lying on the other side of the railway.

The case was argued on April 30th and May 1st, 1888, upon the evidence taken by a special commissioner at Halifax.

Wallace for claimant;

Graham, Q.C. for respondent.

BURBIDGE, J. now (September 24th, 1888) delivered judgment.

The claimant is the owner of a property situated near the town of Dartmouth in the Province of Nova Scotia, consisting of some seventy or eighty acres of land. This property is divided into two parts by the Eastern Passage Road, which crosses it at a distance of a mile and a half or two miles from the slip in Dartmouth, where the ferry-steamers from Halifax land passengers. The portion of the property west of the Passage Road is bounded on the south by the Mount Hope Lunatic Asylum property, and on the west by the harbor of Halifax. On this portion are the claimant's residence and garden, the situation of which is indicated by plan Exhibit X, prepared by the witness James W. McKenzie, who states that of this portion of the property five acres are cleared land, and one acre half cleared. He also

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Reasons for Judgment.

states that there are sixteen and three-fourths acres of uncleared land in the place, besides six acres in the adjoining water lot. Possibly, however, as the plan would appear to indicate, he intended to say that there were sixteen and three-fourths acres including the cleared and uncleared land. The claimant, herself, testified that there were 18 or 19 acres between the Passage Road and the harbor.

In 1884, the Government of Canada constructed the Darmouth Branch Railway from the Intercolonial Railway through the town of Dartmouth and across the lands of the claimant, and others, to the Halifax Sugar Refinery, as shown by Exhibit E. The place and manner at and in which this railway was constructed across the claimant's property, are clearly shown by the plan Exhibit A. A tender of $150 for the right of way was made to the claimant, and several attempts appear to have been made to induce her to accept this sum, but she persisted in her refusal,—claiming at one time $200 and at another alleging that her attorney advised her that the damages to her property were a great deal more than $150. The witness who made the tender—Alpin Grant—does not appear to be clear as to whether at this time she claimed $1,000 or $2,000.

No arrangement with her having been arrived at, she subsequently instituted an action in the Supreme Court of Nova Scotia against Oaks and Paw (the contractors for the construction of the Branch Railway) for trespasses alleged to have been committed upon the property in question. The defendants justified the acts complained of by alleging entry, under directions of the Government of Canada, for the purpose of constructing the Branch Railway. On the trial before the Chief Justice of the court it appeared that the order-in-council authorizing the construction of the said Branch was not passed until the 12th of December, 1884, while

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the entry complained of had been made during the month of July previous. The Chief Justice, being of opinion that the entry was unlawful, directed judgment to be entered for the plaintiff for $100. On appeal to the Supreme Court of Nova Scotia, this judgment was set aside on the ground that no notice of action had been given to the defendants in accordance with the provisions of *The Government Railways Act*, 1881. Notice of appeal to the Supreme Court of Canada was then given.

By arrangement between the Crown and the claimant, and without prejudice to the appeal to the Supreme Court of Canada in *Kearney* v. *Oakes et al.*, the Minister of Railways and Canals has referred the claim to the Exchequer Court,—it being agreed that such claim should be heard on the evidence taken in the case last mentioned, and on such further evidence as should be taken in accordance with the consent now upon file in this court.

The only question arising on the reference is as to the amount of compensation that should be awarded to the claimant for the land taken from her for the Dartmouth Branch Railway, and for damages in respect of her property being injuriously affected by the construction of such railway.

Now I think it will be convenient to consider and dispose of several matters which do not, so far as I understand the case, affect this question of compensation.

In the first place, it was not contended that the property east of the Passage Road is affected in any way.

In the second place, it was suggested by a number of the witnesses examined both on the part of the claimant and of the Crown that the claimant's property (and in using that term hereinafter I wish to be understood as referring only to the portion west of the Pas-

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sage Road) might in the future be available for commercial or manufacturing purposes, such as the erection thereon of factories, or, along the harbor front, of wharves and docks. The witnesses, however, differed in opinion as to whether or not any value which the property had in 1884, arising from this consideration, would be increased or diminished by the construction of the railway. I have no hesitation, looking at all the evidence on this point and the situation of the property, in accepting as correct the views of those witnesses who were of opinion that, having reference to any such use as this of the property, the railroad increased, or, at least, did not depreciate, its value.

What I think I may fairly designate as the principal case presented by the claimant, was directed to showing the value of her property as consisting of a number of small building lots ; and for this purpose a plan (Exhibit B) was put in evidence. This plan was, I infer, made by the witness William A. Hendry, a Deputy Land Surveyor, for, on cross-examination, he states that, so far as he knew, these building lots were never laid off before he did it, and that he did it three or four weeks before his examination (December 28th, 1887). He also admits that, with the exception of the Eastern Passage Road, there are no roads on the property as represented on the plan. This witness had previously in his direct examination stated that this plan (Exhibit B) did not represent the best way of laying out the lots since the railway was built, and that had he to lay it out again he would do it differently. One hesitates to believe that this witness, until the truth was brought out in cross-examination, deliberately attempted to convey the impression that the division of the property into building lots had been made prior to the construction of the railway, and was at that time a well settled and established fact, though it

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is difficult to see what other inference he could wish or expect those who heard or read his evidence to draw. The claimant, in her direct-examination before Mr. McDonald, says that for years she had intended to have the property divided into building lots, and, in her cross-examination, that before the construction of the railway she had never had a plan laying the property off into lots, and that she had never sold a lot. Now I think that any one who reads the evidence in this case carefully must be forced to the conclusion, that, up to the time when such evidence was given, there had never been any demand for any portion of the property for building purposes, and that the probability of its being made available for any such purpose was very remote indeed. That very remote probability added, it is true, something to the value which the property would otherwise have had, but it is perfectly clear, I think, that it would be absurd to think of assessing the compensation to be paid to the claimant on the basis that in 1884 this property consisted of building lots, having at that time a market value as such.

Mr. Graham, in his argument for the Crown, observed that the view thus presented was fabricated out of the slightest evidence; and I must admit that I am not prepared to say that his observation was unwarranted.

On the claimant's property there was, in 1884, a bathing establishment, which had been erected by a company several years before. It is clear, I think, that the place itself afforded exceptional facilities for bathing, and the company had expended some $1,500 in erecting buildings and other improvements. The only drawback mentioned by any of the witnesses was the drain from the Asylum grounds, to which Dr. Weeks referred. The company held a lease from the claimant, paying her a rental of $50 a year. After the season of 1884, the enterprise was abandoned. The claimant

contends that this was caused by the construction, in that year, of the railway, which it is alleged destroyed the privacy of the place. The evidence of Arthur E. Harrington, who had been secretary and vice-president of the bathing company, and who was called by the claimant, disposes of this contention. He says that excepting one year, in which they spent their profits in improvements, the enterprise did not pay. He attributed this to the steamboat which they had, which used to break down, compelling them to use row boats in going from Halifax to the bathing-house. In 1883, they sub-let to one Rudolph, who agreed to pay eight per cent. on the company's outlay, but who never paid anything.

The claimant also alleged that the railway prevented her from again leasing the bathing premises, which subsequently fell into her hands. She says that she had several applications, but that the applicants refused to take the premises when they saw the embankments of the railway. On cross-examination, however, she admitted that Rudolph was the only applicant she could remember, and that he made no offer. He, as I understand the evidence, is the person in whose hands the enterprise failed to pay before the construction of the railway. I am satisfied that no case has been made out to justify me in allowing the claimant any special damages on this branch of her case.

Apart from the general question of the depreciation of the claimant's property by the severance of the part expropriated, she contends, and I think justly, that she has suffered loss by reason of the absence of a railway crossing. This, I think, she was entitled to, and without it she has no convenient access to the shore.

It has prevented her, as she alleges, from selling ballast and sea-manure, and from gathering drift-wood, as had previously been her custom to do, and from which,

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in some years at least, she derived a profit, according to her own estimate, of about one hundred and twenty-five dollars. For such damage, I shall allow her five hundred dollars ($500).

Now in respect to the value of the right of way and the damage caused by the severance, it is not possible to reconcile the evidence, and I shall not attempt to do so. It is clear, I think, that at one time in 1884, the claimant was willing to accept two hundred dollars for the right of way, and looking at the evidence of Lewis P. Fairbanks and James W. Turner, or at the assessment roll, or the amount paid to other proprietors (whose lands were also affected by the construction of the railway), this sum would appear to constitute a sufficient indemnity. I am inclined to think that it did not inadequately represent the market value of the land expropriated—apart from any question of severance.

On the other hand, the proprietors who surrendered their lands freely, or for small sums, were anxious to have the road constructed, and those who exacted any may not have exacted a full indemnity. Then, too, I do not think the claimant, when she offered to accept two hundred dollars, knew where, or understood how, the railway would cross her property; and it is clear that there was no agreement which prevents her now demanding a full indemnity. I think, if I allow her compensation at the rate of $1,200 per acre, at which rate she sold 3⅓ acres to the authorities of the Lunatic Asylum, I will allow her a sum sufficient to indemnify her fully for the land taken, and for all damages to the property other than the special damages arising from the want of a crossing. It was suggested on the argument, though it is not in evidence, that in paying her $4,000 for 3⅓ acres of the land, the Asylum authorities desired to put an end to certain litigation then existing between them and the claimant.

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There is besides this, however, evidence of the sale to them of four acres of cultivated land by Thomas Mott, for $4,400. I would not, however, feel justified in assessing the compensation to be paid in this case at so large a sum were it not that, apart from every other consideration which, in 1884, made this property valuable, I was satisfied that its proximity to Dartmouth and Halifax, its beautiful and convenient situation on the harbor of Halifax, and the probabilities, more or less remote, of its being at some time saleable for one or more villa residences, or for manufacturing or commercial purposes, or even at some distant time as building lots, gave it at that date a value which it would otherwise not have had.

I assess the compensation to be made to the claimant in this case, on giving the Crown a good and sufficient discharge, at two thousand and twelve dollars ($2,012);—on fifteen hundred and twelve dollars, parcel of which, I allow interest from the 13th August, 1884, the date on which the first plan and description were filed in the office of the Registrar of Deeds for Halifax County.

I also allow the claimant her costs in this court; and I reserve leave to either party to apply for further directions.*

Judgment for claimant, with costs.

Solicitor for claimant: *T. J. Wallace*;

Solicitor for respondent: *W. Graham.*

*On appeal to the Supreme Court of Canada by the claimant, the amount of compensation awarded by the Exchequer Court was increased on the ground that it did not appear that such compensation was assessed in view of the *future* damage that may result from the want of a crossing.

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Oct. 22.

ETIENNE SAMSON, AND OTHERS (CLAIMANTS)..... } APPELLANTS;

AND

HER MAJESTY THE QUEEN (DEFENDANT)..... } RESPONDENT.

Appeal from award of Official Arbitrators—Expropriation of land for Government railway—Title to beach lots granted by Crown prior to Confederation—Valuation—Contract, breach of.

Claimants' title to a water-lot at Levis, in the harbor of Quebec, was based on a grant from the Lieutenant-Governor of Quebec prior to Confederation. The grant contained, *inter alia*, a provision that, upon giving the grantee twelve months' notice, and paying him a reasonable sum as indemnity for improvements, the Crown might resume possession of the said water-lot for the purpose of public improvement.

Held: The property being situated in a public harbor, this power of resuming possession for the purpose of public improvement, would be exercisable by the Crown as represented by the Government of Canada. *Holman* v. *Green* (6 Can. S. C. R. 707) referred to.

2. Inasmuch as the Crown had not exercised this power, but had proceeded under the expropriation clauses of *The Government Railways Act*, the claimants were entitled to recover the fair value of the lot at the date of expropriation. That value, however, should be determined with reference to the nature of the title.

The claimants sought to recover from the Crown the amount of damages they alleged they were obliged to pay to a contractor who was prevented by the expropriation from completing the construction of a wharf he had undertaken to build for them.

Held: That as the contractor had been prevented from completing the construction of the wharf by the exercise of powers conferred by Act of Parliament, the claimants were excused from any liability to him in respect of the breach of contract, and could not maintain any claim against the Crown in that behalf.

APPEAL and cross-appeal from an award of the Official Arbitrators.

The facts of the case are recited in the judgment.

April 23rd, 1888.

Belleau, Q. C. for appellants.

Hogg, for respondent.

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BURBIDGE, J. now (October 22nd, 1888) delivered judgment.

In this matter there is an appeal and a cross-appeal from an award made on the 26th day of February, 1886, by Messrs. Compton, Simard and Muma,—Mr. Cowan dissenting.

On November 12th, 1884, the Chief Engineer of the Intercolonial Railway for the Government of Canada took possession of a water lot at Lévis, in the Province of Quebec, then in the possession of the claimant and others, and upon which they were at that date constructing a wharf.

Prior to that date a tender of $13,600. had been made to the claimant for the lot and wharf in question, and a plan and description thereof had been filed in the office of the Registrar of Deeds for the County of Lévis. The tender appears to have been made on the 31st day of October, 1884, but the exact date of the filing of the plan and description is not, I think, disclosed by the evidence.

The statement of claim made is as follows:—

1. For a wharf in course of construction at the time of the taking of possession thereof by the Government on 13th November, 1884, 13,832 cubic yards at $1.79....	$23,514.40
2. Amount of the Beach Lot upon which the wharf is constructed 254 ft. in length by 70 ft. in width, containing 17,780 superficial feet, at $1.30.....	23,114.00
3. Amount of value of work to be done to complete the wharf, and claimed by the contractor.....	744.52
4. Amount of materials on hand, and the whole of which the Government has taken in its possession.....	2,013.30
	$49,386.22

With reference to the 1st and 4th items of this claim,

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the only question that arises is one of value. In any view of the case the owners are entitled to the full value of the wharf at the date of the expropriation, and of the lumber and materials taken and used by the Government. If the statement of the amount actually expended by the claimant is accepted as correct, and as affording the best available evidence of such value, there should, I think, be added thereto a reasonable sum for superintendence and for the use of, or interest upon, the moneys expended during construction.

With reference to the lots upon which the wharf is constructed, it appears from the letters-patent by which the same were granted, and which were filed by direction of the court subsequent to the argument of the appeal, that the owner's title is subject to a number of conditions and reservations and among others to the following :—

Provided always, nevertheless, and we do hereby reserve unto us, our heirs, and successors full power and authority to erect and build one or more battery or batteries or any other works of military defence upon the said lot or piece of land hereby granted, or any part thereof, when our or their service may require the same ; provided further, and we do also hereby expressly reserve unto us, our heirs, and successors, full power and authority upon giving twelve months previous notice to our said grantee, her heirs or assigns, to resume for the purpose of public improvement, the possession of the said lot or piece of land hereby granted or any part thereof, upon payment or tender of payment to her or them of a reasonable sum as indemnity for the ameliorations and improvements which may or shall have been made on the said lot or piece of land, or on such part thereof as may be so required for public improvements, and upon reimbursement to our said grantee, her heirs or assigns, of such sum as shall have been by her or them paid to our Commissioner of Crown Lands for such lot or piece of land or such part thereof so required for public improvements ; and in default of the acceptance by our said grantee, her heirs or assigns, of such sum so as aforesaid tendered, the amount of indemnity, whether before or after the resumption of possession by us, our heirs or successors, shall be ascertained by two experts, one of whom shall be nominated and appointed by our Governor, Lieutenant Governor or person administering the Government of our said Pro-

vince for the time being, and the other by our said grantee, her heirs or assigns, or in the event of a difference of opinion arising between the said experts, by either of them the said experts and a *Tiers-Expert* or Umpire chosen by them.

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The property being situated in a public harbor, and the grant having been made with a view to the construction thereon of a wharf, this power of resuming possession for the purpose of public improvement would be exerciseable by the Crown as represented by the Government of Canada (1).

The Crown has not, however, seen fit to exercise this power, but has proceeded under the expropriation clauses of *The Government Railways Act*, and is, I think, liable to the owners for the fair value to them of the water lot at the date of expropriation. That value must, however, be ascertained with reference to the nature of their title. No one, it is clear, would give as much for a lot the title to which might be defeated by a year's notice, or which was burdened by conditions, as he would if it was not subject to any such defeasance or burden. Neither would it in the one case be of the same value to the owners as in the other. At most in this case the owners were never at any one time sure of more than a year's occupation of the lots in question, and of being paid a reasonable sum for the ameliorations and improvements thereon.

With reference to the 3rd item of the claim, I am of opinion that the claimants are not liable to the contractor. It was not by their act or fault that he was prevented from continuing the construction of the wharf, but by the expropriation under the Act of Parliament. The claimants are, therefore, excused, and consequently are not entitled in this respect to compensation from the Crown.

(1) *Holman* v. *Green* 6 Can. S. C. R. p. 707.

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The claim referred to the Arbitrators was that of Marie Archange Labadie, wife of Etienne Samson, Hélène Poiré, wife of George Guenette, and the said Etienne Samson, while the award is in favor of Etienne Samson only. I apprehend, however, that this is a mistake, as Mr. Samson himself in his evidence states that the claimants are himself, his wife, and his step-daughter.

The amount of the award $29,114 is, I fancy, given as an indemnity to all persons who, at the date of expropriation, had any interest in the property, and if there was nothing but this in the case I should content myself with varying the award in respect thereof.

It is difficult to determine with any certainty the principles upon which the Arbitrators have made their award, as they have assessed the compensation in one sum, and have not made any report. It is clear, however, I think, from the evidence and the way in which the case was presented to them, that, in assessing the value of the lots on which the wharf was being constructed, the Arbitrators were not afforded an opportunity of considering, and did not consider, the nature of the owners' title; but that they have valued the property as though the owners had a title free from any such conditions as exist in the present case (1).

I therefore set the award aside, and remit the whole matter to the said Arbitrators, Messrs. Cowan, Compton, Simard and Muma, now Official Referees of the court, for their re-consideration and re-determination, and for a report to the court; for which purpose they have leave to hear further evidence and the parties as they shall see fit.

It is, I think, desirable that such a report should show:—

(1) *Cripps on Compensation* p. 100.

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(1). The date of the expropriation, from which date the claimants should be allowed interest.

(2). The persons entitled to the compensation money at that date, or if they cannot fully ascertain this from the evidence, whether or not the assessment is made to cover the interests of all such persons.

(3) The amount allowed in respect of each item of the claim.

(4). Any other matter tending to show the principles upon which the assessment is made.

Case remitted to Official Referees for re-consideration and re-determination; the question of costs reserved.

Solicitors for appellants: *Belleau, Stafford & Belleau.*

Solicitors for respondent: *O'Connor & Hogg.*

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Oct. 22.

HER MAJESTY THE QUEEN (DEFENDANT)..... } APPELLANT;

AND

CHARLES WILLIAM CARRIER (CLAIMANT)..... } RESPONDENT.

Appeal from award of Official Arbitrators—Compensation—Valuation of property—44 Vic. c. 25, s. 16, interpretation of—Advantages derived from a public work—Nature of title.

In assessing compensation to be paid to an owner whose land has been expropriated, the market value of the property should not be exclusively considered. Although the claimant has the right to sell his property, and should, therefore, be indemnified in respect of any loss which, in consequence of the expropriation he might make on such sale, he is not bound to sell, and may reasonably prefer to keep his property for the purposes of his business; and in that case should be indemnified for any depreciation in its value to him for the purposes for which he has been accustomed, and still desires, to use it.

2. Notwithstanding the generality of the terms of 44 Vic. c. 25, s. 16 (re-enacted by R.S.C., c. 40, s. 15, and 50-51 Vic. c. 16. s. 31), which provides that the Official Arbitrators shall take into consideration the advantages accrued, or likely to accrue, to the claimant, or his estate, as well as the injury or damage occasioned by reason of the public work, such advantages must be limited to those which are special and direct to such estate,and not construed to include the general benefit shared in common with all the neighboring estates.

3. In assessing compensation to be paid to a claimant whose land has been expropriated, the court will look at the nature of his title as one of the criteria of value.

APPEAL and cross-appeal from an award of the Official Arbitrators.

The facts of the case are sufficiently stated in the judgment.

January 23rd and 24th, 1888.

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Bossé, Q. C. for appellant;

Hogg for the respondent.

Reasons for Judgment.

BURBIDGE, J., now (October 22nd, 1888) delivered judgment.

In this case there is an appeal by the Crown and a cross-appeal by the respondent (the claimant in the proceedings before the Arbitrators) from an award of $61,811.86, made on the 13th day of September, 1886, by Messrs. Compton, Simard and Muma (Mr. Cowan dissenting) on a claim for $193,006.39 for compensation for property expropriated for, and injuriously affected by, the construction, in the summer of 1882, of the St. Charles Branch of the Intercolonial Railway.

The property in question was situated at Lévis, in the Province of Quebec, and consisted of beach and water lots upon which buildings and wharves had been constructed, and which were used by the claimant in carrying on his business.

Referring to the premises occupied by the claimant and the business there carried on, A. H. Larochelle, one of his employees, gives the following evidence :—

Messrs. Carrier, Lainé & Co.'s establishment is very large, is situated in the centre of the business part of Lévis, and in a very advantageous position. I think that apart from the large buildings of the railway companies, this establishment is the most extensive in the Province. All kinds of foundry work and mechanism are done there, in iron, brass and other materials, from the construction of stoves—large and small—to all kinds of machinery ; claimants also make steam power machinery for different kinds of mills, steamboats, and other things in this kind of work.

Their yard before the building of the railway was suited for ship building of different species, which claimants built, and also for the repairing of ships. They also built either for themselves or for others, and also had steamboats to repair their engines, or to replace them by others of their own make.

It was a most prosperous establishment and which, within the last

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few years has always increased, and every year new machines and new ameliorations have been introduced.

There are a great many stoves made in the foundry, but all the mouldings which might be wanted for the making of steam machines, or for other objects, are also fabricated. We also construct steam boilers for stationary machines ; in fact, all that could be done by a large establishment, even the best of machinery for the moulding and finishing of all pieces of iron, brass, or other metals, were done at claimants' establishment.

A part of such beach and water lots the claimant held under two grants made by the Lieutenant-Governor of Quebec, bearing date respectively the 17th of March, 1873, and the 25th of October, 1880 ; and the remaining portion under a lease for twenty years from 1st May, 1881, from one Charles McKenzie who, I assume, derived his title from James McKenzie, who held under two grants from the Crown bearing date the 17th of August, 1857.

This much appears from the evidence given on the hearing before the Arbitrators. From the exemplifications of the grants, which have by direction been filed in the case since the argument on appeal, it appears that such grants contained a number of special provisions.

The following is an extract from one of the grants of 17th August, 1857, to James McKenzie : —

We do hereby grant unto the said James McKenzie, his heirs and assigns forever, full power and liberty to use, occupy and enjoy the said lot or piece of land in any manner that he or they may think fit by erecting a wharf or wharves, store or stores, or other buildings thereon, and to apply the produce or profits thence arising to his or their own use and benefit, paying unto us, our heirs and successors the respective sums aforesaid, provided always, and these our Letters-Patent are granted upon the express condition that our said grantee, his heirs and assigns, do and shall within three years from the date of these presents, erect and build, or cause to be erected and built on the said lot or piece of land hereinbefore granted, an open wharf for the greater convenience and accommodation of ships and vessels resorting to and lying in our port of Quebec, and for the more safe and easy loading and unloading of goods, wares and merchandise, at the said

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wharf in and upon and from and out of any such ship or vessel; provided, also, that every such wharf shall be of a depth extending from low-water mark to high-water mark, and not less than seventy feet in length or frontage, and shall be constructed of proper materials, in workmanlike manner, and be so loaded as to be capable of resisting any pressure to which any such wharf may be exposed, and shall be faced all round with substantial timber of proper quality, so as to prevent the loading from escaping into the river, and shall be kept in a complete state of repair; and every such wharf shall be subject to the inspection and approval, and its sufficiency shall be established by the certificate of the Commissioner of Public Works for our said Province,or of any person or persons appointed for that purpose by the Governor, Lieutenant-Governor, or person administering the government of our said Province; provided always that our said grantee, his heirs and assigns, do and shall at all times, after the construction and erection of any such wharf or wharves on the said lot or piece of ground, permit all and every person or persons whomsoever to use such wharf or wharves for the purposes of moorage and wharfage, and to moor and fasten ships or vessels thereto, and to lade and unlade any goods, wares and merchandise, at any such wharf or wharves, and also to use any crane or cranes erected thereon, upon payment of a reasonable rate as and for moorage, wharfage and cranage, to be assessed and allowed to the proprietor or wharfinger of such wharf or wharves, by and under the authority and in the manner hereinafter mentioned; and shall leave an open space at one of the ends of every such wharf for a landing place for boats and small crafts on the said beach lot hereby granted; and we do hereby for us, our heirs and successors, grant to the said James McKenzie, his heirs and assigns, that it shall and may be lawful for him or them to demand, have and receive to and for his or their own use and behoof from any person or persons whom the same shall or may concern, such reasonable rate and rates as and for moorage for all ships or vessels which shall be moored or fastened to such wharf or wharves, as and for wharfage for all goods, wares and merchandise shipped off, laden or unladen at such wharf or wharves, and as and for the use of any crane or cranes to be erected on any such wharf or wharves, as shall from time to time be assessed or allowed by the Governor, Lieutenant-Governor or person administering the Government of our said Province; and provided always that our said grantee, his heirs and assigns, do and shall, within three months of the day of obtaining the said certificate, cause to be published in *The Canada Gazette* during four consecutive weeks the tariff of rates so assessed or allowed as aforesaid; provided further, and these our Letters-Patent are granted upon the further express condition, that if our said grantee, his heirs and assigns, do not nor shall, within the aforesaid

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term of three years from the date of these presents, erect and build an open wharf of the dimensions and in the manner hereinbefore mentioned, or shall not publish the tariff of rates in the manner and within the time hereinbefore described and specified, then, and in every such case, he, our said grantee, his heirs and assigns, shall, from and after the expiration of the said period of three years, and until such wharf shall be built of the dimensions and in the manner aforesaid, and the said certificate shall be so as aforesaid by him or them obtained, and until such publication shall be made, pay unto our said Commissioner of Crown Lands over and above the hereinbefore first mentioned sum, an annual rent of fifteen pounds nine shillings and seven pence, currency aforesaid; and, provided further, that if our said grantee, his heirs and assigns, neglect or refuse to keep every such wharf in a complete and proper state of repair to the satisfaction of our Commissioner of Public Works for our said Province, then, and in every such case, this, our present grant, and everything herein contained, shall cease and become absolutely void, and the said lot or piece of ground hereby granted shall revert to us, our heirs and successors, and become the absolute property of us or them in the same manner as if these presents had never been made, anything herein contained to the contrary in any wise notwithstanding; provided always, that if our said grantee, his heirs and assigns, shall require and shall actually occupy the said lot hereby granted for the purpose of a timber cove or for the purpose of building ships thereon, then, in either such case, he or they shall not be bound to conform to the conditions and provisions hereinbefore mentioned in so far as they relate to the erection of the said wharf; provided always, and these our Letters-Patent are granted upon the express condition, that our said grantee, his heirs and assigns, do and shall renounce, quit and give up all and every claim against, and shall hold harmless, all and every the *censitaires* holding lands in the immediate rear of the beach lot hereby granted, for or by reason of any sale or transfer of property by them, or any of them, heretofore made to our said grantee, or of right of property in the said beach lot or any part thereof; and further, that in case the said beach lot shall at any time hereafter be laid out for building lots, a sufficient number of cross-streets shall be left open so as to afford easy communication between the public high-road in the rear of the said beach lot and low-water mark in front thereof, and that such streets shall be made in the manner and of the dimensions that shall be prescribed by municipal regulations then lawfully established; and also, that our said grantee, his heirs and assigns, whenever thereunto required by competent public authority, shall deliver up the ground necessary for completing a width of thirty-six feet, French measure, on the whole length of the said beach lot as reserved for a public

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highway, by and in virtue of an ordinance of the Superior Council of Quebec (*Conseil Supérieur de Quebec*) passed on the thirteenth day of May, in the year of Our Lord one thousand six hundred and sixty-five, intituled : *Ordonnance au sujet des clôtures sur le bord du Fleuve St. Laurent ;* provided always, nevertheless, and we do hereby reserve unto us, our heirs and successors, full power and authority to erect and build one or more battery or batteries, or any other works of military defence, upon the said lot or piece of ground hereby granted, or any part thereof, when our or their service may require the same ; provided further, and we do also hereby expressly reserve unto us, our heirs and successors, full power and authority, upon giving twelve months' previous notice to our said grantee, his heirs or assigns, to resume, for the purpose of public improvement, the possession of the said lot or piece of ground hereby granted, or any part thereof, upon payment or tender of payment to him or them of a reasonable sum as indemnity for the ameliorations and improvements which may or shall have been made on the said lot or piece of ground, or on such part thereof as may be so required for public improvements, and upon reimbursement to our said grantee, his heirs or assigns, of such sum as shall have been by him or them paid to our Commissioner of Crown Lands for such lot or piece of ground, or such part thereof so required for public improvements and in default of the acceptance by our said grantee, his heirs or assigns, of such sum, so as aforesaid tendered, the amount of indemnity, whether before or after the resumption of possession by us, our heirs or successors, shall be ascertained by two *experts*, one of whom shall be nominated and appointed by our Governor of our said Province for the time being, and the other by our said grantee, his heirs or assigns, or in the event of a difference of opinion arising between the said *experts*, by either of them the said *experts*, and a *tiers-expert* or umpire chosen by them ; and provided further, and these our Letters-Patent are granted upon the further express condition that nothing in our said grant contained shall, or shall be construed, to interfere in any way or diminish any right, privileges, easements, or servitudes granted to any railroad company by any statute whatsoever of the Legislature of our said Province, and further that our said grantee, his heirs and assigns, do and shall in every respect conform and submit to the provisions and requirements of all and every such statutes.

The other grants, though not in the same terms, are similar to this, and all contain the reservations of power to construct works for military defence on the property, and to resume possession thereof for the purposes of public improvement on giving twelve months'

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notice, and paying a reasonable sum as indemnity for the ameliorations and improvements made thereon.

No question was raised before the Arbitrators as to the right of the Lieutenant-Governor of Quebec to make grants of the beach and water lots in question, although the same are within the harbor of Quebec (1); nor was the point pressed on the argument of the appeal. The explanation is probably to be found in an order-in-council, a copy of which has since been filed in this case, passed on the 13th of April, 1870, by which the Governor-in-Council concurred in an opinion of the Minister of Justice, that, subject to any laws passed by the Dominion Parliament respecting navigation, the beach lots on the River St. Lawrence, and other rivers of the Province of Quebec, if ungranted, belonged, like other Crown lands, to the Province of Quebec.

For the present, therefore, I take it that the grants from the Province of Quebec to the claimant are recognized by the respondent and are, for the purposes of this case, to be treated as having been properly made.

The claimant seeks compensation not only in respect of his freehold, and of his leasehold interest in the McKenzie property, but also in respect of the interest of the heirs McKenzie, in the latter. In support of this he has filed an agreement dated the 27th day of July, 1883, made between Charles McKenzie and himself, whereby he covenanted, notwithstanding the expropriation, to pay the full rent of $1500. reserved in the lease before referred to, and McKenzie assigned to him the sum or amount which the Arbitrators might award as indemnity for damages to the McKenzie property.

The following is the statement of claim made in respect of both properties :—

(1) 22 Vic. (P.C.) c. 32 s. 1; 36 Vic. c. 62; *Holman* v. *Green* 6 Can. S.C.R. 707 (1881).

STATEMENT of claim of C. W. Carrier, on account of property expropriated by the Government for the St. Charles Branch of the Intercolonial Railway :—

1. 14,341.46 superficial feet of land expropriated for railway, at $2.00	$28,682	92
2. 52,505.60 cubic feet of wharf, (built of wood, iron, stones) expropriated at 10 cents	5,250	56
3. 17,556.75 cubic feet wharf (filled up with earth and stones) expropriated at 10 cents	1,755	67
4. One cistern 14' 9" x 10' x 12' with automatic valve, partly covered by railway and to be rebuilt on other side of track	500	00
5. To removing crane from old wharf unto new wharf	600	00
6. One wharf and crossing to be constructed outside of track to replace ship-yard destroyed by building railway in front of it, 826,673 cubic yards at $2.70	22,319	00
7. One wharf to be built alongside of track to replace frontage destroyed by railway, and two cross wharves between said wharf and ry. track, 8,387 3-10 cubic yards at $2.70	22,647	00
8. To filling up space between above mentioned wharf and ry. track, 6,579 yards at 60 cents	3,947	00
9. One new boiler shop, 4,948 superficial feet to be built on wharf outside of track to replace old boiler shop, part of which was destroyed, and remainder not being large enough for the purpose	4,778	57
10. To new engine, boiler, and shafting to be fitted up in new boiler shop to drive machinery	1,500	00
11. To yearly consumption of coal at $1.00 per diem, and engineer stoker at $1.00 per diem, as also oil and waste at $15.00 per year, or $615.00 per year capitalized at 6 per cent	10,250	00
12. To new forge to be built on new wharf to replace forge for marine work and ship-yard purposes	1,505	00
13. To a nightwatchman in ship-yard, boiler shop, &c, 365 nights at $1.00 per night capitalized at 6 per cent.	6,083	34
14. Damage done to property owing to railway being built across deep water wharf and the space to ground vessels for loading and unloading, and steamboats for fitting in engines and boilers, so shortened as to be now useless for the purpose	8,333	33
15. To timber pond destroyed by railway, it being also the only way to communicate on the beach with vehicles, 5,940 superficial feet, at $1.00	5,940	00

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16.	To loss of 4 years rental of outer end of deep water wharf, having had to use it myself on account of being deprived of my other wharf by construction of railway, at $750.00	3,000 00
17.	To 4 years deprived of use of ship-yard, and loss of profits made yearly on boat building.	10,000 00
18.	To loss of time by men in boiler shop owing to said shop being partly destroyed and having to run to and from the forge and other end of premises, and to work outside, 4 years at $900.00	3,600 00
19.	To daily loss of time of workmen disturbed by trains and passengers, average 200 men, 6 minutes each, 1,200 minutes=20 hours=2 days, at average $1.25 =$2.50 for 300 days, $750.00 capitalized at 6 per cent	12,500 00
20.	To extra cost of crossing machinery, vehicles, &c., over railway track to communicate on wharf outside and loss of time for men and horses, owing to trains being stopped in front of property on arrival and departure of trains, and due also to constant shunting	12,000 00
21.	To increase of insurance premiums since the railway has been built on $40,000, at 1⅛ per cent. $450, capitalized at 6 per cent	7,500 00
22.	To general depreciation of property resulting from the fact that it is separated into two different parts and cannot be managed as one single property	20,000 00
23.	To fees paid to surveyors and engineers to establish damage, as also for making plan of property	314 06
		$193,006 39

A claim similar to this was considered by Mr. Justice Taschereau in the case, in this court, of *Paradis* v. *The Queen* (1). To the instructive judgment rendered in that case, I wish to refer, as giving, with great fulness of detail and clearness, the principles upon which compensation should be assessed.

Now, if in the present case it were possible to come to a conclusion as to the value to the claimant for any available purpose of the properties in question, taken as a whole, immediately preceding the expropriation, and the value of the same thereafter, the depreciation

(1) 1 Ex. C. R. 191.

being occasioned by such expropriation and not otherwise, the difference of the two sums would represent the amount of the indemnity to which the claimant is entitled. In making such an estimate the market value should of course be considered, but not exclusively. For although the claimant has the right to sell his property, and should, therefore, be indemnified in respect of any loss which in consequence of the expropriation he might make on such sale, he is not bound to sell, and may reasonably prefer to keep his property for the purposes of his business, and in that case should be indemnified for any depreciation in its value to him for the purposes for which he has been accustomed, and still desires, to use it. In a case such as this, the evidence respecting the value of the property actually expropriated is, as a rule, much more certain and definite than that with respect to the depreciation of the remainder of the property from which it is severed, and therefore it is often convenient to assess such value and depreciation separately,—the sum of the two representing the total depreciation.

By 44 Vic. c. 25 s. 16 it was provided that in assessing the value of property or damages in a case of this kind, the Arbitrators should take into consideration the advantages accrued or likely to accrue to the claimant or his estate, as well as the injury or damage occasioned by reason of the public work (see also R. S. C. c. 40, s. 15 and 50-51 Vic. c. 16, s. 31). The language of this provision is apparently large enough to include not only the special and direct benefit arising from the position of a property on the line of railway, but also the general benefit not arising therefrom but from the facilities and advantages caused by the railway which affect all the estates in the neighborhood equally, and which are shared in common with such estates. I apprehend, however, that the narrower is the true

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construction of the provision, and that the advantages accrued, or likely to accrue, should be limited to those which are special and direct (1), and in a case like the one under consideration to such as arise from increased conveniences for carrying on business, because of the opportunity of connecting the property with the railway by tracks and sidings. In this way, no doubt, and by the facilities afforded for receiving and shipping goods, a manufactory, such as the one in question, could be greately benefited.

Applying these general remarks to the claim under consideration it is clear, I think, that, for the most part, the claim could not be entertained in the form in which it is presented.

With the exception, however, of items 16 and 17, which will be represented by interest on the amount allowed, and item 23, which is a matter of cost rather than compensation, the other items present elements of value or depreciation which, if established by the evidence, should be considered and disposed of in making the assessment of compensation. For example, items 1, 2 and 3 are to be considered in fixing the value of the property expropriated; items 14 and 15, in deciding as to whether or not there is a depreciation of the value of the property because, by reason of the expropriation, it has become impossible to put it to some use to which the claimant could formerly have put it; items 4, 5, 6, 7, 8, 9, 10 and 12 in considering how far the premises were, by the expropriation, rendered unfit for the claimant's business, and therefore depreciated in value to him, and whether the works constructed or proposed by him for the purpose of putting it in a state to continue that business were or are reasonably necessary; and items 11, 13, 18, 19, 20, 21 and 22 in deciding as to whether or not there is any

(1) *Sutherland on Damages* Vol. 3, 452-3-4.

depreciation in the value of the property to the claimant, because, even after he has done what he can to counteract any inconvenience occasioned by the construction of the railway, he is still compelled to conduct his business at a greater expense than formerly.

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In other words, items 1, 2 and 3 will be disposed of when the value of the property expropriated has been fixed, while the amount allowed for the depreciation in value of the property not expropriated (which, as before stated, must be assessed in view of the special advantages which such property derives from the construction of the railway) will include the other items mentioned.

Now I do not wish to be understood as expressing any opinion as to whether or not the claimant has, in respect of the value of the property taken, or of any of the elements of depreciation, made out his case; and especially do I wish to guard against being thought to approve of the calculations and extensions presented in reference to such items of the claim as 11, 13, 14, 15, 18, 19, 20 and 22. It was to items similar to these, I apprehend, that Mr. Justice Taschereau referred in the case of *Paradis* v. *The Queen*, (1) when he expressed the opinion that the statement of claim in that case was most extraordinary, "its gross exaggerations being only equalled by its striking illegalities."

In the view I take of this case it is not necessary for me at present to express any opinion as to the amount of compensation that should be awarded. That is peculiarly a matter for the consideration of the Arbitrators, and did I think that the case had been properly presented to them I would not be inclined to interfere with their finding. But it appears to me that neither the value of the property expropriated, nor its depreciation can be satisfactorily assessed without knowing

(1) 1 Ex. C. R. 217.

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what the claimant's title is, and whether or not it is free from, or burdened by, conditions.

I have no doubt that every witness who put a value upon this property, or of any part of it, and that the Arbitrators in making their award, did so on the assumption that the claimant had a good title to the premises, free from any burdensome condition. It is impossible for it to be otherwise, as they did not have before them the grants to which I have referred, but only extracts therefrom showing the descriptions of the several lots.

I think that the assessment has not proceeded on a correct principle, and therefore I set aside the award and remit the whole matter to the said Arbitrators, Messrs. Cowan, Compton, Simard, and Muma, now Official Referees of this court, for their re-consideration and re-determination and for report to the court, for which purpose they have leave to hear further evidence and the parties as they shall see fit.

Such report should show:—

(1) The date of the expropriation, from which date interest should be allowed.

(2.) The assessment of compensation, and the manner in which this amount is arrived at.

(3.) Whether the Official Referees have ascertained definitely the claimant's interest in the premises, and whether the same is free from any incumbrance or charge, and whether the compensation is awarded in reference to his interest only, or in respect of the entire estate, and for indemnity to every person, who, at the time of the expropriation, may have had any interest therein.

Case remitted to Official Referees for re-consideration; costs reserved.

Solicitor for Respondent: *J. G. Bossé.*

Solicitors for Appellant: *O'Connor & Hogg.*

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

1888
Dec. 13.

AND

JOSEPH N. POULIOT, FORTUNAT F. ROULEAU AND ARTHUR P. LETENDRE..... DEFENDANTS.

Information—Statutory defence—Demurrer—Illegality of contract—Dominion Elections Act, 1874—*Interpretation Act (R.S.C.c. 1 s. 7 subsec. 46).*

The information alleged an agreement with Her Majesty whereby in consideration of the conveyance by the Intercolonial Railway of certain passengers between certain stations, the defendants agreed to pay Her Majesty, through the proper officers of that railway, the fares or passage money of such passengers at the rate therein mentioned as agreed to between the defendants and such officers. The defendants, admitting the agreement as alleged, sought to avoid it by setting up as a defence that such passengers were carried on *bons* in blank signed by one of the defendants only.

Held,(on demurrer to the plea) to be no answer to the breach of contract alleged.

2. The Crown is not bound by sections 100 and 122 of *The Dominion Elections Act*, 1874.

3. The 46th clause of the 7th section of *The Interpretation Act*, (R.S. C. c. 1.) whereby it is provided that no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, Her Heirs or Successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not limited or qualified by any exception such as that mentioned in *The Magdalen College case* (11 Rep. 70b), "that the King is impliedly bound by statutes passed for the general good * * * * or to prevent fraud, injury, or wrong."

DEMURRER to defendants' pleas.

By an information filed by Her Majesty's Attorney-General for the Dominion of Canada the court was informed as follows:—

"1. The Intercolonial Railway is a public work of

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the Dominion of Canada vested in Her Majesty The Queen, and is managed and worked by officers duly appointed by and under the control of the Government of the said Dominion.

"2. That, in the month of September A.D. 1878, the defendants entered into an agreement with Her Majesty, through certain of the officers managing the said Intercolonial Railway, whereby in consideration of the carriage and conveyance over and upon the said railway, between certain stations, of certain passengers, they the defendants would pay to Her Majesty, through the proper officer of the said railway, the fares or passage money of the said passengers at the rates hereinafter mentioned, as then agreed upon between the defendants and the said officers.

"3. That in pursuance of the agreement mentioned in the preceding paragraphs, there were carried and conveyed over and upon the said railway a large number of passengers, to wit: eight hundred and fifty-four, at the prices, and between the stations, following:—

34	passengers, return	tickets,	Bic to	Rimouski,	at 20c.....	$ 6 80
160	do	do	St. Fabien	do	at 38c.....	60 80
191	do	do	St. Simon	do	at 58c.....	110 78
100	do	do	Ste. Luce	do	at 20c.....	20 00
208	do	do	Ste. Flavie	do	at 36c.....	74 88
100	do	do	Metis Rd.	do	at 46c.....	46 00
61	do	do	St. Octave	do	at 54c.....	32 94
854						$352 20

Whereby the said defendants have become indebted to Her said Majesty in a large sum of money, to wit:— the said sum of $352.20.

"4. The defendants have not paid Her Majesty the said sum of $352.20, or any part thereof, and the whole of the said sum is now due, together with interest thereon from the 10th day of September A.D. 1878.

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Whereby Her Majesty is entitled to demand judgment against the defendants.

CLAIM.

"Judgment against the said defendants for the sum of $352.20, with interest thereon at the rate of six per cent. per annum, from the 10th day of September, A.D. 1878, and costs of suit."

To this information the defendants pleaded as follows:—

"1. The said defendants in this cause, for plea or answer to the information of the Honourable the Attorney-General for the Dominion of Canada, on behalf of Her Majesty, not confessing or acknowledging any of the matters and things in the said information set forth and alleged to be true, but on the contrary hereby expressly denying the truth of each and every the allegations of the said information, saith:

"2. That the said passengers, in the information mentioned, were so carried and conveyed to Rimouski from certain places therein mentioned and back, on *bons* in blank signed by the defendant Joseph N. Pouliot in the following form:

"Good for return tickets to Rimouski and back on the tenth September instant.

"J. N. POULIOT.

"Rimouski, 7th September, 1878.

"And that the plaintiff should, and ought to have brought Her said action against the said Joseph N. Pouliot on the said *bons*.

"3. That the said alleged agreement in the information mentioned (which said alleged agreement, except for the purposes of this plea, the defendants do not admit) was made on or about the 7th day of September, A.D., 1878, and that the 10th day of the said month of September was the day appointed at the last general elections for the nomination of candidates to serve as

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members of the Parliament of Canada, and that the said alleged agreement was an executory contract, promise, or agreement unlawfully made between the plaintiff, Her said Majesty represented as in the information mentioned by the said certain officers managing the said Intercolonial Railway and the defendants, and was an executory contract, promise, or agreement to carry and convey on the said 10th day of September certain passengers, as in the said information mentioned, to the town of Rimouski and back to the respective homes of such passengers, for the purpose of being present at the said town of Rimouski at the said nomination of candidates to serve as member aforesaid for the county of Rimouski, and for the purpose of hearing the election speeches of the said candidates, with the intent and in view of influencing the electors aforesaid to vote for Doctor Romuald Fiset, hereinafter mentioned, a fact well known to the plaintiff, represented as aforesaid, at the time of such agreement, and for other election purposes, or for purposes arising out of or connected with the said election; and that at the nomination the said Doctor Romuald Fiset, a member of the Parliament of Canada for the said county of Rimouski and the Honourable Hector L. Langevin, C. B. were nominated as candidates to serve as member, as aforesaid; and that the said passengers in the said information mentioned, being supporters of the said Doctor Romuald Fiset, and duly qualified to vote as electors at the said election for the county of Rimouski, were carried under the said alleged agreement for the election purposes aforesaid and not otherwise; and that the said conveyance of the said passengers unlawfully did influence the whole election in favor of the said Doctor Romuald Fiset; and that at the time of entering into the said alleged agreement, and at the time of carrying the said

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passengers, the plaintiff, represented as aforesaid, had full notice of the premises.

Wherefore the defendants say that by reason of the premises, and of *The Dominion Elections Act*, 1874 (1), the said alleged agreement in the information mentioned was and is void and of no effect; and pray that the said information be hence dismissed and set aside with costs."

" 4. That the said alleged agreement in the information mentioned (which said alleged agreement, except for the purposes of this plea, the defendants do not admit) was made on or about the 7th day of September A.D., 1878, and that the 10th day of the said month of September was the day appointed at the last general election for the nomination of candidates to serve as members of the Parliament of Canada, and that the said alleged agreement was an executory contract, promise or agreement, made between the plaintiff, Her said Majesty, represented, as in the information mentioned, by the said certain officers managing the said Intercolonial Railway and the defendants as agents of, and as representing, one Doctor Fiset hereinafter re-

(1) Sec. 100 reads as follows :—

"Every executory contract, or promise, or undertaking, in any way referring to, arising out of, or depending upon, any election under this Act, even for the payment of lawful expenses, or the doing of some lawful act, shall be void in law; but this provision shall not enable any person to recover back any money paid for lawful expenses connected with such election."

The portion of sec. 122 which affects the case is as follows :—

"All persons who have any bills, charges or claims upon any candidate for or in respect of any election, shall send in such bills, charges or claims within one month after the day of the declaration of the election, to such agent or agents as aforesaid; otherwise such persons shall be barred of their right to recover such claims, and every or any part thereof, * * * provided that such bills, charges and claims shall and may be sent in and delivered to the candidate, if and so long as, during the said month, there shall, owing to death or legal incapacity, be no such agent; and provided also, that the agent shall not pay any such bill, charge or claim without the authority of the candidate, as well as the approval of the agent."

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ferred to and was an executory contract, promise or agreement to carry and convey on the said tenth day of September certain passengers, as in the said information mentioned, to the town of Rimouski and back to the respective homes of such passengers, for the purpose of being present at the said town of Rimouski at the said nomination of candidates to serve as member aforesaid, and for the purpose of hearing the election speeches of the said candidates and for other election purposes, or for purposes arising out of, or connected with, the said election, and that at the said nomination the said Doctor Romuald Fiset, a member of the Parliament of Canada for the said county of Rimouski, and the Honourable Hector L. Langevin, C.B. were nominated as candidates to serve as member as aforesaid, and that the said passengers in the said information mentioned, being supporters of the said Doctor Fiset and duly qualified to vote as electors at the said election for the county of Rimouski, were carried under the said alleged agreement for the election purposes aforesaid, and not otherwise; and that at the time of entering into the said alleged agreement and at the time of carrying the said passengers, the plaintiff, represented as aforesaid, had full notice of the premises.

"5. And that afterwards the election was duly holden and the said Doctor Romuald Fiset was duly elected as member as aforesaid, but the plaintiff did not, within one month after the day of the declaration of the said election, send in or transmit to the defendant, Fortunat F. Rouleau, the duly appointed agent of the said Doctor Fiset at the said election, any claim for the said carriage and conveyance of the said passengers in the information mentioned, in pursuance of section 122 of *The Dominion Elections Act*, 1874.

"Wherefore the defendants submit by reason of such default in sending in such claim, and by force of the

said *The Dominion Elections Act*, 1874, the said alleged agreement in the information mentioned became and is void and of no effect,and pray that the said information be hence dismissed and set aside ; the whole with costs.

"6. And the said defendants for a further plea to the said information of the Honourable the Attorney-General of Canada on behalf of Her Majesty, in this cause filed, hereby expressly deny the truth of each and every allegation of facts stated and set forth in the said information.

"7. Wherefore the defendants pray that by the judgment in this cause the said information be held and declared to be not well founded, and that it be hence dismissed and set aside; the whole with costs.

The plaintiff joined issue upon the pleas of the defendants, and also demurred thereto as follows:—

"1. The plaintiff joins issue on all the pleas or defences of the defendants herein to the information of the plaintiff.

"2. The plaintiff demurs to the first plea or answer of the defendants herein, and says the same is bad in law on the grounds following:

Because the claim of the plaintiff is based upon a contract made by the defendants, which is set out in the information,whereby the defendants agreed to pay to Her Majesty the moneys mentioned in the information, and it is no answer to the breach of said contract to allege that the passengers, for the carriage of whom the claim is made under the contract set out, were carried on *bons* signed by one of the defendants.

"3. The plaintiff also demurs to the second plea or defence of the defendants herein, and says the same is bad in law on the grounds following:

Because the provisions of *The Dominion Elections Act*, 1874, referred to in the said plea or defence, do not prevent Her Majesty from recovering upon the

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contract set out in the information, as such provisions do not apply to the Crown.

"4. The plaintiff also demurs to the third plea or defence of the defendants herein, and says the same is bad in law on the grounds following:

Because the provisions of *The Dominion Elections Act*, 1874, referred to in the said plea or defence, do not prevent Her Majesty from recovering upon the contract set out in the information, as such provisions do not apply to the Crown."

November 29th, 1888.

Hogg, in support of demurrer: The Crown is not within the purview of the prohibitory clauses of *The Dominion Elections Act*, 1874: [1.] Because the Sovereign can do no wrong, and therefore Parliament could not be supposed to have intended to legislate against the Crown in such a case; [2], the provisions of *The Interpretation Act* (R. S. C. c. 1, s. 7, sub-sec. 46) explicitly except the Crown from the operation of any Act wherein it is not expressly mentioned that it shall be bound thereby.

Cites *Chitty on Prerogatives* (1); *Maxwell on Statutes* (2).

Sinclair, contra: The word "rights" as used in sub-sec. 46 of sec. 7 of *The Interpretation Act*, means *prerogative* rights only, and the Crown never had any prerogative right to enforce a contract such as the one set out in the information in this case. The Legislature by this sub-section only intended to re-enact the rule at common law, that the Crown may be bound by express words or necessary implication; and this statute being for the public good, upon well recognized principles, impliedly bound the Crown. In order to accede to the argument of the learned counsel for the Crown that no statute can affect the Sovereign

(1) P. 382. (2) 2nd ed. p. 161.

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unless the Sovereign is mentioned therein, this sub-section must be construed as if it read "no provision in any statute shall affect Her Majesty," &c., leaving out the word "rights" as superfluous. He cited *Chitty on Prerogatives* (1), *Hardcastle on Statutory Law* (2).

BURBIDGE, J., now (December 13th, 1888) delivered judgment.

It is alleged in the information in this case that the defendants entered into an agreement with Her Majesty, through certain officers managing the Intercolonial Railway, whereby, in consideration of the carriage and conveyance over and upon the said railway between certain stations of certain passengers, the defendants agreed to pay to Her Majesty, through the proper officers of the said railway, the fares or passage money of such passengers at the rate therein mentioned, as agreed upon between the defendants and such officers. The defendants, admitting the agreement, seek to avoid it, by setting up as a defence thereto that such passengers were carried on *bons* in blank, signed by the defendant Joseph N. Pouliot in the following form:—

Good for return tickets to Rimouski and back on the tenth of September instant.

(Signed) J. N. POULIOT.

Rimouski, 7th September, 1878.

and that the action should have been brought against the said Joseph N. Pouliot on such *bons*.

To this plea the plaintiff demurs on the ground that it does not present an answer to the breach of contract alleged; and of that there can, I think, be no doubt. If the defendants promised, as alleged, to pay the fares mentioned, their liability cannot be in any way affected by the fact that the passengers were carried on the production, to the officer in charge of the train, of such

(1) Pp. 4-7. (2) Pp. 180-185.

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bons or orders, or that such *bons* were signed by one and not by all the defendants.

The second and third pleas suggest a number of questions, but the argument was confined to the single issue raised by the demurrer as to whether or not the Crown is bound by the provisions of the 100th and 122nd sections of *The Dominion Elections Act*, 1874 (37 Vic , c. 9).

By the 100th section of the Act mentioned it is provided that every executory contract, or promise, or undertaking in any way referring to, arising out of, or depending upon any election under the Act, even for the payment of lawful expenses or the doing of some lawful act shall be void in law, but that no person shall receive back any money paid for lawful expenses connected with any such election. This provision first occurs, I think, in an Act of the Province of Canada for the more effectual prevention of corrupt practices at elections (23 Vic. c. 17, s. 6).

By the first clause of the 122nd section of *The Dominion Elections Act*, 1874, it is enacted that all persons who have any bills, charges or claims upon any candidate for or in respect of any election, shall send in such bills, charges, or claims within one month after the day of the declaration of the election to the agent of the candidate, otherwise such persons shall be barred of their right to recover such claims. A similar provision is to be found in an Act of the Parliament of the United Kingdom to amend the law relating to corrupt practices at elections (26-27 Vic. c. 29, s. 3).

The law as to what statutes are binding on the Crown is to be found in the 46th clause of the 7th section of *The Interpretation Act* (R. S. C., c. 1), where it is enacted that no provision in any Act shall affect, in any manner or way whatsoever, the rights of Her

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Majesty, Her Heirs and Successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.

This provision occurs for the first time, I think, in an Act of the Province of Canada for putting a legislative interpretation on certain terms used in Acts of Parliament, and for rendering it unnecessary to repeat certain provisions and expressions therein, and for ascertaining the date and commencement thereof, and for other purposes (12 Vic., c. 10, s. 5, (25)). From this Act it found its way into the *Consolidated Statutes of Canada* (c. 5, s. 6 (25)), and was made applicable to the *Consolidated Statutes of Lower Canada* and of *Upper Canada* (C.S.L.C , c. 1., s. 13,—C.S.U.C., c. 12, s. 19). It is also found in *The Interpretation Act* passed in 1867 by the Parliament of Canada (31 Vic., c. 1, s. 7 (33)); in 1868, by the Legislature of Ontario (31 Vic., c. 1, s. 7 (31)); in 1871, by the Legislature of Manitoba (34 Vic., c. 1, s. 7 (27)); and in 1872, by the Legislature of British Columbia (35 Vic., c. 1, s. 7 (30)); and has been continued in subsequent revisions of the statutes of the Dominion and of the Provinces named. In the *Quebec Interpretation Act* (31 Vic., c. 7, s. 5) the language of the older statutes was not followed, it being provided that "no Act affects the rights of the Crown unless they are specially included."

The general rule to be deduced from decided cases is that the Crown is not bound by a statute unless named therein, or included therein by necessary implication.

When, from the language used, it is manifest that it was the intention of the Legislature to include the Crown, it is sufficiently named within this rule (1).

(1) *Moore* v. *Smith*, 1 El. & El., 597; *Theberge* v. *Landry*, L. R., 2 App. Cas.. 102; *Cushing* v. *Dupuy*, L. R., 5 App. Cas., 409.

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The Intrepretation Act, however, in its literal and grammatical meaning demands more than this. Not only must the Queen be named, but her rights are not to be affected unless it is expressly stated in the enactment that she shall be bound thereby.

It is not necessary, however, in this case to come to a conclusion as to whether or not the general rule to which I have referred has been narrowed by *The Interpretation Act*, for it is not contended that there are in *The Dominion Elections Act*, 1874, any words which, either expressly or by implication, indicate an intention on the part of the Legislature that the Crown should be bound thereby.

The defendants' contention is that *The Dominion Elections Act*, 1874, falls within the exception to be found in the older authorities "that the King is impliedly bound by statutes passed for the general good; the relief of the poor; the general advancement of learning, religion and justice; or to prevent fraud, injury or wrong (1)."

It is to be observed that the language of the exception is very general and large enough to include many statutes that have never been thought to apply to the Crown. In *Maxwell on the Interpretation of Statutes* (2), it is stated that probably it is more accurate to say that the Crown is not excluded from the operation of a statute where neither its prerogatives, rights, nor property are in question; and though it may be true that there is no case in which the very general propositions propounded by Lord Coke in the *Magdalen College case* (3), have been expressly denied or over-ruled (4),

(1) Chitty on Prerogatives, p. 382; *Magdalen College, case* 11 Rep. 70b; Bac. Abr. *Prerogative* (E.) Vol. 8; Maxwell on Statutes p. 166; Hardcastle on Statutory Law p. 185; Wilberforce on Statute Law, pp. 40-41.

(2) P. 167.

(3) Cited *ante*.

(4) Hardcastle on Statutory Law, p. 190.

they have not, I think, been approved or followed in later cases.

With reference to the fact that the enactments in question occur in statutes for the prevention of corrupt practices at elections, and were passed with a view of preventing such practices, it appears to me for obvious reasons that the proposition that the law is *primâ facie* made for subjects only applies with peculiar force to such statutes.

Then, too, it is to be observed that the 100th and 122nd sections of *The Dominion Elections Act*, 1874, create statutory defences to actions upon contracts arising out of Parliamentary elections—the former by making any such executory contract void, and the latter by barring the remedy against the candidate if its provisions are not complied with. But the law is that a defendant cannot, in a proceeding on behalf of the Crown, plead a defence given by statute unless the Crown is named therein; and it has never been doubted that the right of the Queen to collect debts due to her, and the remedies that she may employ therefor, are not impaired by any Act of Parliament unless the Crown is by express words or necessary implication included therein (1).

Looking at the language used by the Legislature, "All persons shall send in such bills &c." (122nd section)—"this provision shall not enable any person to recover back any money paid for lawful expenses" (100th section)—and having regard to the context and the relation of the Crown to the election of members of the House of Commons, I would, apart from *The Interpretation Act*, be of opinion that the Legislature did not intend the provisions of *The Dominion Elections Act*, 1874, referred to, to apply to the Crown (2).

(1) Chitty on Prerogatives pp. 366-383.

(2) *R.* v. *Tuchin* 2 Ld. Raymond 1066; *The Queen* v. *Benson* 2 P. R. (U.C.) 350; *Regina* v. *Davidson* 21 U.C.Q.B. 41.

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But in my opinion *The Intrepretation Act* is conclusive. Its language is explicit and I fail to discover any good reason for modifying its plain negative words by reading into the Act a provision of such general character, and doubtful authority, as the exception to which I have alluded.

The defendant also contends that the word "rights" in the 46th paragraph of the 7th section of *The Interpretation Act* means prerogative rights; that Her Majesty has no prerogative right to interfere in the carrying on of elections for the purpose of unlawfully influencing the result; that the provisions of *The Dominion Elections Act*, 1874, directed against such unlawful interference, do not impair or affect any of Her Majesty's prerogatives, and are therefore binding on the Crown and subject alike.

This contention, it seems to me, is open to a number of observations; but I do not propose to discuss it further than to repeat that the rights affected by the 100th and 122nd sections of the Act last mentioned are rights of action, and that in the case of the Crown such rights, and the remedies by which they are enforced, are not affected by any statute unless there are words therein manifesting on the part of the Legislature an intention so to affect them.

Briefly stated the case is this :—The defendants, admitting that they promised the Crown to pay the fares or passage money as mentioned, allege that the action cannot be maintained because the promise arose out of an election under *The Dominion Elections Act*, 1874, and the 100th section thereof makes such promise void, and the 122nd section bars the remedy,—no statement of claim having been sent to the candidate's agent within one month after the day of the declaration of such election. To this plea the plaintiff demurs on the ground that, assuming the promise to have arisen

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out of an election under the Act relied on, neither Her Majesty's right of action, nor her remedy for enforcing the same, is defeated or affected by the Act, as the Crown is not included therein either by express words or necessary implication; and in my opinion the demurrer should be sustained.

There will be judgment for the plaintiff on demurrer to the defendants' pleas.

Demurrer allowed with costs.

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitor for defendants: *J. N. Pouliot.*

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Feb. 5.

GEORGE P. MAGANN.....PLAINTIFF;

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Revenue—Customs duties—Tariff Act, (1886)—Schedule "C."—"Shaped" lumber.

Under item (Departmental No.) 726 in Schedule "C." of the *Tariff Act* (1886) oak lumber sawn, but not "shaped, planed, or otherwise manufactured," may be imported into Canada free of duty.

Plaintiff imported a quantity of white oak lumber from the United States which had been sawn to certain dimensions so as to admit of it being used in the manufacture of railway cars and trucks without waste of material, but yet before being used for such purpose had to be re-cut and fitted.

Held,—That the lumber, being merely sawn to such dimensions as would enable it to be worked up without waste, was not "shaped" within the meaning of the *Tariff Act*, and was not dutiable.

THIS was a claim for a refund of duties paid by the plaintiff upon the importation of certain lumber from the United States.

The facts of the case are as follows :—

By item (Departmental No.) 726, Schedule "C." of the *Tariff Act* (1886), it is provided that the following articles shall be admitted into Canada free of duty, that is to say :—

"Lumber and timber, plank and boards, sawn, or box-wood, cherry, walnut, chestnut, gumwood, mahogany, pitch-pine, rosewood, sandal-wood, Spanish-cedar, oak, hickory, and white wood, not shaped, planed, or otherwise manufactured, and saw dust of the same, and hickory lumber, sawn to shape for spokes of wheels but not further manufactured."

The plaintiff, having entered into a contract with the Grand Trunk Railway Company to supply the company with a certain quantity of white oak plank

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Statement of Facts.

and boards and white oak lumber of specified thicknesses, widths, and lengths, arranged with certain millmen in the State of Michigan to saw such plank, boards, and lumber from the log. The plank, boards and lumber were intended to be used principally, but not wholly, for the construction of cars and railway trucks, and they were ordered to be sawn, and were in fact sawn, of such thicknesses, widths, and lengths as to admit of their being used in such construction without waste of material The lengths called for by the contract varied, the shortest being two feet two inches, and the invoices upon which duty was collected and paid, under protest, indicated that the lumber when imported was cut to these exact lengths; but the fact as proved by the plaintiff and not denied by the defendant, no witnesses being called for the Crown, was that while the invoices disclosed the correct quantity of material imported, there being in each entry the equivalent of the number of pieces shown in the invoice, they did not show accurately the shape of the different pieces, and that, with perhaps a few unimportant exceptions, the lumber was imported in lengths in which it would be commercial or merchantable,—care being taken only that the lengths would be such that the lumber could, in Canada, be sawn into the shorter and specified lengths without waste.

With reference to the lumber it was proved that after it had been cut to the specified lengths the pieces could not be used in the construction of cars without being re-cut and fitted.

February 5th, 1889.

McCarthy, Q.C. (with whom was *Robinson*, Q.C. and *MacKelcan*) for the plaintiff, contended that the sawing of the lumber from the log at the mill of such thicknesses, widths, and lengths that it might be used by the plaintiff without waste did not amount to shap-

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Argument of Counsel.

Judgment.

ing the same within the meaning of the statute. That if, which did not appear to be denied, the lumber in question, in the shape and condition in which it was, would be free of duty if imported for general purposes, or for no definite purpose, it would not become dutiable because its length was such that it could conveniently, and without waste, be cut up and used for a specific purpose, and that the plaintiff, in ordering the lumber as he did from the mill-men, simply had that in view. That a piece of white oak lumber could not at one and the same time be shaped or not shaped, dutiable or not dutiable, according to the use to which it was to be put. That Parliament not having enacted, as it had done in other cases, that the article should be dutiable, or not, according to the use to which it was intended to be applied by the importer or his customers,—as, for instance, that a white oak plank 30 feet long which, being imported for no specific purpose or for general purposes, would be free of duty,—it would not become dutiable because the importer intended to cut it into five pieces six feet long, each of which was adapted to, and intended to be used for, some specific purpose.

Sedgewick, Q.C. (with whom was *Hogg*) for the Crown, contended that the lumber being so cut in the United States as to be conveniently fitted in the construction of cars in Canada, was sufficiently shaped to bring it within the exception contained in the item of the tariff referred to.

Per curiam: The plank, boards, and lumber in question, in the form in which they were imported, were not shaped within the meaning of the statute, and were not dutiable.

Judgment for plaintiff, with costs.

Solicitors for plaintiff: *MacKelcan & Mewburn.*

Solicitors for defendant: *O'Connor & Hogg.*

NICHOLAS CONRAD PETERSON.....SUPPLIANT; 1889

Mar. 5.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of Right—Indian Reserve lands—Conditional sale—Waiver.

Suppliant purchased from the Crown a parcel of land, forming part of an Indian Reserve, subject to the condition that unless he erected certain manufacturing works thereon within a given time he would forfeit all rights under the sale. A portion of the purchase money was paid down. Some time after the expiry of the time wherein suppliant was bound to erect the works but had not done so, the Crown, through a duly authorized officer, accepted and received the balance of the purchase money from him,—such officer stating, however, that the sale would not be complete until the condition upon which it was made was complied with. On petition praying for a declaration by the court that suppliant was entitled to letters-patent for said land,—

Held:—(1). That the acceptance of the balance of the purchase money, under the circumstances, constituted a waiver of the condition in respect of the time within which it was to be performed, but not of the condition itself; and that inasmuch as the suppliant had not performed such condition, he was not entitled to the relief prayed for. *Clarke* v. *The Queen* (1 Ex. C. R. 182), *The Canada Central Railway Company* v. *The Queen* (20 Grant 273) referred to.

(2). While the law is that the Crown is not bound by estoppels and no laches can be imputed to it, and there is no reason why it should suffer by the negligence of its officers, yet forfeitures such as accrued in this case may be waived by the acts of Ministers and officers of the Crown. *Attorney-General of Victoria* v. *Ettershank* (L. R. 6 P. C. 354), and *Davenport* v. *The Queen* (3 App. Cas. 115) referred to.

PETITION of right praying for a declaration by the court that the suppliant was entitled to letters-patent for certain lands, being portion of an Indian Reserve

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near the town of Sarnia, in the County of Lambton, Ontario.

The facts of the case, and the points of law raised on the argument, are fully stated in the judgment.

December 18th, 1888.

S. H. Blake, Q.C., and *Adams* for the suppliant;

Nesbitt for the respondent.

BURBIDGE, J. now (March 5th, 1889,) delivered judgment.

This is a petition praying for a declaration that the suppliant is entitled to letters-patent for lots one and two, Riverside, and lots one, two, three and four, range one, and lots one, two, three and four, range two, in the new survey of Indian Lands on the south of the town of Sarnia, in the County of Lambton, Ont.

In November, 1879, the suppliant, a machinist having a foundry and machine shop at Sarnia, by letter, dated the 17th day of that month, made application to the Superintendent-General of Indian Affairs for the lots in question and a number of other lots (the whole containing some ten acres), stating that he wished to secure such lots for immediate use, and for the erection thereon of an iron foundry and machine and boiler works. The Superintendent-General declining to treat for the sale of so large a block of land as that applied for, the suppliant, after considerable correspondence, on May 27th, 1880, accepted the offer made to him through Mr. Watson, the Indian Agent at Sarnia, to purchase the lots in question for the sum of one thousand dollars. His letter of acceptance concluded as follows: "I will also commence as soon as possible, on the above "mentioned grounds, the construction of the necessary "buildings for manufacturing."

At this time the Superintendent-General intended to sell in lots a portion of the Reserve of which those

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sold to Peterson formed a part, and it was thought that the selling price of the former would be enhanced by the construction on the latter of such buildings and works as the suppliant proposed to construct, and it is clear that, but for this consideration, the price demanded for the latter would have been considerably more than it was. This was well understood by both parties to the agreement, and it is not denied that the suppliant's undertaking to put up such buildings formed part of the consideration for the lots purchased by him.

On the 30th of July, 1880, the first instalment of the purchase money was paid, when the following receipt was given to the suppliant :—

INDIAN DEPARTMENT.

$200. A. SARNIA, 30th July, 1880.

No. 389 of Indian Land Sale.

Received from N. C. Peterson the sum of two hundred dollars, being the first instalment of one-fifth on the purchase of lots 1 and 2, Riverside, and lots 1, 2, 3, 4, range No. 1, lots 1, 2, 3, 4, range No. 2, in the new survey of Indian Land on the south of the town of Sarnia, sold to him on the 30th July, 1880, for the sum of one thousand dollars ; the terms of payment being one-fifth down, and the balance in four equal annual instalments with interest on each, from the date of purchase, at the rate of six per cent. per annum. It being expressly provided that the erection of buildings for manufacturing purposes within nine months is one of the conditions of sale.

It is an express condition of the above sale that the purchaser, or his heirs or assigns, shall pay regularly the instalments, together with the interest, as they fall due, till the whole shall be paid, under pain of forfeiture of the land above sold ; and also of all the instalments already paid on account of the same.

(Sgd.) EBENEZER WATSON,
Indian Supt.

Afterwards the suppliant went into possession of the property, and in September, 1880, placed thereon a quantity of bricks to be used in the erection of the proposed buildings ; and though he has since maintained his possession, he has not taken any further

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steps to carry out the condition to erect such buildings. At the time of the purchase it was understood that the proposed works would be constructed on lots 1 and 2, Riverside, at a place then crossed by the highway, which the Superintendent-General proposed to divert, substituting therefor a convenient way along River Street. This necessitated the construction of a bridge, which was not finished until July, 1881; and though thereafter the public could use River Street, the latter did not, apparently, until 1882, when the bridge was raised, afford as convenient a way as that along the river bank. Subsequently, when difference arose between the suppliant and the Superintendent-General, the former urged the delay in affecting the diversion of the highway as an excuse for his not erecting the proposed works. There is some conflict of testimony as to what took place between the suppliant and Watson, the Indian Agent, in respect of this matter; but apparently there was an understanding that the former should not put up his buildings until the bridge was built. I am not, however, wholly satisfied that this was the only, or even the primary, reason for the suppliant's delay. But whether it was or not, is, I think, immaterial in view of what subsequently transpired. For, if in August, 1881, the Crown, as I think it did, by the receipt of the balance of the purchase money, waived any forfeiture which had theretofore been occasioned by the suppliant's non-compliance with the condition mentioned, the reasons for such non-compliance, whatever they may have been, cannot, I think, in any way affect the legal position of the parties hereto.

The circumstances surrounding the payment of this balance on the 1st of August, 1881, are in dispute. Watson testifies that on this occasion he told Peterson that such payment would not complete the purchase until the conditions of sale were fulfilled, and if that were not done soon the latter would be in danger of

losing the sale; and that once or twice afterwards he spoke to him about the same thing, and gave him the same warning. Watson also stated that at the time of the payment he made an entry in his official book, which, being produced, contained opposite to a memorandum of the payment in full on August 1st, 1881, of $800, and $48 interest, this note:

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Mr. Peterson not entitled to patent till buildings for manufacturing purposes are completed. See August, 1881, Ret.

The suppliant denies that any such conversations took place. I find the facts to be as stated by Watson, supported, as I think he is to a certain extent, by the entry in his books.

In November, 1880, the Superintendent-General put up for sale at public auction the lots indicated in the survey of the Indian Reserve south of the town of Sarnia, the auctioneer calling attention, and, in his opinion, with good effect, to the sale to the suppliant and his agreement to erect the buildings mentioned. At this time about one-third of the lots were sold, and the remainder were again offered for sale at public auction in January, 1882, and January, 1883, on neither of which occasions was there any reference to the suppliant's undertaking.

After the payment in August, 1881, of the balance of the purchase money no one appears, for some five years, to have taken any interest in the transaction out of which this case arises. In September, 1886, however, the suppliant having become a party to an arbitration with the Erie and Huron Railway company, which had taken for its roadway lots 1 and 2, Riverside, his solicitor, Mr. Adams, on the 9th of that month, applied to the Superintendent-General for letters-patent for all the lots purchased. The correspondence of which this application was the commencement was continued until the 28th June, 1888.

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The position taken by the suppliant in such correspondence is, briefly, that the delay in the diversion of the highway prevented him from erecting his buildings within the time agreed upon, that the condition was waived, and that he is entitled to letters-patent for the lots. On the other hand for the Indian Department it is contended that the suppliant is not so entitled as he has not fulfilled the condition on which he purchased the property, and that the Superintendent-General has been and is in a position to cancel the sale to him and to sell to whom he sees fit. It was also pointed out that no advantage could, after the sale of the lots in the Reserve, accrue to the Indians by the erection of the works which suppliant had agreed to erect.

In May, 1888, the Superintendent-General had the property in question valued by Mr. Watson and Mr. English, another Indian Agent, who concurred in estimating its value at that time at $3,920. For this sum it was offered to the suppliant, he to be credited with the $1,000 already paid. Before considering this offer, the latter wished to know if he would be allowed interest on the $1,000 if he accepted the offer, or whether that sum would be returned to him with interest if he withdrew from the negotiation? In reply he was told that in neither case would he be allowed interest, to which he had no claim as he had had possession of the property.

The suppliant then asked that the letters-patent should issue to him upon his putting up the buildings in accordance with his agreement of 1880, and asked for one year from July 1st, 1888, in which to erect them. By a letter of June 27th, 1888, this request was refused, and suppliant was notified that unless within two months he paid the sum of $2,920, the sale would be cancelled.

Thereupon the suppliant filed his petition.

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The case was fully and ably argued and my attention directed to a large number of cases, to many of which it will not be necessary to refer.

With reference to the undertaking of the suppliant to erect buildings for manufacturing purposes on the lands in question within nine months from July 30th, 1880, I am of the opinion that the acceptance, under the circumstances to which I have referred, on August 1st, 1881, of the balance of the purchase money constituted a waiver of the condition in respect of the time within which it was to be performed and of the forfeiture theretofore occasioned, but not of the condition itself, and that the suppliant, not having performed such condition, is not entitled to the relief which he seeks.

For the suppliant it was contended that the undertaking to erect buildings contained in the receipt of July 30th, 1880, was so vague as to be void, neither the value nor the character thereof being in any way defined, and that the previous correspondence could not be looked at to ascertain what in this respect was the intention of the parties (1). Now, these are difficulties which would, I think, be much more serious than they are if the Crown were seeking to compel the suppliant to carry out his contract. In such a case it might be that the court would not undertake to give directions as to the description of buildings which should be constructed, and to compel their construction. Similar difficulties, but not, I think, insuperable, might have arisen if the suppliant had erected buildings, and if, on his application for letters-patent, a controversy had arisen between him and the Crown as to whether or not such buildings were in accordance with his contract. But here the suppliant has done nothing, and I can see no difficulty

(1) *Wood* v. *Silcock* 50 L. T. (N.S.) 251.

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in the way of the court refusing him relief until he has made some effort to comply with the conditions of the contract to which he became a party.

In this connection it was said that even if the suppliant were bound to erect the buildings mentioned he was not bound to maintain them, and *Jessup* v. *The Grand Trunk Railway Company* (1), and a number of other cases, were cited in support of such proposition. The contention may be good, as to that I express no opinion; but it is, I think, altogether outside the question at issue and does not call for any consideration at present.

For the suppliant it was contended that, admitting the condition to build to be a valid condition, it had been waived, and that such waiver could not be limited to the time within which it was to be performed, but must extend to the condition itself, *Davenport* v. *The Queen* (2), *Dumpor's case* (3), being relied upon. Now, while the law is that the King is not bound by estoppels, and that no laches can be imputed to him, and that there is no reason why he should suffer by the negligence of his officers (4), it appears to be well settled that forfeitures such as accrued in this case may be waived by the acts of Ministers and officers of the Crown. But there is nothing, I think, in any of the cases inconsistent with the view which I have taken; that the waiver may in such a case as this affect the matter of time only and not the substance of the condition. On the contrary it appears to be clear that a waiver of the time within which an

(1) 28 Grant 583, 7 Ont. App. Cas. 128.

(2) 3 App. Cas. 115.

(3) 1 Smith's L. Cas. 43-47.

(4) Chitty on Prerogatives, pp. 379, 381; Everest and Strode on Estoppels, p. 8; *Bridges* v. *Longman* 24 Beav. 27; *Attorney-General of Victoria* v. *Ettershank* L. R. 6 P. C. 354; *Davenport* v. *The Queen*, *ut supra*.

act is to be done is not necessarily a waiver of the act itself (1).

It was suggested that the time within which the buildings were to have been erected having been once waived, the Crown could not insist upon their erection within any defined time. But I do not see that such a state of facts presents any greater difficulty than if the contract had been silent as to time, or in case time had not been of the essence of the contract. In such cases as these it is, I think, beyond question that the Crown could have given the suppliant notice that unless the condition were complied with within a given reasonable time the sale would be cancelled (2).

At the conclusion of the argument I was asked by Mr. Blake, in case I came to the conclusion that the suppliant was not entitled to the relief prayed for, to declare that he would be entitled thereto upon performing, within a reasonable time, the condition to erect buildings for manufacturing purposes. It was urged that, owing to the attitude of the Crown, the suppliant could not afford to take the risks and incur the expenses of building before coming to the court for a declaration of his rights.

With that request I ought not, I think, to comply.

Assuming, contrary to the contention of the Crown to which I shall presently refer, that if the suppliant had a claim, that is, a legal claim to letters-patent of the land in question, arising out of the contract referred to, the court could make a declaration to that effect, it does not follow that in a case in which not having done all that on his part he ought to have done he has no such claim, the court has authority to declare, or would be justified in declaring, that if he should do thus and so he would have such a claim.

(1) *Counter* v. *MacPherson* 5 Moo. P. C. 83.

(2) Fry on Specific Performace, 2nd. ed. 471-473, and cases there cited ; *O'Keefe* v. *Taylor*, 2 Grant 95.

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But even if the authority existed, it is doubtful if, in view of the suppliant's delay, it should be exercised in his favor. Neither do I see how any such declaration could materially benefit him, or the refusal of it injuriously affect his rights. There is nothing now, so far as the facts are before the court, as during seven years and more there has been nothing, to prevent him from perfecting his claim to the letters-patent that he desires to have issued to him. He is in the undisturbed possession of the property and cannot be dispossessed until the sale to him has been cancelled. And here it may not be improper for me to add that I do not think the Superintendent-General, since the waiver of the time within which the condition, that has been broken, was to have been performed, can get rid of the contract without a notice to the suppliant that it will be cancelled if he does not perform such condition within a given reasonable time. The Superintendent-General is, I think, in a position to say to the suppliant:—"I will cancel the contract if you do not perform the condition within nine months" (I mention the time originally agreed upon as an instance only, and not as expressing any view as to what would be a reasonable time). But I do not think that he has a right to say to the suppliant:—"I will cancel the contract if you do not pay me more money for the property."

It was here, I think, that the Department of Indian Affairs took up a position that is not tenable. It was, no doubt, a natural position to assume in view of the suppliant's default and the circumstances of the case. It is one, too, that would, if effect could be given to it, be for the benefit of the Indians interested, of whom the Superintendent-General is the guardian, and it may be that it would, if the parties could agree upon the amount to be paid, afford the best solution of the

difficulty. It necessitates, however, the making of a new contract, involving the consent of both parties, and is, except as it may affect the question of costs, outside the range of the present inquiry.

To refer briefly to another question discussed on the argument of this case, it was contended for the Crown that the court has no jurisdiction to make such a declaration as that prayed for, and the case of *Clarke* v. *The Queen*, decided in this court by Sir William J. Ritchie, C. J. (1), was relied upon. In support of the court's jurisdiction Mr. Blake referred to the changes in the statute since the decision in *Clarke's* case, and to the *Canada Central Railway Company* v. *The Queen* (2), decided by Vice-Chancellor Strong. In the same direction, though in view of the differences in the statutes of Canada and of Victoria not, perhaps, conclusive, is the case of the *Attorney-General of Victoria* v. *Ettershank* (3). The question is no doubt an interesting and important one. and not free from difficulty; but this is not, I think, the time to attempt its solution. The view which I have taken of the case renders that task unnecessary, at least for the present.

Petition dismissed, without costs.

Solicitor for suppliant: *J. Adams.*

Solicitors for respondent: *O'Connor & Hogg.*

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(1) 1 Ex. C. R., 182. (2) 20 Grant 273.
(3) L. R. 6 P. C. 354.

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Mar. 18.

HER MAJESTY THE QUEEN (DEFENDANT)..... } APPELLANT;

AND

THE COMMISSIONERS OF SEWERAGE AND WATER SUPPLY FOR THE CITY OF ST. JOHN, AND PART OF THE CITY OF PORTLAND (CLAIMANTS)..... } RESPONDENTS.

Appeal from report of Official Referee—Damages to property from works executed on Government railway—Parol undertaking to indemnify owners for cost of repairs by officer of the Crown—Crown's liability thereunder.

The claimants' property having been injuriously affected in the carrying out by the Crown of certain improvements in the yards and tracks of the Intercolonial Railway at and near its station in the City of St. John, N.B., A., the Chief Engineer of the railway, verbally agreed with the claimants that the works which it was necessary to execute in order to restore their property to its former safe and serviceable condition, should be executed under the direction of M., the claimants' engineer, and that the Crown would pay to the claimants the cost thereof. The exact extent and character of the works to be so executed were never definitely settled.

The works executed under M.'s direction exceeded what were necessary to remove the injury done, and to a certain extent added to the permanent value of the claimants' property. M. did not act in bad faith, but erred in judgment. The work, however, was done upon and adjacent to the railway property, where it was open at all times to the inspection of the officers and engineers of the railway, and the necessary excavations were made for M. by men employed and paid on behalf of the Crown.

The case was referred to an Official Referee to ascertain the amount of damages, if any, and he reported in favor of claimants for $2,655.62, less certain deductions.

On appeal from this report,

Held (affirming the report), that while the claimants were entitled to take such steps and to execute such works as were necessary to make their property as good, safe and serviceable as it was before the interference therewith, and to recover from the Crown the expenses thereby incurred, they were not entitled to improve

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their water system and service at the Crown's expense. They were entitled to be fully indemnified for any injury done, but to nothing more.

2. The question of A.'s authority, under the circumstances, to make a contract whereby the Crown's liability would be extended, not being raised,—

Held, that the claimants were entitled, under the contract made with A., to recover the cost of the works executed under M.'s direction.

Reasons for Judgment.

APPEAL from a report of one of the Official Referees of the court, recommending that respondents (claimants) be paid the sum of $2,655.62, less certain deductions, as due by the Crown upon an undertaking by one of its officers to indemnify respondents for the cost of executing certain works in connection with their property, rendered necessary by the interference of the tracks of the Intercolonial Railway therewith.

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

January 18th and 19th, 1889.

McLeod, Q.C., and *Pugsley* for appellants;

Barker, Q.C., for respondents.

BURBIDGE, J. now (March 18th, 1889,) delivered judgment.

This is a motion, made on behalf of the defendant, by way of appeal from the report of Mr. Compton, one of the Official Referees of the court, "recommending "that the claimants be paid the amount of their claim, "viz.: two thousand six hundred and fifty-five dollars "and sixty-two cents," less certain deductions therein indicated.

The facts of the case are fully stated in the report and need not be repeated here.

There is no question but the claimants' property was injuriously affected by the alterations and improvements made in 1884, by the Minister of Railways and Canals, in the yard and tracks of the Intercolonial Rail-

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way at and near the station in St. John, N.B., and that claimants were entitled to take such steps, and to execute such works, as were necessary to make their property as good, safe, and serviceable as it was before the interference therewith, and to recover from the defendant the expense thereby incurred. They were not entitled, however, to improve the water system and service of the city of Portland at the Crown's expense. They were entitled to be fully indemnified for any injury done, but to nothing more.

Now it appears clear to me that the claimants, in the extent and character of the works which they executed and the expense which they incurred, exceeded the limit which I have indicated, and that a very considerable portion of the claim made is for works and materials which added to the permanent value and utility of the claimants' property, but which cannot be fairly said to have been rendered necessary by any thing done by the Minister of Railways, or the officers of his Department.

It is, therefore, with hesitation that I have come to the conclusion to dismiss this motion and confirm the report. In coming to this conclusion I am influenced not so much by what passed between the Chief Engineer of the Intercolonial Railway and the Chairman and Engineer of the St. John and Portland Sewerage and Water Commission, as by what thereafter was done and not done. It is clear, I think, that Mr. Gilbert Murdoch, the Engineer of the Commission, was, as well for the Minister of Railways as for the Commission, to have the direction of whatever works were to be executed. I find, too, that Mr. Archibald, the Chief Engineer of the railway, consented to, or at least did not dissent from, the laying of a new main. The work was done upon and adjacent to the railway property. It was open at all times to the inspection of the officers

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and engineers of the railway. The excavations were made by men employed, supervised, and paid on behalf of the Minister of Railways, and Mr. Murdoch was allowed to proceed to the completion of the work without even a suggestion from any one acting in the interest of the railway authorities, who must, I think, be taken to have acquiesced in and assented to what he did. I think it is unfortunate that Mr. Murdoch when, on his return from Halifax, he disapproved of the suggestions as to what works were necessary, made by his assistant in his absence and approved of by Mr. Archibald, did not, in the absence of the latter in British Columbia, communicate with the Chief Superintendent or some other responsible officer of the Intercolonial Railway before going on with the work. But there is, in my opinion, no good ground for concluding, as was suggested upon the argument of this motion, that Mr Murdoch acted in bad faith. That he erred in judgment as to the character and extent of the works which an engineer, occupying the dual position of trust that he occupied, ought to have executed at the Crown's expense, may be, and I think is, true; but that he deliberately and dishonestly used his position to improve the claimants' property at the defendant's cost, I cannot believe.

I am, therefore, of opinion to dismiss the motion, and to confirm the report with costs to the claimants.*

Appeal dismissed with costs.

Solicitor for appellant: *E. McLeod.*

Solicitor for respondent: *G. W. Allen.*

*On appeal to the Supreme Court of Canada (PRESENT: Ritchie, C. J., Strong, Taschereau, Gwynne and Patterson, JJ.), the judgment of the Exchequer Court was affirmed; Strong and Gwynne, JJ. dissenting on the ground that A., the Chief Engineer of the Intercolonial Railway, had no authority to bind the Crown by any such undertaking as that put forward by the claimants herein.

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April 2.

DAVID FALCONER, THE YOUNGER, AND CONRAD G. OLAND, ASSIGNEES OF DAVID FALCONER IN TRUST FOR HIS CREDITORS..... } CLAIMANTS;

AND

HER MAJESTY THE QUEEN..... .....RESPONDENT.

Expropriation of land—50-51 Vic. c. 17—Value for building purposes—Sales of similarly situated properties—Crossings.

When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value.

2. There is no legal liability upon the Crown to give a claimant a crossing over any Government railway, and where the Crown offered by its pleadings to construct a crossing for claimant, the court assessed damages in view of the fact that there was no means of enforcing the performance of such undertaking. (See now 52 Vic. c. 38 s. 3.)

3. Where claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in his pleadings, the court, while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimants' witnesses.

THIS was a claim arising out of an expropriation of lands for the purposes of the Darmouth Branch of the Intercolonial Railway.

January 9th to 16th, 1889.

Henry, Q.C., *Wallace*, and *Weston* for claimants;

Graham, Q.C., and *J. A. Sedgewick* for respondent.

The facts of the case are fully set out in the judgment.

BURBIDGE, J., now (April 2nd, 1889) delivered judgment.

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Reasons for Judgment.

This is a claim for compensation for lands expropriated for the Dartmouth Branch of the Intercolonial Railway, and for damages to other lands of the claimants occasioned by such expropriation and the construction of the railway.

The lands in question are situate within the Town of Darmouth, and are referred to in the statement of claim and in the evidence as Lots 1, 2 and 3.

By notices to the Registrar of this court bearing date the twenty-fifth day of May, 1888, the Minister of Railways and Canals, in accordance with the provisions of *The Expropriation Act*, gave notice of his readiness to pay to the persons entitled to such compensation,—in respect of Lot 1 $50, of Lot 2 $50, and of Lot 3 $100.

The proceedings required by the Act referred to having been taken by the Registrar, the claimants filed in this court a statement of claim in which they allege that by reason of the premises they have suffered damages,—in respect of Lot 1 of $13,000, of Lot 2 of $9,000, and of Lot 3 of $25,000.

By the statement of defence the Attorney-General maintains the sufficiency of the amount of compensation offered by the Minister of Railways and Canals. To this there is a reply, but this question of compensation is the real and, in the end, the only issue to be determined.

In the determination of that question I have had the benefit of the large experience and accurate local knowledge of Mr. Compton, one of the Official Referees of the court, who sat with me as assessor on the hearing of the case.

It will be necessary to refer briefly to each lot and to the manner in which it is affected by the expropriation, but, before doing so, it will be convenient to state a few considerations applicable to the three lots. For twenty or twenty-five years they had been unproduc-

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tive, and in 1884, when part was taken and when the injury complained of was done, they had no value other than their actual value in the market. This value, however, was from their convenient and favorable situation on the harbor of Halifax affected by what I may designate speculative considerations, which, I think, influenced more or less, and to a certain extent properly influenced, the estimates of value given by the witnesses examined before the court. That there is a wide difference between some of such estimates is not, I think, remarkable. Given anything like an active demand for such properties as those in question, I am not prepared to say that their value would not be fairly indicated by the opinions expressed by the witnesses for the claimants. But the fact is that neither in 1884 nor for years before was there, nor has there since been, any such demand. For 30 years the owner had been waiting for the purchaser who never came. Will such demand arise this year or next, or not for 20 years? These are questions which it is impossible to answer, but which are elements entering into, and necessarily rendering uncertain, any conclusion that may be arrived at. In such cases, I know of no rule safer than to ascertain values, as nearly as may be, by comparison with actual sales of similar and similarly situated properties of which the evidence in this case affords a number of instances. Subjected to this test all the estimates made by the witnesses called for the claimants are, I think, excessive; while those made by the witnesses examined on behalf of the defendant appear to me to approximate the actual value of the several properties in 1884.

In constructing the railway no crossing or means of access from the highway to the several lots had been provided, and the absence thereof tended, the claimants alleged, to depreciate the value of their properties.

It appears that in constructing Government railways it is the practice to give to each adjoining proprietor, upon request therefor, one crossing, although there is no legal liability so to do. In the present case this was not done. The properties were not being used for any purpose, and no one asked to have such crossings made. The Crown has, however, by an amendment to the statement of defence, offered to construct such crossings. The faith of the Crown being thereby pledged it cannot be doubted that the necessary crossings will, when they are required, be made ; though the fact that the claimants must rely therefor upon an obligation that is not enforceable, is one which, I think, should not be overlooked in assessing the compensation to be made to them.

Lot 1.—According to the statement of claim this property (lot 1) had a water frontage of 676 feet and extended from Water Street out into the harbor about 300 feet. By the deed from Fairbanks, and others, to Falconer, dated August 10th, 1866, it appears to have had a frontage of some 650 feet with a width from high-water mark out into the harbor of 200 feet at the eastern side thereof and of 250 feet at the western.

At one time, many years ago, there were upon it buildings and wharves. Of these no trace is left. One building was burned, and the others and the wharves have been destroyed and washed away. Of lot 1, there was taken for the purposes of the railway a strip about thirty feet wide along the water front and adjoining Water Street. In March, 1884, David Falconer, the elder, entered into an agreement (Exhibit D) whereby for the sum of fifty dollars to be paid to him, he bound himself to convey to the Crown for the purposes of the said railway a right of way not exceeding fifteen feet in width across this property and adjoining Water Street. At this time he was not the

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owner in fee, but was entitled to a reversion under the trust deed (Exhibit C); but it is, I think, clear that during his life time he was not only consulted by the claimants, his son and son-in-law, but that he acted for them in the negotiations for the sale of portions of these properties to the Crown.

The agreement to which I have referred was not, however, carried into execution, and the respondent has acquired no rights thereunder. It is material only as indicating the view of a person interested and competent to speak as to the effect upon the property of the expropriation of a right of way across it fifteen feet wide for the purposes of a railway. What Mr. Falconer, influenced I assume by the view that the construction of the railway would enhance the value of the remainder of the property, offered to sell for fifty dollars contained about 10,000 square feet. The extent expropriated was 22,050 square feet. For the property so expropriated, and for the depreciation of the remainder of the property by reason of such expropriation and the construction of the railway, I am inclined to think the sum of one thousand dollars would be a fair indemnity.

Lot 2.—This property (lot 2) had a harbor frontage of some 470 feet. It extended from Water Street southerly to high-water mark and thence out into the harbor two hundred feet. It had never been used for any purpose, and was the least valuable of the three properties. Along the whole extent of the property the land was bold, and at the northwestern extremity thereof the railway passed through an excavation in a bluff. By reference to the plan Exhibit U it will be seen that of this property there has been acquired and taken for the purposes of the railway 31,500 square feet. Of this 7,800 square feet, indicated on such plan by being colored red and barred, was in May, 1884,

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acquired from the claimants by deed of surrender, the consideration being the nominal sum of fifty dollars.

The question to be determined is the amount of compensation that should be paid for the value of the 23,700 square feet additional that have been expropriated, and for any further depreciation in the value of the property occasioned by such expropriation. I assess such compensation at five hundred dollars.

Lot 3.—In the expression lot 3 I include only the portion of the property, so designated in the statement of claim, that lies westerly of the line of the railway as originally located. It has a water front of some 420 feet, and extends out into the harbor three hundred feet. Before the construction of the railway, and the surrender to which I shall presently refer, it formed part of a property that extended easterly to what is called the Windmill Road, and contained some seven or eight acres.

In May, 1884, the claimants, in consideration of the sum of $280, surrendered to the Crown for the purposes of the Dartmouth Branch Railway a portion of this larger property, containing .635 acres, as indicated by the barred lines on plan Exhibit U. This was not the actual value of the property surrendered, but was one which the claimants were willing to accept to secure the construction of the railway. Subsequently, the location of the railway was changed, and the portion indicated on the plan referred to (Exhibit U.) by being colored red was expropriated. That part which on this plan is indicated both by being colored red and barred is common to both locations of the railway, and was acquired by the deed of surrender referred to.

It appears that the Crown has been and is willing, for the sum paid to the claimants therefor, to grant to them that part of the property acquired by such deed of surrender that is not covered by the present location.

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On the hearing of the case I expressed the opinion, and I have seen no reason to change it, that no question arises now as to the effect of the expropriation and the construction of the railway upon the property east of the original location thereof. That was settled by the parties themselves when they severed their property, and surrendered the right of way mentioned. The question to be determined, as it was in the case of lot 2, is the compensation that should be made for the additional land expropriated and for damages caused by such expropriation to that part of the property which lies westerly of the original location, and to which, as I have said, I refer as lot 3.

The question is not free from difficulty. It is clear, of course, that if an equal area were recovered from the sea the property would be equally valuable; but the expense of such recovery would vary greatly according to the character of the works undertaken therefor. There is, I suppose, no question that some extension harbor-wards, in addition to what was already on the property, would under any circumstances have been necessary to any large use thereof. Several of the witnesses thought that, assuming that the portion covered by the original location was in the possession of the claimants, the present location would be better for them than the original. Others were of the contrary opinion.

The difference of opinion is, I think, natural and easily accounted for. For some businesses and purposes it is desirable to have the railway between permanent buildings and the wharves, for others it is not desirable; and while one, looking to some special use of the property, would prefer the present location, another, influenced by other considerations, would prefer the former location. Anything, however, that lessens the number of possible purchasers depreciates, I think, in

some degree the value of a property. The claimants are entitled to such a sum of money as represents the difference in the values of the property before and after the expropriation. That may sometimes be best estimated by ascertaining, as near as may be, the cost of taking such steps and executing such works as would make the property as valuable as it was previously. One of the steps which in this case it is open to the claimants to take, is to re-purchase from the Crown the portion sold to it in 1884. They are not, I think, bound to do this. Neither do I think the Crown can, in mitigation of damages, force a grant upon them. The fact, however, that the Crown has offered to sell and that it was and is open for the claimants to buy, is a consideration which, I think, ought not to be disregarded.

Beyond making this purchase, prudent men probably would not take any step until they knew to what use the property was to be put. On the whole I think the sum of two thousand five hundred dollars will, in respect of lot 3, represent a liberal indemnity.

In these valuations I am happy to say I have Mr. Compton's concurrence.

In coming to the conclusions stated I have not lost sight of the fact that Mr. Falconer was willing to settle the claims under consideration for, according to Alpin Grant's evidence, the sum of $2,000, and for $2,500 according to that of the claimant David Falconer the younger. On the one hand I have not thought myself bound to limit my assessment by what, for the purposes of effecting a settlement, Mr. Falconer was willing to accept; while, on the other hand, I take it that his offer fully justifies me in not following the speculative estimates made by the claimants' witnesses and allowing the large amounts claimed.

The judgment of the court is, that the amount of compensation offered by the Minister of Railways and

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Canals was not sufficient, and that for such compensation the claimants are entitled, in respect of the three lots, to be paid the sum of four thousand dollars with interest from May 25th, 1888, to this date, in accordance with the 15th section of *The Expropriation Act.*

They are also entitled to costs.

The properties referred to remain vested in the Crown, and the claims of all parties are barred according to the statute (1).

Judgment for claimants, with costs.

Solicitor for claimants : *B. A. Weston.*

Solicitor for respondent : *W. Graham.*

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(1) 50-51 Vic. c. 17.

JOSEPH RIOUX..... ....CLAIMANT; 1889

AND Oct. 24.

HER MAJESTY THE QUEEN.....RESPONDENT.

Rule of court respecting claims pending before Official Arbitrators when The Exchequer Court Act came into force—Report by two of the Arbitrators where claim referred to them generally—Practice.

By a rule of court made on March 7th, 1888, it was ordered that, unless it was otherwise specially ordered, any matter pending before the Official Arbitrators when *The Exchequer Court Act* (50-51 Vic. c. 16) came into force that had been heard or partly heard by such Arbitrators should be continued before them as Official Referees, and that their report thereon should be made to the court in like manner as if such matter had been referred to them by the court under the 26th section of the said Act. Prior to the making of this rule a claim had been referred by the Minister of Railways and Canals to the Official Arbitrators for investigation and award. This claim, however, was proceeded with and heard before two of such Arbitrators only, and a report thereon in favor of the claimant was made by them to the court. On motion by claimant for judgment on such report,—

Held:—That the hearing of the claim by two of the Official Arbitrators was not a hearing within the meaning of the rule, and that judgment could not be entered on the report.

MOTION for judgment to confirm a report of two Official Referees of the court.

May 27th, 1889.

Belcourt in support of motion;

Hogg contra.

BURBIDGE, J., now (October 24th, 1889) delivered judgment.

This is a motion for judgment for the claimant for six hundred dollars on a report, dated the 7th day of April, 1888, made by Messrs. Compton and Simard, two of the Official Referees of this court.

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It appears that this claim and that of one François Drapeau had, prior to the coming into force of the Act 50-51 Vic. c. 16, been referred by the Minister of Railways and Canals to the Official Arbitrators for investigation and award, and that such claim had, on the 9th of July, 1886, been proceeded with and heard before Messrs. Compton and Simard, two of the four Official Arbitrators, but that no award had been made in the matter.

By the 59th section of 50-51 Vic. c. 16, it was provided that all matters pending before the Official Arbitrators when such Act came into force should be transferred to the Exchequer Court, and might therein be continued to a final decision in like manner as if the same had, in the first instance, been referred to the court under the said Act.

By a general rule of the court made on March 7th, 1888, it was ordered that unless it was otherwise specially ordered any matter pending before the Official Arbitrators when the said Act came into force, that had been heard or partly heard by such Arbitrators, should be continued before them as Official Referees, and that their report thereon should be made to the court in like manner as if such matter had been by the court referred to them under the 26th section of the said Act.

The report on which the claimant moves for judgment purports to be made in pursuance of this rule.

It is objected, however, on the part of the Crown that the case is not within the rule, as the matter is not one that had been heard or partly heard before the Official Arbitrators, since two only of them acted in the matter.

It is conceded that the claim could have been prosecuted before three of the four Official Arbitrators, and that in such a case two could have made an award (1);

(1) R.S.C. c. 1 s. 7 (42).

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but it is contended that the proceedings having taken place before the two Arbitrators only it was not a hearing by the Official Arbitrators, and that no judgment can be entered on the report.

Reasons for Judgment.

I am of opinion that the objection is well taken.

Motion dismissed, without costs.

Solicitors for claimant: *Belcourt & MacCraken.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

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Oct. 24.

ETIENNE SAMSON, AND OTHERS, (CLAIMANTS.).. ..... } APPELLANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Appeal from award of Official Arbitrators—Compensation for the taking of an unfinished wharf—Builder's profit—Basis of value—Interference with Arbitrators' award.

Where a wharf in course of construction, and materials to be used in completing it, had been taken by the Crown, the court allowed the claimants a sum representing the value of the wharf as it stood, together with that of the materials; and to this amount added a reasonable sum for the superintendence of the work by the builder, who was one of the claimants, for the use of money advanced, and for the risks incurred by him during the construction thereof, in other words a sum to cover a fair profit to the builder on the work so far as completed.

2. The court will not interfere with an award of the Official Arbitrators where there is evidence to support their finding, and such finding is not clearly erroneous.

APPEAL from an award of the Official Abritrators.

This case came before the court at a previous date on a motion by way of appeal from an award of the Official Arbitrators, and by order of court dated 22nd October, 1888, was remitted to them by name as Official Referees of the court, which they had then become, for their re-consideration and re-determination.* A meeting of the four Official Referees, or of a majority of them, not being possible to be had, this order was discharged, and, by consent of parties, further evidence was ordered to be taken before the Registrar of the court.

May 6th, 1889.

The present appeal was argued upon the evidence

* REPORTER'S NOTE.—See the report of the case as it was then before the court at page 30.

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taken by the Arbitrators and the additional evidence taken before the Registrar.

Belleau, Q.C., for appellants;

Hogg for respondent

BURBIDGE, J., now (October 24th, 1889) delivered judgment.

In this matter there is an appeal by the claimants and a cross-appeal by the Crown from an award made on the 26th day of February, 1886, by Messrs. Compton, Simard and Muma (Mr. Cowan dissenting) by which the claimants were adjudged to be entitled to the sum of twenty-nine thousand one hundred and fourteen dollars for property expropriated at Lévis, in the Province of Quebec, for the purposes of the St. Charles Branch of the Intercolonial Railway.

As the compensation was assessed in one sum, and no report accompanied the award, it was not possible to determine, as accurately as I desired to do, the principles upon which the award was made. I thought, too, when the case first came before me that the Arbitrators' attention had not been directed to the character of the title under which the claimants held the property; and in addition it was not clear whether the amount awarded was intended or not as compensation to all persons who, at the time of the expropriation, had any interest in the property.

For these reasons I was of opinion to set aside the award and refer the matter back to the Official Arbitrators; but as the Official Arbitrators had ceased to act as such and had become Official Referees of this court, I referred the whole matter to them by name for re-consideration and for a report to the court.

Subsequently it was found impracticable to secure a meeting of the four Official Referees, or even of a majority of them, and on the application of the claimants

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Reasons for Judgment.

and with the consent of the Crown I rescinded and discharged my previous order, and directed further evidence to be taken before the Registrar of the court.

The claim made is as follows :—

1.	For a wharf in course of construction at the time of the taking of possession thereof by the Government, on 13th November, 1884, 13,832 cubic yards at $1.79	$23,514 40
2.	Amount of the beach lot upon which the wharf is constructed, 254 feet in length by 70 feet in width, containing 17,780 superficial feet, at $1.30.....	23,114 00
3.	Amount of value of work to be done to complete the wharf, and claimed by the contractor.....	744 52
4.	Amount of materials on hand, and the whole of which the Government has taken in its possession.....	2,013 30
		$49,386 22

With reference to the 3rd item of this claim I was, when the case was first argued, of opinion that the claimants were not liable to the contractor in respect thereof; that it was not their act or fault that prevented him from continuing the construction of the wharf, but the expropriation under the Act of Parliament; and that the claimants were, therefore, excused, and, in consequence, not entitled in respect of this item to compensation from the Crown. On the second argument it was admitted that this view was correct, and no claim was made in respect of such item.

With reference to the first and fourth items of the claim, the sum of which amounts to twenty-five thousand five hundred and twenty-seven dollars and seventy cents, there is evidence that the wharf in course of

construction at the date of the expropriation, and the materials taken by the Crown, had cost the claimants the sum of nineteen thousand four hundred and forty-six dollars and seventy-two cents.

This expenditure made under the circumstances indicated in the evidence affords, I think, a satisfactory means of arriving at the value of the wharf and materials. To such amount should be added a reasonable allowance for superintendence and for the use of money in the construction of the wharf, and for the risks incurred by the builder, in other words a reasonable sum to cover a fair profit to the builder.

The sum of twenty-five hundred dollars which, in round numbers, is 12½ per cent. on the amount expended, would, I think, be such a reasonable allowance. This would bring the value of the wharf and materials up to twenty-one thousand nine hundred and forty-six dollars and seventy-two cents, leaving of the total award of $29,114 the sum of $7,167.28 to represent the value of the land expropriated.

The claim is made (2nd item) for 17,780 superficial feet of a beach lot, but William B. McKenzie, who was called for the claimants and who measured it, puts it at 17,500 superficial feet. The difference, however, is not very material, as in either case the sum of $7,167.28 would represent a small excess over 40 cents per superficial foot.

Now I take it that I ought not to disturb the finding of the Official Arbitrators, if, under the evidence, they may with reason have come to the conclusion that forty cents a superficial foot was the fair value of the beach lot in question.

In the case of *The Heirs Young* v. *The Queen* I have given my reasons for coming to the conclusion, on evidence similar to that given in this case, that, looking to any use or purpose to which the claimants could

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have put them, the value of beach lots adjoining that in question was less than forty cents per superficial foot. That case, however, came before me in a form which not only left me free, but made it incumbent on me to find upon my own judgment. In this case the parties are, I think, entitled to the judgment of the tribunal of first instance unless that judgment is clearly erroneous.

Many witnesses have been examined, and there is much evidence that would have supported an assessment of value for the beach lot in question at sums very considerably lower or higher than 40 cents per superficial foot, according to the weight given to the testimony of witnesses for the Crown or for the claimants, respectively. And here I may add that I do not see that the additional evidence that was taken under my order, in the taking of which the attention of the witnesses was directed to the character of title, differs very materially from that which was given before the Arbitrators.

The expropriation which gave rise to this claim was made on the 31st of October, 1884, and there were, as will be seen by the evidence of Edouard Demers, the Crown's agent, two actual transactions in the year 1884 between the parties in respect of other portions of the property of which that expropriated had formed part.

Demers, speaking generally, says that for beach lots for the right of way the Crown paid 40 cents per foot including all damages to the pieces left (that is all the damages occasioned by the severance), but that where such lots were covered by wharves or level filling the Crown paid one dollar per foot.

Referring to the first transaction between the parties in the year 1884 he says :—

The Government bought another lot indicated in red on the plan

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annexed to the title deed filed in this case as exhibit No. 30 (dated July 22nd, 1884). This lot contains seven thousand five hundred and seventy three feet and a half. This part, apart from the portion on which the rails lay, was covered with a small wharf and filled in with earth and levelled to the track,—close to the crib-work for the track. The lot was levelled to the height of fourteen to fifteen feet, and on the south side about seven to eight feet. The whole lot was bought for seven thousand dollars including the right of way. I calculated the beach lots for the right of way at forty cents and the level ground at one dollar, and I came to an agreement with the claimants to pay for the whole lot seven thousand dollars.

With reference to the second purchase by the Crown from the claimants, the deed giving effect to which bears date of the 2nd December, 1884, Demers says:—

The Government bought from the claimants two thousand four hundred and sixty-six feet (2466) of beach lots situate opposite the wharf in question, and behind the station, as shown by plan marked in red and annexed to the title deed filed as exhibit 29. This lot was levelled with earth to the height of seven or eight feet towards deep water, and three or four feet in height towards the public road. For this lot was paid one dollar per foot.

It is to be observed also that this portion of the property, adjoining as it did the public highway, would not be so injuriously affected by the severance occasioned by the first purchase as would be the portion of the water lot north of the railway track and abutting on the harbor, even with as good a crossing as could under the circumstances be given.

Now I cannot say that the Arbitrators in assessing the damages valued the beach lot in question at forty cents per superficial foot, but if they did the evidence to which I have referred, relating as it does to actual transactions, taken in connection with the other evidence adduced, would, I think, have amply justified their finding. And when it appears that the total award is sufficient, and not more than sufficient, to compensate the claimants for other property, the value of, which is satisfactorily determined, and for such beach lot at a rate, which, in my opinion, the Arbitrators

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were under the evidence justified in allowing, it becomes, I think, my duty to sustain the award, and dismiss both the appeal and the cross-appeal.

Under the award the claimants were, on the 31st day of October, 1884, entitled to receive from the Crown in full satisfaction of their claim the sum of twenty-nine thousand one hundred and fourteen dollars, to which should be added interest from that date until the present.

This amount is intended as compensation to all persons who at the date of the expropriation had any interest or estate in the property mentioned, and is, according to the agreement made on the second argument, to be paid to the claimants upon their giving to the Crown a good discharge from all such persons.

The claimants are entitled also to the costs before the Arbitrators and of the cross-appeal, and the respondent to the costs of the appeal. The latter may be set off against the former.

Leave is reserved to any person interested to apply for further directions.

Appeal and cross-appeal dismissed with costs.

Solicitors for appellants: *Belleau, Stafford & Belleau.*

Solicitors for respondent: *Casgrain, Angers & Hamel.*

HER MAJESTY THE QUEEN (DEFENDANT)..... } APPELLANT ; 1889 Oct. 24.

AND

CHARLES WILLIAM CARRIER. (CLAIMANT)..... } RESPONDENT.

Appeal from an award of the Official Arbitrators—Expropriation of land —When court will not interfere with award.

Where an award of the Official Arbitrators in an expropriation matter was not excessive in view of the evidence before them, the court declined to interfere with it.

APPEAL from an award of the Official Arbitrators.

This case came before the court by way of appeal from such award at a previous date, and, by order of court, was remitted to the Arbitrators by name as Official Referees of the court, which they had then become, for their re-consideration and re-determination.* The facts upon which the present motion by way of appeal is made are stated in the judgment.

May 6th, 1889.

Hogg for appellant ;

Belleau, Q.C., for respondent.

BURBIDGE, J., now (October 24th, 1889) delivered judgment.

In the notes of reasons for the order of October 22nd, 1888, which was made in this case after the first argument, I have given my view of the principles upon which compensation should be assessed in this case, and I need not repeat what I then stated. It was not, however, found convenient to give effect to that order

*REPORTER'S NOTE.—See the report of the case as it was then before the court at page 36.

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because of the difficulty of securing the attendance at one time of all, or even of a majority of the Official Referees, and, subsequently, on the 11th March, 1889, on the application of the respondent, and with the consent of Her Majesty's Attorney-General for Canada, that order was rescinded and discharged and the case referred to the Registrar of this court to take evidence with respect to :—

(*a*) The date of the expropriation ;

(*b*) The persons entitled to the compensation money at that date and their respective interests therein ; and

(*c*) The value of the whole property and of its depreciation.

Such further evidence having been taken, the case came on for argument on appeal and cross-appeal from the award of the Arbitrators.

The 15th July, 1882, has been determined to be the date of the expropriation.

With respect to the persons entitled to the compensation money at that date and their respective interests therein, it was agreed between counsel for the respondent and appellant that the compensation money awarded should be taken to be awarded in respect of the interests of all persons in both the Carrier and McKenzie properties, and should be paid to the respondent upon giving a good discharge to the Crown from all such persons.

The only question, therefore, remaining to be determined is as to whether the assessment made by the Arbitrators should, under the evidence, be sustained or not. It was admitted, and I think it is clear, that the evidence taken before the Registrar is as conflicting as that given before the Arbitrators, and, except so far as it shows what means have been adopted by the claimant to overcome the inconveniences resulting from the severance of his property and the construction and

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operation of the railway, does not place the case in a position differing substantially from that in which it came before the Official Arbitrators.

With reference, however, to that part of my reasons for the order of October 22nd, 1888, in which I have stated that the additional facilities afforded for receiving and shipping goods from the manufactory might greatly enhance the value of the property, I am bound to say that on a full consideration of all the evidence, and from personal observation of the property and the relation of the railway thereto, I am not satisfied that such has been the result in this case. The property was before the construction of the St. Charles Branch of the Intercolonial Railway situated at no considerable distance from a shipping point on the Grand Trunk Railway at Lévis, and though I think it would have been of great advantage to the property to have been brought by means of a branch line or siding into actual contact and connection with the Grand Trunk Railway and the Intercolonial Railway, I am not so clear that such actual connection is an advantage when it is secured by having the main line of the railway, at a point so close to a station, run through the premises. The constant passing and shunting of trains must, I think, constitute an inconvenience that greatly outweighs the advantages to be derived from such connection.

A few things in respect of the case are I think clear. First, the property affected by the expropriation and by the construction and operation of the railway was a very valuable one,—its value being estimated at sums varying from $100,000 to $300,000 and upwards. Secondly, the damage is substantial and considerable. Thirdly, the claim as made is grossly extravagant.

Mr. Hogg, in the course of his very exhaustive argument, deduced from the evidence and submitted to the court a statement from which he came to the con-

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clusion that a sum of about $35,000 expended on the property would make it as good and valuable a property as it was before it was affected by the railway. For some, possibly for many, purposes that might be the case, but yet, perhaps, such an expenditure would not entirely obviate the inconveniences, looking to the use made of the property, arising from the constant passing and shunting of trains through the property, to which I have already referred.

Assuming, however, that the property was at the time of the expropriation worth $200,000, which perhaps would be a reasonable estimate, the award represents a small excess over thirty per cent. of that amount. My own impression has been, and is, that the award was a liberal one, and that, too, I fancy was the view of the claimant himself, or, perhaps, I should say that he deemed it on the whole, not unfair ; for his counsel frankly admitted on the argument that there would have been no appeal by the respondent if the Crown had not first appealed from the award.

It is very clear, I think, that there is evidence to support the award, but that possibly is not in this case an absolutely reliable test, for there is in the very great mass of testimony that has been adduced evidence of estimates that to me, at least, appear extravagant. I am not, however, prepared to say that the award is excessive. It was made, too, it is to be observed, by persons having large experience, and who at the time constituted the tribunal charged with the responsibility of determining such matters.

Under these circumstances I think that I ought to dismiss the appeal, and with costs. It is hardly necessary to add that I am also of opinion to dismiss the cross-appeal with costs.

The amount of the award is to be paid to the legal representatives of the claimant upon their giving to

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the Crown a good discharge from all persons interested in either property, according to the agreement hereinbefore mentioned.

Leave is reserved to any person interested to apply for further directions.

Appeal and cross-appeal dismissed with costs.

Solicitors for appellant: *O'Connor & Hogg.*

Solicitors for respondent: *Belleau, Stafford & Belleau.*

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Nov. 18.

HUGH McLEOD.....CLAIMANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Expropriation of land—50-51 Vic. c. 17—Measure of compensation—Enhancement of future value of property by railway—Tender by the Crown—Bare indemnity—Costs.

Upon an expropriation of land under the provisions of 50-51 Vic. c. 17, the measure of compensation is the depreciation in the value of the premises assessed not only in reference to the damage occasioned by the construction of the railway, but also in reference to the loss which may probably result from its operation.

2. Where there was evidence that the railway would enhance the value for manufacturing purposes of certain portions of land remaining to claimant upon an expropriation, but it did not appear that there then was, or in the near future would be, any demand for the land for such purposes, the court did not consider this a sufficient ground upon which to reduce the amount of compensation to which the claimant was otherwise entitled.

3. In assessing the value of lands taken or injuriously affected by a public work the owner should be allowed a liberal, not a bare, indemnity.

4. Where the tender was not unreasonable and the claim very extravagant, the claimant was not given costs although the amount of the award exceeded somewhat the amount tendered.

THIS was a claim for compensation upon an expropriation of lands belonging to the claimant at Sydney, N. S., for the purposes of the Cape Breton Railway, and for damages resulting therefrom to other lands of the claimant.

The facts of the case are fully stated in the judgment.

June 3rd, 4th, 5th, 6th, 7th and 12th, 1889.

Gillies for the claimant;

Graham, Q.C., for the respondent.

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BURBIDGE, J., now (November 18th, 1889) delivered judgment.

This is a claim for $10,000, of which the sum of $4,800 is demanded for the value of eight lots of land taken by the Crown for the purposes of the Cape Breton Railway, and the sum of $5,200 for the depreciation in value of the remaining portions of the property, alleged to arise in consequence of such taking for such purposes. The case was heard at Sydney in June last, Mr. Compton, one of the Official Referees of the court, sitting with me as assessor.

No difficulty arises in respect of the principles that should govern the assessment of compensation in this case. The claimant is entitled to a full indemnity for the value of the land taken, and for any damages occasioned by the severance of his property, or arising from its being otherwise injuriously affected by the construction or operation of the railway. The measure of compensation is the depreciation in the value of the premises, assessed not only in reference to the damage occasioned by the construction of the railway, but also in reference to the loss which may probably result from its operation.

The property affected is situated within the limits of the town of Sydney, and consists of a portion of three blocks indicated on the plan (claimant's exhibit No. 2) by the numbers 28, 29 and 30. These three blocks (28, 29 and 30) were purchased by the claimant in 1863 for the sum of $260, and, with the exception of the lots sold therefrom, have since been occupied by him as one field bounded on the west by Great George Street, on the south by a property now owned by Captain Lorway, on the east by the Creek, and on the north by Townsend Street.

Dolbin Street, Douglas Street, and a street without a name shewn on the plan referred to as running be-

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tween the claimant's property and that of Captain Lorway's, do not appear, at least during the claimant's possession, to have been opened to use by the public. And the same is true of Park Street, shown on the plan of the property (claimant's exhibit No. 1) which was made since the location of the railway.

The whole property, including the streets, contained at the time of the purchase by the claimant about 8¼ acres, and has been used principally for pasture and hay land. But, while this was the use made of it prior to and at the time of the expropriation, its chief value consisted in the fact that it was suitable for division into building lots and for sale by lots for building purposes. And it appeared in evidence that some 18 or 20 years ago the claimant caused a plan to be made showing a division of the property into lots, and since then he has from time to time sold a number thereof on Townsend Street and Great George Street to laborers and others who have erected thereon small and inexpensive houses and out-buildings. The area of the lots so sold is slightly in excess of one acre.

The whole property is not, however, equally available for building purposes. Where the railway runs it is low, the level being less than two feet above ordinary high-water mark and the land being overflowed by the spring tides, so that in its present condition, and without draining and filling in, it is not suitable for the erection of buildings thereon except on piles. Now it might happen that the demand for property for building purposes would be active enough to overcome these considerations, and to bring property similar to this into the market for building purposes. But this at present is not the case in Sydney, where, within the portion of the town shown on claimant's exhibit No. 2, from one-half to two-thirds, and, within the limits of the corporation, a greater proportion of the town is still

available for such purposes. It is fair then, I think, to conclude that the portion of the property crossed by the railway, and that adjoining it on both sides, had, at the date of the expropriation, a value exceeding that derived from its use for agricultural purposes; but that such value was not very considerable in view of the expenditure necessary to the utilization thereof for building purposes, and the remoteness of the chance of there being a demand for it in its then condition for such purposes.

Some of the witnesses were of opinion that the part of the property near the water was suitable for manufacturing purposes, and that for such uses its value would be enhanced by the construction of the railway. That the construction and operation of the railway will increase any value which the property may have for manufacturing purposes cannot be doubted, but there is nothing in the evidence respecting the conditions of business and trade in the town of Sydney to lead one to conclude that there will, in the near future, be any active demand for this property for manufacturing purposes, though it is possible that such may prove to be the case.

At present, however, I do not attach enough weight to these considerations to feel justified, by reason thereof, in lessening the amount of compensation to which otherwise I think the claimant entitled.

In such a case as this it is difficult, I think, to come to any satisfactory conclusion with reference to the amount at which the value of the land taken, and the depreciation in the value of the property remaining to the claimant, should be assessed, without forming some opinion as to the value of the property as a whole. In a return made by the claimant for the purposes of the assessment of rates and taxes in the town of Sydney for the year 1887, he returned the

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property in question as consisting of four or five acres, in pasture, and of the value of $500. With it he made return of another property at $800. These values, however, it appears were not accepted by the assessors, who rated the two properties at $1,800 instead of $1,300; and, in accordance with the rule adopted by them that year to value property for the purposes of assessment at one-fourth the cash value, assessed the claimant on real estate of the value of $450. I do not, however, think it would be fair or just to conclude that the $500 at which the claimant valued this property, or the somewhat higher sum at which the assessors valued it, represents the true value thereof. If the suggestion made that the claimant, in making the return, valued the property at one-fourth or one-fifth of its true value were accepted, the conclusion would be more consistent with the other evidence in the case.

From a comparison of the property in question with other properties (such as the Biscoe property and the Bown property) similarly situated, suitable for the same purposes and valuable for like considerations, the fair values of which have been determined by actual sales taking place under ordinary and usual conditions, I have no difficulty in coming to the conclusion, in which Mr. Compton concurs, that the value of the portion of blocks 28, 29 and 30, then owned by the claimant, and which with the streets contained about seven acres, did not, at the date of the expropriation, exceed two thousand eight hunded dollars.

Of this property there was taken for the use of the railway about three-fifths of an acre ($\frac{57}{100}$). The railway crosses it obliquely, thereby increasing the damages occasioned by the severance; and undoubtedly the value that the adjoining property derived from the chance that it might have been in demand for building purposes is to some extent lessened. With reference to the prices obtained for the lots sold by the claimant,

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there is, except in the case of Mr. McCodrum, no evidence entirely satisfactory. The claimant appears to have included in the sums which he states he received, the interest paid by the purchasers from time to time. McCodrum, in 1872 or 1873, purchased two lots 44 by 80 feet for $80 a lot. They are situated immediately west of where the railway crosses the south line of Townsend Street, and are in level three or four feet higher than the level of the property where the railway crosses it. McCodrum's cellar is four feet in depth, and the high water backs into his drains. Some of the property on Townsend Street has changed hands within a few years, and the prices obtained do not indicate any considerable advance in values since the time when McCodrum purchased his two lots. In 1888 two lots, 40 x 100, opposite to McCodrum's on Townsend Street and similarly situated, were sold by the witness Burns for $75 per lot.

Assuming a demand, for building purposes, for the property crossed by the railway and that immediately adjoining it, I do not think that lot for lot it would be worth as much, or would command as high a price, as the McCodrum or Burns lots, for the reason already mentioned that it could not be conveniently utilized for such purposes without incurring the expense of filling it in.

The amount tendered by the Crown as compensation for land taken and for damages was four hundred dollars, and there is ample evidence to sustain the sufficiency of the tender. This evidence is to me much more satisfactory, and having seen, as I have, the property, I should accept it with much more confidence than the evidence by which the claimant sought to sustain the claim for damages, greatly exceeding in amount the value of his whole property.

I am not wholly satisfied, however, that either the committee, who, at the instance of the persons inter-

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ested in the extension of the railway from the Shipyard to Barrack Point, made an appraisement of such damages, or the Government valuator, or the witnesses who have been called for the Crown and who have estimated the damages, have given sufficient weight to the fact that the claimant's property has been taken against his will by a compulsory process, and that he should not have a bare indemnity but a liberal indemnity.

Mr. Compton is inclined to think the sum tendered sufficient, because the portion of the property remaining to the claimant is likely to be available for manufacturing purposes, owing to the nearness of the railway ; but believing the time when manufactories will be established in the town of Sydney to be somewhat remote, he agrees with me in assessing the compensation to be paid to the claimant in this case at six hundred dollars. To that sum will be added $63 for interest from February 18th, 1888.

There will also be an order, in accordance with the undertaking of the Crown given on the trial, for the construction of level crossings on Park Street and on the street between the claimant's property and that of Captain Lorway's, whenever they are opened for use to the public.

With reference to costs I entertain the view that where, as in this case, the tender is not unreasonable and the claim very extravagant, I should not allow costs to the claimant, although to make certain that the compensation is not merely an indemnity, but a liberal indemnity, something more than the sum tendered is ultimately awarded.

The judgment will therefore be entered up for $663, without costs.

Judgment for claimant without costs.

Solicitor for claimant : *J. A. Gillies.*

Solicitor for respondent : *Wallace Graham.*

THE STRAITS OF CANSEAU MARINE RAILWAY COMPANY..... } PLAINTIFFS; 1889 Nov. 18.

AND

HER MAJESTY THE QUEEN..... DEFENDANT.

Expropriation of land for Government railway—Increased risk from fire by operation of railway—Damages.

The plaintiffs were owners of a water-side property upon which they operated two marine railways. A portion of this property was expropriated for the right of way of a Government railway, the track of the latter being situated in such close proximity to the plaintiffs' works that the works, as well as ships in course of repair upon them, would be in danger of taking fire from locomotives when the Government railway was put in operation. In consequence of this increased risk from fire it was shown that plaintiffs would have to pay higher rates of insurance upon their works than they had theretofore paid, and that ships might, for the same reason, be deterred from using the marine railways.

Held:—That the damage resulting from such increased risk from fire was a proper subject for compensation. *Duke of Buccleuch* v. *Metropolitan Board of Works* (L.R. 5 H.L. 418), and *Cowper Essex* v. *The Local Board for Acton* (14 App. Cas. 153) referred to.

2. Where lands are taken and others held therewith injuriously affected, the measure of compensation is the depreciation in value of the premises damaged assessed not only with reference to the injury occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user.

THIS was a claim for compensation arising out of an expropriation of land belonging to plaintiffs at Port Hawkesbury, N.S., for the purposes of the Cape Breton Railway, and for damages suffered by them in respect of their use and occupation of other property.

Ross for the plaintiffs;

Graham, Q.C., for the defendant.

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BURBIDGE, J., now (November 18th, 1889) delivered judgment.

The plaintiffs are the owners of marine railways situated at Port Hawkesbury, or Ship Harbor, in the County of Richmond and Province of Nova Scotia. For the purpose of such railways they acquired, in the year 1863, the fee of a property situated upon the harbor above mentioned, and a grant from the Crown of a water-lot adjoining such property. The water-lot is five hundred feet wide, and extends out into the harbor eight hundred feet; the property referred to, including a road sixty-six feet in width reserved thereout, forms substantially a square, of which each side is five hundred feet in length. Excluding the reserved road, which runs parallel to the shore of the harbor and divides the property into two nearly equal parts, it contains about five acres. For the water-lot the plaintiffs paid (in old currency) fifty dollars, and for the other property five hundred dollars.

Between the years 1863 and 1866 the plaintiffs constructed upon their property two marine railways or slips. The track of the larger of the two was 650 feet in length, and there was operated thereon a cradle 208 feet in length. It was built to accommodate vessels of a tonnage of 1000 tons, but ships of 1200 or 1400 tons could, it appears, be safely placed thereon.

The smaller railway had a shorter track and carried two cradles, each of which was originally intended to accommodate vessels of two hundred tons register. In making some repairs, however, the inshore cradle was shortened as it was longer than was required for the class of vessels using it, so that at present it is 74 feet in length; the length of the outer cradle being 103 feet.

In the year 1885 the larger track was damaged by heavy drift ice, which striking against it, caused a

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twist therein commencing at a distance of 468 feet from the upper end thereof and extending from that point one hundred and twenty feet. Since then the injured portion of the larger track has not been used. The cradle upon this track has also suffered injury from a like cause. In the year 1887 it was struck by floating ice and the outer portion thereof so injured that it was found necessary to cut off 48 feet therefrom, reducing its length to 160 feet, and since then no ship of more than 500 tons register has been taken up on this slip.

The larger railway was constructed for a life of sixteen years, and the smaller for a life of twenty years. The former cost $31,588.32, and the latter $14,747.22. Both have from time to time been repaired, and are still operated.

The larger track, however, requires extensive renewals and repairs, the cost of which was, in 1884, estimated by Mr. Crandall at $10,000, and, in 1885, by Mr. Yorston at a few hundred dollars less than that sum. In giving his evidence in this case, Mr. Crandall said that, apart from its being affected by the Cape Breton Railway, he thought it would now take about $15,000 to put the large railway in a good condition for fifteen years. The making of these repairs has been deferred from year to year, the plaintiffs preferring,—

To continue working the slip as far as practicable, and in the meantime to negotiate with parties for the disposition of the company's property at Port Hawkesbury, subject to the consent of the stockholders.

The weekly returns of the vessels placed on the slips are incomplete, but Mr. Ross, as a part of his argument, favored me with a statement made by the secretary of the company, showing the number of such vessels, and their tonnage, for the years 1873 to 1888, inclusive, with the exception of the year 1884. I have been able from

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the returns in evidence to complete such statement in respect of the year 1884, and in part to verify its correctness in other respects. From this statement, which may, I think, be taken as approximately correct, it appears that, during the sixteen years mentioned, there have been upon the two slips 2289 vessels, representing a total tonnage of 168,378 tons, or in other words an average of 143 vessels per year, in tonnage a fraction less than 74 tons each.

With reference to this question of tonnage, there are in evidence no returns for the years 1873, 1875 and 1878 and only partial returns for the years 1879 and 1883, but from such partial returns and the returns for the other years it appears that during the period mentioned there were upon the slips 51 vessels, the tonnage of which, respectively, exceeded 200 tons. Of these, 33 were above 200 tons register and under 300; 12 above 300 and under 400; 2 above 400 and under 500; 1 above 500 and under 600; 2 above 600 and under 700; and 1 above 800 and under 900 tons register. The latter, the *Worcester* of the Boston line of steamships (the register tonnage of which is given in the returns as 865 tons, and the gross tonnage by Mr. Morrison as 1400 tons), is the largest vessel that has ever been upon the plaintiffs' railways.

The total earnings of the two slips or railways have, in the twenty-four years from 1865 to 1888, both inclusive, amounted to $98,317.36, and the total disbursements for working expenses, renewals and repairs, during the same time, to $67,824.22. Dividends were paid in the years 1866, 1870, 1871, 1872, 1873, 1874, 1878, 1879, 1881 and 1883. In the years 1873 and 1874, dividends of eight per centum were so paid, and in the year 1881 one of two per centum. These were respectively the largest and smallest dividends paid. In all there has been so paid to the shareholders in dividends

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the sum of $22,462.79, representing an average yearly dividend a small fraction in excess of two per centum on the paid up capital stock of the company, which amounts to $45,000.

In the year 1888, the Minister of Railways and Canals expropriated for the purposes of the Cape Breton Railway a portion of the plaintiffs' property at Port Hawkesbury and of the reserved road before mentioned containing 1.77 acres, and, deeming it advisable so to do, in pursuance of *The Expropriation Act* notified the Registrar of the court of his readiness to pay the sum of $6,000 as compensation for the portion of land so expropriated, and for all damages arising from, or in connection with, the taking of the said land.

The usual notice being published, the plaintiffs filed a statement of claim. The answer of the Crown thereto, and the plaintiffs' reply to such answer, complete the pleadings. There is also a claim in respect of the reserved road mentioned filed by Henry N. Paint, but as the plaintiffs abandoned any claim, in respect to the same and Mr. Paint did not appear on the hearing, the question of the Crown's liability in respect thereof has not been considered in this case. Any rights which Mr. Paint may have are reserved to him.

In the first place, the plaintiffs alleged that they were the owners in fee of the portion of land so expropriated. This the Crown denied, and set up the reservation of the right of way in the deed from Peter Ross and Henry N. Paint to the plaintiffs. In reply the plaintiffs admitted the reservation, but claimed title by possession. On the trial it was admitted that the plaintiffs' title was subject to such reservation. I find, therefore, that the plaintiffs are, subject to such reservation, entitled to compensation for the value of the land expropriated.

The plaintiffs also allege that their property is in-

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juriously affected by such expropriation, and by the construction and proposed operation of the railway, the particulars of which are stated in the fifth paragraph of the statement of claim in clauses lettered from (a) to (m).

It is alleged that all access to the plaintiffs' works from the rear or land side is totally cut off (a). To remedy this the defendant offers to construct a crossing. At the time of the hearing, the Cape Breton Railway was not completed, but Mr. Donkin, the resident engineer in charge of the construction thereof, explains how it was proposed to complete this crossing, which had then been commenced. There will be an order for its construction if it is not already completed. This, I think, will minimize but not provide against all inconvenience arising in this respect from such severance. For the rest damages must be allowed.

It is also alleged that all extensions of the plaintiffs' works on the rear or land side of their property are now rendered impossible (b). In this connection it will be convenient to consider the allegations contained in clauses (g) and (h) of the 5th paragraph of the statement of claim.

Owing to the damage from ice to the cradle upon the large track it was proposed to lengthen the track on the land side some fifty-five or sixty feet so as to make it possible to draw the cradle, when placed in winter quarters, that much farther out of water. For this purpose Mr. Crandall, who constructed the works, and who is an expert in such matters, thought at first that it would be necessary to excavate a portion of the bank now occupied by the railway ; but, upon measuring the distance from the head of the large track to the edge of the railway embankment, he found that he could get the required number of feet without excavating if the engine-house and machinery were

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placed on the side of the track. As to that, it would in any event have been necessary to remove the engine-house and machinery; and, in his opinion, even at an increased expenditure, it would be better to have the new engine-house and machinery placed at the side than at the end of the track. As to the difference in cost Mr. Crandall thought the construction of the engine-house and machinery on the side of the track would cost some $2,500 more than at the end of the track, while the excavation at the end would involve an expenditure of $1000 more than at the side, giving an increased cost for the side location of $1,500. Mr. Crandall estimated that the excavation at the end of the track would cost about $1,500. Mr. Donkin, however, places the cost of such excavation at $3,000. He is acquainted with the nature of the soil, and made his estimate from measurements. If he is right in this, and I think in such a matter he is the safer guide, even in the matter of cost the side location has the advantage over the end location. Another course suggested to give the extra fifty-five or sixty feet of track out of the water, was in renewing the track to raise it 3 feet. But this would increase the danger from ice, and necessitate the construction of breakwaters as a protection therefrom. It was clear from the evidence that such a means was not necessary to secure safe winter quarters for the large cradle.

The smaller track is, however, more directly affected. The railway embankment covers a few feet of the land end thereof, and, by reason of the proximity of the railway, the plaintiffs will be deprived of the use of some thirty or thirty-five feet of that portion of the smaller track that is out of water. It is clear that there is no way to remedy this evil and to secure an equal number of feet of track out of water, if they are necessary to the convenient and profitable use of the slip, except

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by raising this track two feet or two and one-half feet. That would cost about $3,850, and would not be a very considerable matter if it did not happen that the track so raised would be more exposed than it is now to the heavy drift ice and would need to be protected by breakwaters, the cost and expense of maintaining which would amount to a large sum—estimated by Mr. Crandall at $7,000. There is, however, evidence that would justify the conclusion that, notwithstanding the interference of the railway with the smaller track, it is still capable of being worked to the full capacity required of it without any raising of the tracks. This would, I think, clearly be the case if the jib-booms of vessels using the slip were rigged in when two of the larger size were upon it at the same time, except perhaps in the event of the company having occasion to place a vessel on each cradle when in winter quarters. But I agree with Mr. Ross that the necessity of adopting any such expedient has a tendency to interfere with, or render less profitable, the business of the marine railway, and therefore depreciates the value of the property.

There is no evidence that up to the date of the hearing of the case the railway had prevented the plaintiffs using at the same time the two cradles on the smaller track for any business that had offered, and I assume that they will not incur the large expenditure which I have mentioned unless the business of the railway actually calls for it. In this connection I should mention that between the retaining wall of the railway and the northerly line of that portion of the land expropriated which is immediately in the rear of the plaintiffs' works, is a strip of land a few feet wide for which the Crown has no use and which it offers to reconvey to the plaintiffs. There will, in pursuance of such offer, be an order for such reconveyance.

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With reference to the allegations contained in clauses (b), (g) and (h) of the 5th paragraph of the statement of claim, I am of opinion that in any view of the matter, and whatever expedients may be adopted, the interference with the plaintiffs' property and the profitable use of it is substantial, and the depreciation in its value resulting therefrom very considerable.

It is also alleged (c) that the land of the plaintiffs in rear of the portion expropriated is rendered totally valueless to the plaintiffs, the severance preventing the plaintiffs from utilizing the same in connection with their business. To this the defendant answers, as the fact is, that the plaintiffs' land in rear of the portion expropriated was, previous to the expropriation, severed from the plaintiffs' works by the reserved road before mentioned. There is no proof of any special damage to this portion of the plaintiffs' property, and I think it is not injuriously affected except as a portion of the property as a whole.

It is also alleged (d) that, by reason of the excavations for the railway, the water supply for the plaintiffs' steam boilers, which is obtained from a well in the rear of the machine-shop, has been diminished in quantity and made full of sediment, working great injury to the plaintiffs' boilers; and (j) that it will be necessary to sink new wells. These allegations are denied by the defendant, and are not sustained by the evidence.

It is also alleged (e) that the severance of the plaintiffs' property will prevent the plaintiffs from collecting surface water in the spring, as was their custom, to be used in clearing the ice from under the cradles and upon the track. The defendant offers to lay a pipe under the railway track to conduct such surface water from the plaintiffs' lands to their works, which will, I think, obviate the difficulty. There will be an order for the laying of such pipe.

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The allegations as to the injury that will probably be occasioned to the chimney built on plaintiffs' property by the running and shunting of trains (f) are denied, and are not supported by any evidence.

It is also alleged ((i) (k) and (c)) that the operation of the railway in such close proximity to the plaintiffs' property injuriously affects the same, for the reasons that it will be necessary to incur expense in taking additional precautions against fire; that the rates of insurance upon their property and upon vessels using the slips will be increased, and the owners of vessels will be deterred from using the slips for the repair of the same. The defendant denies that the passing and use of engines and trains on the said land, as they will pass and be used, will increase the risk from fire either to plaintiffs' works or to ships, and sets up, by way of demurrer, the defence that such matters are not, in law, proper subjects for compensation. As to that, I think, the law is to the contrary. I have always understood the rule to be that where lands are taken and others held therewith are injuriously affected, the measure of compensation is the depreciation in value of the premises damaged, assessed not only with reference to the damage occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user. That is the rule laid down by Mr. Cripps in his treatise on the *Principles of the Law of Compensation* (1) upon the authority of *re Stockport, &c., Railway Co'y* (2) and *Buccleuch* v. *Metropolitan Board of Works* (3), and it is affirmed in a late case in the House of Lords,—*Cowper Essex* v. *The Local Board for the District of Acton* (4).

On the question of fact I find that an increase risk from fire will be occasioned to the plaintiffs' property,

(1) Pp. 124, 125.
(2) 33 L. J. Q. B. 251.
(3) L. R. 5 H. L. 418.
(4) 14 App. Cas. 153.

and to vessels using the same, by the operation of the Cape Breton Railway.

The plaintiffs also allege (m) that the alterations that it will be necessary to make in their works by reason of the construction of the railway will occupy considerable time, and that a loss of profits during the time so occupied will result. This allegation is not, I think, sustained by the evidence except in respect of the raising of the tracks of the smaller railway, if that should be found necessary, to which reference has already been made.

Before considering the question of the amount of compensation that should be assessed in favor of the plaintiffs, it will, I think, be convenient to come to some conclusion as to the value of the property as a whole at the date of the expropriation. The property had been acquired and the works constructed by the plaintiffs at a total cost of about $48,000, and with any reasonable deduction for depreciation could not, I think, under ordinary circumstances, have exceeded in value, in the year 1888, the sum of $30,000. In view of the damages that had been done to the company's railways by ice, and the evidence in respect to their condition, and the business which they had done or was likely to be done upon them, I am satisfied that, for the purposes of assessing the compensation in this case, it would be fair to fix such value at twenty-five thousand dollars. In that estimate Mr. Compton, who acted as assessor, entirely concurs. It exceeds by $10,000 the sum which Mr. Crandall says he would have given for the property if it had not been affected by the railway.

The plaintiffs claim $65,000 damages. The defendant tenders $6,000 as a full compensation, and, in addition to other matters of defence that I have mentioned, sets up that the plaintiffs' property is benefited by the construction of the railway. In support of that view Mr.

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Graham relied, in part, upon an expression of opinion occurring in the report of the directors of the plaintiff company for the year 1887, in which they state that:—

> During last season contracts were made for a pier to be constructed at Point Tupper for railway purposes which will be completed coming season, the tracks as laid out pass through the company's property which is contiguous to the proposed terminus, and when completed must enhance the value of the same materially.

It does not appear, however, whether in the view of the directors this enhancement in value would be occasioned by any special advantages resulting to the property from the construction of the railway, or from considerations affecting in common all the property in the neighborhood. There is, however, some evidence that the railway is likely to be of special benefit to the property in question by facilitating the transmission thereto of the timber needed for the plaintiffs' works, and for the repairs of vessels resorting thereto.

Mr. McKeen, the Government valuator on whose valuation the tender of $6,000 was made, says that Mr. Ross, the President, and Mr. Twining, the Secretary, of the company, at the time he attempted to arrange with them, demanded $10,000, and that Mr. Twining said they would accept that amount. With reference to this, Mr. Twining states that what Mr. Ross and he told Mr. McKeen was that if the latter would put his valuation of damages at $10,000 they would recommend the company to accept that amount, but, he adds, that this took place before the construction of the railway, and that he did not know at the time that it was so near the smaller track.

On the whole, I am, after a careful examination of the evidence and arguments of counsel, and from an inspection of the premises, inclined to the opinion that the sum of $10,000 would constitute a liberal indemnity to the plaintiffs for all damages that have been, or

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are likely to be, occasioned to their property by the expropriation of the portion thereof referred to, and by the construction and operation of the Cape Breton Railway. In this view Mr. Compton also concurs. To that sum should be added $753.34 for interest from 16th August, 1888. There will be judgment for the plaintiffs for $10,753.34, and costs to be taxed.

In addition there will be an order for the construction of the works to which I have referred, and for the reconveyance to the plaintiffs of the strip of land mentioned.

Judgment for plaintiffs with costs.

Solicitors for plaintiffs : *Ross, Sedgewick & Mackay.*

Solicitor for defendant : *W. Graham.*

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Jan. 20.

CARTER, MACY & CO. .....PLAINTIFFS;

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Customs laws—Teas in transit through United States to Canada—52 Vic. c. 14—Tariff Act (1886), *item* 781.

The plaintiffs made two shipments of teas from Japan to New York for transportation in bond to Canada. In one case the bills of lading were marked "in transit to Canada"; in the other, the teas appeared upon the consular invoice, made at the place of shipment, to be consigned to the plaintiffs' brokers in New York for transhipment to Canada. On the arrival of both lots at New York, and pending a sale thereof in Canada, they were allowed to be sent to a bonded warehouse as unclaimed goods for some five or six months. Thereafter the teas were entered at the New York Customs House for transportation to Canada, and forwarded to Montreal. There was nothing to show that the plaintiffs at any time proposed to make any other disposition of the teas, and there was nothing in what they did that contravened the laws or regulations of the United States or of Canada with respect to the transportation of goods in bond.

Held, that the teas were not dutiable as teas from the United States, the transaction having taken place prior to the passing of the Act 52 Vic. c. 14 which expressly provides that in such a case the teas would be dutiable.

CLAIM for return of certain moneys deposited with the Customs authorities at the Port of Montreal to obtain the release of goods seized for alleged violation of the provisions of the Customs laws.

The proceedings herein were commenced in the court by a reference by the Minister of Customs under *The Customs Act* (R. S. C. c. 32, sections 182 and 183, as amended by 51 Vic. c. 14, s. 34). Under the provisions of these sections no pleadings are necessary unless directed by the judge, and in this case no such direction was made, the case being submitted

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upon the papers on file in the Customs Department which accompanied the reference to the court.

The question submitted for trial under the reference was whether certain teas which had been imported by the plaintiffs from Japan and sold by them to Montreal merchants, after remaining in New York for several months, was a direct importation to Canada *viâ* New York and, therefore, free from Customs duty ; or whether the teas were, under the circumstances of the case, imported to New York and afterwards purchased by the persons who got them in Montreal, and were, therefore, teas from the United States, and subject to Customs duty under the tariff?

The facts of the case appearing upon the evidence are sufficiently stated in the judgment.

October 15th, 1889.

McMaster, Q.C., for the plaintiffs :

It is beyond dispute that the goods were duly entered in New York for exportation to Canada. The goods never broke bond in the United States, and no import entry, or entry for home consumption, was ever made in that country.

To say that the goods might have been sold in the United States, cannot surely be of any weight in the face of the continued and persistent course of dealing in a contrary direction. From first to last not the slightest act was done by the importers which could cast a doubt upon the absolute sincerity of their intentions and conduct.

The reasons given for the course adopted by the importers are, it is contended, perfectly sufficient and intelligible, and if they chose to consult the dictates of business convenience and prudence, whilst scrupulously keeping within the spirit and letter of the law, it cannot be argued that because they might have done something, which it is proved they never even contem-

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plated doing, therefore the law is to be strained to tax their importation.

Sedgewick, Q. C., (with whom was *Hogg*) for the Crown:

The mere stamping of the bills of lading with words which might show that the tea was intended for Canada is nothing in itself. There was nothing incumbent on the plaintiffs by reason of these words in the bills of lading to carry the tea to Canada, and the question is: was the intention, as indicated in the bills of lading and invoices, to import the tea direct to Canada carried out? This question must be answered in the negative.

The facts show—1st, that the tea was detained in New York for a time, and under circumstances entirely inconsistent with a through or direct importation from Japan to Canada; and 2nd, that the sale of the tea in New York to Montreal merchants was a dealing with the tea which showed that the plaintiffs were not treating the importation as a through or direct importation to Canada, but as an importation to New York; and, therefore, the tea was properly subject to duty when brought into this country. Cites *Synopsis of Treasury Decisions* (U.S.), 1884, art. 845.

BURBIDGE, J., now (January 20th, 1890) delivered judgment.

The plaintiffs claim that they are entitled to have returned to them the sum of thirteen hundred and forty-nine dollars and one cent, deposited by them with the Collector of Customs of the Port of Montreal under the circumstances hereinafter mentioned. The matter comes before the court under a reference by the Minister of Customs made in pursuance of sections 182 and 183 of *The Customs Act* as contained in 51 Vic. c.

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14 s. 34, and, in accordance with the practice in such cases, was heard without pleadings.

The plaintiffs, who are importers of teas doing business at the City of New York, on the 23rd July, 1888, at Kobe, Japan, through their agents Messrs Hunt & Company, shipped by the S.S. " Gleneagles " 506 half-chests of tea to be delivered at the Port of New York. Across the face of each of the two bills of lading covering this shipment there were stamped the words "in transit to Canada," and the same words appear in the consular invoices as indicating the proposed destination of the shipment.

On the 26th of the same month, through other agents —Messrs. Fraser, Farley & Varnum, the plaintiffs shipped from Yokohama, by the S.S. " Lord of the Isles," 475 half-chests of tea to be delivered at the Port of New York to the order of Messrs. Brown Bros. & Company. In the latter case, however, there was nothing upon the face of the bill of lading to indicate that at the time of shipment the teas were intended for the Canadian market ; but by the consular invoice thereof, dated at Yokohama the 2nd of August, 1888, the 475 packages of tea were " consigned to the order of Messrs. Brown Bros. & Company *viâ* Suez Canal for transhipment to Canada."

Before the arrival of the teas at New York the plaintiffs attempted unsuccessfully to find a market for them in Canada, and on their arrival there in October, 1888, no entry being made thereof, the teas were sent to the bonded warehouse as unclaimed goods. The plaintiffs in the meantime made no effort to sell the teas in the United States but continued to look for a market in Canada, which they succeeded in finding in March, 1889. Thereupon the teas were entered at the New York Customs House for exportation in bond to Canada and forwarded to Montreal, where, being entered

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free of duty as a direct exportation from Japan, they were seized as being dutiable, and subsequently released on the deposit with the Collector of Customs of the sum of thirteen hundred and forty-nine dollars and one cent before mentioned.

By item 781 of the Act (1886) respecting duties of Customs, tea is not dutiable unless it falls within the description contained in item 434 of said Act, by which it is provided that " tea from the United States " is liable to a duty of ten per centum *ad valorem*.

The only question then to be determined in this case is, whether or not under the circumstances already stated, the teas in question are to be considered as teas from the United States within the meaning of the Act.

Now, it appears to me that the expression " teas from the United States " does not mean teas the growth and product of that country, for as yet the United States cannot be said to be a tea-producing country. Primarily it means, I think, teas that come into Canada from the United States. It appears to me, however, to be equally clear that the expression referred to does not include teas shipped in good faith from some other country to Canada, and which pass through the United States in bond. That is not denied, but it is said that the teas in question were not in good faith shipped from Japan to Canada because it was open to the plaintiffs to depart from their original intention and to enter the goods for consumption in the United States, and because of the delay at the Port of New York in entering them for transportation in bond to Canada. It appears to me, however, that in all which the plaintiffs did there was no violation of the laws of the United States, or of Canada, regulating the transportation of goods in bond, and nothing to indicate any purpose on their part to depart from their original intention as to the destination of the teas, which never lost, I think, the

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character that they had from the first of a direct exportation from Japan to Canada. I am, therefore, of opinion that the teas in question were not dutiable. I only desire to add that, while it may not be conclusive of the matter, I am greatly confirmed in the view that I have expressed by the amendment to *The Customs Act* made by Parliament in the session of 1889 (52 Vic. c. 14 s. 7) to which my attention was directed at the hearing, by which among other things it was provided that goods that are permitted to remain unclaimed, as the teas in question were, in any country intermediate between the country of export and Canada, should not be considered as *in transitu* through such intermediate country, but should be treated as goods imported from such intermediate country and valued and rated for duty accordingly.

There will be judgment for plaintiffs with costs, and leave is reserved for either party to apply for further directions.

*Judgment for plaintiffs with costs.**

Solicitors for plaintiffs : *McMaster, Hutchinson & Maclennan.*

Solicitors for defendant : *O'Connor & Hogg.*

*On appeal to the Supreme Court of Canada by the Crown, the judgment of the Exchequer Court was affirmed.

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Jan. 20.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... } PLAINTIFF;

AND

THE GRAND TRUNK RAILWAY COMPANY..... ..... } DEFENDANTS.

Bond for the payment of money on a day certain with interest—Non-payment of bond at maturity—Claim for interest thereafter at rate reserved in bond—Damages in the nature of interest.

Upon a bond for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest cannot be implied, and thereafter interest is not recoverable as interest but as damages. *Goodchap* v. *Roberts* (14 Ch. D. 49) referred to.

2. In assessing damages in the nature of interest on a bond payable at a particular place reference should, in general, be had to the rules in force at the place where the same is so payable.

THIS was an information filed by the Attorney-General for the Dominion of Canada, on behalf of the Crown, to recover from the defendants a sum of $20,206.41, as a balance due upon a certain preferential bond of The Northern Railway Company of Canada, to the liability of the said railway company thereon the defendants had succeeded.

The bond declared on in the information is as follows:—

"PROVINCE OF CANADA.

SECOND PREFERENTIAL BOND.

No. 4,639.

£50,000 sterling.

"By virtue of an Act of the Legislature of the Pro-"vince passed in the twenty-second year of the reign "of Her Majesty Queen Victoria, and an order of His Ex-"cellency the Right Honourable the Governor-General-

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"in-Council, requiring The Northern Railway of Canada "to call in all their existing bonds and authorizing the "Company to issue to the holders second preferential "bonds in lieu thereof, The Northern Railway of "Canada hereby promises to pay to bearer fifty "thousand pounds sterling on the thirty-first day of "July in the year one thousand eight hundred and "eighty-four at the office of the Commercial Bank in "London, England, with interest thereon at the rate "of six per cent. per annum, payable half yearly. The "said principal and interest being by virtue of the said "Act and order a preferential charge on the said rail-"way and the earnings thereof, payable next after an "issue of first preferential bonds not exceeding two "hundred and fifty thousand pounds sterling, also au-"thorized by the said Act and order.

"Dated in Toronto this 1st day of August, 1859."

(Sgd.) FRED. CUMBERLAND,
Vice-President.

(Sgd.) GEO. BEATTY,
Secretary. [L.S.]

The information set out, *inter alia*, that the Crown, at the date of the filing thereof, was the holder of such bond; that The Northern Railway Company of Canada, before suit, had become a part of The Grand Trunk Railway of Canada,—the latter company becoming responsible for the former's liabilities; and that defendants, having only paid £57,000 sterling upon the bond, were then indebted to the Crown thereon in a balance of £4,153.8.6 sterling. The particulars of claim are as follows:

CLAIM.

"Her Majesty's Attorney-General on behalf of Her Majesty the Queen claims as follows:—

1. Judgment for the sum of £4,153.8.6 sterling, equal to $20,206.41, being the balance due on the said bond.

2. Judgment for the costs of this suit."

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The defendants, in their statement of defence, pleaded as follows:—

"The defendants say that on the said 19th day of April, 1888, they paid the said principal money as mentioned in the said information; that interest, as interest, ceased to be payable on the bond after the 31st July, 1884, when the said bond fell due, and that after said date all the defendants were, or are, liable to pay to the holder of the said bond, over and above the principal money, was, and is, a reasonable sum as damages for the non-payment of said money for such time as it remained unpaid, and this irrespective of the rate of interest payable on the bond from time to time before the principal money fell due; that the said bond was payable in England (and not in Canada) where the rate of interest then was, and now is, less than six per cent."

"That on account of said damages for non-payment of the said principal money after it fell due, the defendants paid to Her Majesty the Queen, over and above said principal money, the sum of £7,000 sterling money of Great Britain, which in said information is admitted; and they now bring here into court the further sum of £441.2.0 sterling equal to $2,146.60 currency, and they say that the plaintiff has sustained no greater damage than the said sum so paid and said sum now brought into court, together, and they are ready and willing to pay the costs of this suit to this time, and they pray that they may be further dismissed therefrom."

Issue joined.

The facts of the case appearing upon the trial are recited in the judgment.

October 1st, 1889.

Bell, Q. C. for defendants: Inasmuch as it is admitted by the plaintiff that the principal money of the bond has been paid, as well as all interest due thereon up to its maturity, the plaintiff has no *locus*

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standi and is out of court. The information claimed a specific sum as a balance due upon the bond, while, as a matter of fact, the bond was fully satisfied, and could not be held to support the claim in any sense. (Cites *Dixon* v. *Parkes* (1); *Cook* v. *Fowler* (2).) [*Hogg*, Q. C. for the Crown: We claim the balance due as damages.] That is not your case as shaped in the information. [*Hogg*, Q. C.: The particulars of claim are adequate to cover it. Besides, you have paid money into court, which admits our claim so far as it goes.] If we take the ground put forward by the learned counsel for the Crown, and look at this as an action for damages for the detention of the money, even then the plaintiff cannot succeed, because such an action will not lie where the principal money has been paid and accepted. Again, the contract was to be performed in England, and its validity and interpretation must be governed by the law of the place of performance. (Cites *Story's Conflict of Law*. (3)). In England damages are recoverable for the detention of money after a day certain, but the rate of such damages is determined with a view to the circumstances of each particular case. (Cites *Addison on Contracts* (4); *Watson's Principles of Equity* (5); *Rothschild* v. *Currie* (6); *Dixon* v. *Parkes* (7); *St. John* v. *Rykert* (8); *Power* v. *Peck* (9)). The bond having to be performed in England, the measure of damages should be the reasonable rate of interest there at the present time. The reasonable rate in Canada would be six per cent., but money is lower in England. We have paid four per cent. into court, and the plaintiff is not entitled to receive more than that.

(1) 1 Esp. 110.
(2) L. R. 7 H.L. 27.
(3) Secs. 278 *a*, 280, 281. (8th ed.)
(4) Abbot's Am. ed. 1888, p. 195.
(5) Ed. 1886, p. 74.
(6) 1 Q. B. 43.
(7) 1 Esp. 110.
(8) 10 Can. S.C.R. 278.
(9) 15 Ont. App. 138.

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Argument of Counsel.

Hogg, Q. C. for the Crown: The evidence shows that the sum paid was not accepted in full; nor was the matter settled by such payment. The receipt given by the Crown was merely *pro tanto*, and did not relate to the whole claim. [BURBIDGE, J.—Must I not find that there is now nothing due upon the bond ?] That would not be, I submit, a proper finding upon the facts. The bond was for £50,000 and interest at 6 per cent. On the 19th April, 1888, there was due upon the bond £61,153.8s. 6d. sterling, and they only paid £57,000 sterling. We claim a balance due us as damages in the nature of interest for the detention of the money. The defendants have acknowledged and paid part of our claim; we are entitled to the balance. He cited *Addison on Contracts* (1); *Leake on Contracts* (2); *Goodchap* v. *Roberts* (3); *Mounson* v. *Redshaw* (4); *Price* v. *The Great Western Railway Co.* (5); *Keene* v. *Keene* (6); *Simonton* v. *Graham* (7); *Cooper* v. *Earl Waldegrave* (8); *Gibbs* v. *Fremont* (9); *Allen* v. *Kemble* (10).

BURBIDGE, J. now (January 20th, 1890) delivered judgment.

This is an information, filed by Her Majesty's Attorney-General for Canada, upon a bond made on the first of August, 1859, by The Northern Railway of Canada (to whose liabilities the defendants have succeeded) whereby The Northern Railway Company promised to pay to bearer fifty thousand pounds sterling on the thirty-first day of July, 1884, at the office of the Commercial Bank in London, with interest thereon at the rate of six per centum per annum, payable half-yearly,

(1) 8th Ed. 196.
(2) Pp. 1105-6-7.
(3) 14 Ch. D. 49.
(4) 1 Saund. (W. N.) 185.
(5) 16 M. & W. 244.
(6) 3 C. B. (N.S.) 144.
(7) 8 Ont. P. R. 495.
(8) 2 Beav. 282.
(9) 9 Ex. 25.
(10) 6 Moo. P. C. 314.

such principal and interest constituting a second preferential charge on such company's railway and earnings.

The interest was duly paid according to the tenor of the bond, but the principal was not paid until the year 1888, at which time the plaintiff claimed to be paid in addition thereto interest at the rate of six per centum per annum. The defendants were willing to pay interest at the rate of four per centum per annum, and as to the difference between four and six per centum invoked the indulgence of the Crown. Pending negotiations between the President of the company and the Minister of Finance with respect to this matter, the defendants, on the nineteenth of April, 1888, paid to the plaintiff the sum of fifty-seven thousand pounds sterling, of which the sum of seven thousand pounds was intended to represent the interest at four per centum per annum on the principal sum from July 31, 1884, to the date of payment. It will be observed, however, that this amount falls short of representing such interest by the sum of four hundred and thirty-five pounds twelve shillings and five pence sterling.

In the result, the Governor-in-Council declined to authorize the Minister of Finance to waive the Crown's claim to the difference between interest at four and six per centum per annum, and before their cheque for fifty-seven thousand pounds was cashed the defendants were, by letters of the 29th May and the 3rd July, respectively, informed that such amount would not be accepted as a settlement in full, but that it would be used as a payment on account.

To the information filed on behalf of the Crown to recover the sum of twenty thousand two hundred and six dollars and forty-one cents, alleged to be the equivalent of four thousand one hundred and fifty-three

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pounds eight shillings and six pence sterling, representing the difference between the interest due on the bond referred to on the 19th April, 1888, and the sum of seven thousand pounds sterling so paid, the defendants in their statement of defence allege that interest as interest ceased to be payable on the said bond after the thirty-first of July, 1884, when the said bond fell due; and that after that date all they were and are liable to pay to the holder of the bond, over and above the principal money, was and is a reasonable sum as damages for the non-payment of said money for such time as it remained unpaid, and that irrespective of the rate of interest payable on the bond from time to time before the principal money fell due; that the bond was payable in England (and not in Canada) where the rate of interest then was and now is less than six per centum per annum. The defendants also brought into court in satisfaction of the plaintiff's claim the sum of four hundred and forty-one pounds two shillings sterling, equal to two thousand one hundred and forty-six dollars and sixty cents currency, which, with the seven thousand pounds theretofore paid, was intended to represent interest on the principal sum at the rate of four per centum per annum from the date when the same became due until it was paid; and they further stated that the plaintiff had sustained no damages beyond this, and that they were ready and willing to pay the cost of the suit to the time when the statement in defence was filed.

On this statement of defence the plaintiff has taken issue.

Upon the question raised by the statement of defence as to whether or not upon a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied, the

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defendants must, I think, succeed. In such a case it is clear that interest after such day certain is not recoverable as interest but as damages (1).

In *Goodchap* v. *Roberts* (2), the law which, I think, governs the case under consideration is stated concisely and clearly by Sir George Jessel, M. R. Speaking of the case then before him, he says:—

> The question before us arises on the proof of debt by a creditor in an administration suit. The case stands on the same footing as if this was an action on the covenant in the mortgage deed, and we are now really sitting as a jury to assess the damages for breach of covenant in not paying £5,000 on the day named in the covenant. The agreement was to pay ten per cent. up to a certain day, and then to pay £5,000, and the only point we have to decide is, what is the proper amount of damages for the non-payment of that debt. Now in an action at law for the non-payment of money on a day certain, where it is an interest-bearing debt, the rule has always been to recommend the jury to give five per cent., because that is the usual commercial value of money. If there ever should come a time when it fell very much, juries might give less, or if it rose very much they might give more, but that is the reason of the rule. The fact of the parties having bargained for a higher or a lower rate of interest for a time certain is always to be taken into consideration as showing the value of money, but it does not decide the question. It appears to me that no jury would give more than five per cent. in such a case as this, and sitting as a jury we ought not to give more.

With respect to another question discussed at the hearing as to whether or not an action would lie for interest not payable by contract but as damages for the detention of a debt, or money claim, where the principal sum had been paid to and received by the plaintiff before action brought, the defendants relied

(1) *Mounson* v. *Redshaw*, 1 Saund. (W.N.) 204 note (t); *Dixon* v. *Parkes*, 1 Esp. 110; *Dickenson* v. *Harrison*, 4 Price 282; *Atkinson* v. *Jones*, 2 Ad. & El. 439; *Cooper* v. Earl *Waldegrave*, 2 Beav. 282; *Price* v. *The Great Western Ry. Co.* 16 M. & W. 244; *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Dalby* v. *Humphrey*, 37 U. C. Q. B. 514; *Goodchap* v. *Roberts*, 14 Ch. D. 49; *Simonton* v. *Graham*, 8 Ont. P. R. 495; *St. John* v. *Rykert*, 10 Can. S. C. R. 278; *Ex parte Charman*, W.N. (1887) 184.

(2) 14 Ch. D. 51.

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upon *Dixon* v. *Parkes*, (1), and the plaintiff upon *Hellier* v. *Franklin* (2). If it were necessary to decide that question it would not be unreasonable, I think, to conclude as suggested in *Mayne on Damages* (3), that in *Hellier* v. *Franklin* the action was in fact on a bond given with a penalty in a larger amount to secure payment of a sum of money; in which case the principal money due, and the interest thereon, might have been considered as part of the penalty. But in view of the admission of the plaintiff's right of action contained in the pleadings, it is not, I think, necessary to come to any conclusion on that question, or to consider how far the rule laid down in the earlier case of *Dixon* v. *Parkes* (4) is supported by later cases (5).

With reference to the amount of damages, I think that the contention of the defendants that the court should have regard to the rules in force at the place where the bond was payable, must prevail (6). Having reference then to such rules, the form of the action and all the circumstances of the case, I am of opinion that I ought to assess the damages at an amount that will represent interest on the principal sum at five per centum per annum from the thirty-first July, 1884, to the 19th April, 1888.

There will be judgment for the plaintiff for eleven thousand one hundred and sixty-six dollars and sixty-four cents, with costs; and the sum of money paid into court may be taken out of court by the plaintiff and applied in reduction of the amount of the judgment.

Judgment for plaintiff with costs.

Solicitors for plaintiffs : *O'Connor & Hogg.*

Solicitor for defendants : *John Bell.*

(1) 1 Esp. 110.
(2) 1 Starkie 291.
(3) 4th ed. 149.
(4) *Cited ante.*
(5) See *Beaumont* v. *Greathead* 2 C. B. 494 ; *Leake on Contracts* 885.
(6) *Story on the Conflict of Laws* 8th ed. s. 291, and *Leake on Contracts* 1106, and cases there cited.

JOHN P. CLARKE AND JOHN R. BARBER..... } SUPPLIANTS; 1890 Jan. 20.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Contract to supply printing paper—Construction—Omission in Schedule —Evidence.

On the 1st December, 1879, B., to whose rights the suppliants had succeeded, entered into a contract with the Crown to supply, for a given time, "such quantities of paper, and of such varieties, as may "be required or desired from time to time for the printing and "publishing of the *Canada Gazette*, of the statutes of Canada, and of "such official and departmental and other reports, forms, documents "and other papers as may at any time be required to be printed "and published, or as may be ordered from time to time by the "proper authority therefor, according to the requirements of Her "Majesty in that behalf." Attached to the contract, and made part thereof, were a schedule and specifications showing the paper to be supplied and the price to be paid therefor, but in which no mention was made of double demy,—the paper ordinarily, though not exclusively, used for departmental printing.

Held, that notwithstanding this omission, the contractor had agreed to supply the Crown and the Crown by implication had agreed to purchase of the contractor, among other paper, that required for departmental printing.

APPEAL from a ruling of two special referees of the court refusing certain evidence tendered by suppliants in support of their claim for damages upon an alleged breach of contract by the Crown.

The facts of the case are fully stated in the judgment.

October 18th, 1889.

McCarthy, Q.C. and *Macdonald* for suppliants;

Hogg for Crown.

BURBIDGE, J. now (January, 20th, 1890) delivered judgment.

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I am of opinion that the learned referees should have received the evidence tendered of the purchase from parties other than the contractor of paper required for departmental printing.

On the 22nd of September, 1879, the Under-Secretary of State advertised for, amongst other things, tenders for furnishing, during a term of five years from the first day of December then next, of printing paper for the printing of the *Canada Gazette*, the statutes and orders-in-council, and for pamphlets and other work required by the several departments of the Government of Canada, and it was stated in the advertisement that blank forms of tender and specifications would "be furnished "on application to the Queen's Printer, on and after "Wednesday, the 24th instant."

At this time the contractor, a manufacturer of paper, was, under a contract of the 1st October, 1874, supplying the Government with the printing paper required for the *Gazette*, the statutes and the departmental printing. In the schedule and specifications attached to, and forming part of, such contract, the paper to be supplied in accordance therewith, and the prices to be paid for such paper, were described as follows:—

Per ream of 500 sheets, No. 1 Double Royal, for the laws, to weigh 52 lbs. per ream	$6.15
Per ream of 500 sheets, No. 1, Royal, to weigh 26 lbs. per ream	3.10
Per ream of 500 sheets, No. 2, *Gazette* paper, double quadruple foolscap, to weigh 64 lbs. per ream of 500 sheets	6.95
Per ream of 500 sheets, No. 2, *Gazette* paper, quadruple cap, to weigh 32 lbs. per ream	3.50
Per ream of 500 sheets, No. 1, Double Demy, 50 lbs. per ream.	6.00

In the blank forms of tenders supplied in pursuance of the advertisement, to which I have alluded, there were the following schedule and specifications:—

Per ream of 500 sheets, No. 1, Double Royal, for the laws, to weigh 52 lbs. per ream.

Per ream of 500 sheets, No. 1, Royal, to weigh 26 lbs. per ream.

Per ream of 500 sheets, No. 2, *Gazette* paper, double quadruple foolscap, to weigh 64 lbs. per ream of 500 sheets.

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Per ream of 500 sheets, No. 2, *Gazette* paper, quadruple cap, to weigh 32 lbs. per ream.

On the 15th of November, 1879, by direction of the Secretary of State, the Queen's Printer informed the contractor that his tender for printing paper for the "statutes and *Gazette*" had been accepted, and subsequently, in pursuance of the advertisement, tender and acceptance, the contract of the 1st of December, 1879, set out in the pleadings, was duly executed.

After a recital of the *Act respecting the Office of Queen's Printer and the Public Printing* (32-33 Vic. c. 7), the advertisement and the acceptance of the contractor's tender, we find the following provisions in the contract:—

Now this indenture witnesseth, that in consideration of the sums and prices to be paid for such paper as may be supplied in accordance with, and at the rates mentioned, in the schedule and specification thereof, signed by the "Contractor" (hereunto annexed and marked "A"), which said schedule and specification are to be construed and read as part hereof and as if embodied in and forming part of this contract, he the "Contractor" doth hereby covenant, promise and agree to and with Her Majesty in the manner following, that is to say:—

(1.) That he the "Contractor" shall and will, well and truly and faithfully, and from time to time, and when and so often as application or order may be given to him for the same, and during the term of five years from the first day of December, one thousand eight hundred and seventy-nine, supply and deliver to the person or persons appointed to take charge thereof, at Ottawa, such quantity or quantities of paper, and of such qualities and varieties as may be required or desired from time to time for the printing and publishing of the *Canada Gazette*, of the statutes of Canada, and of such official and departmental and other reports, forms, documents, and other papers, as may at any time be required to be printed and published, or as may be ordered from time to time by the proper authority therefor, according to the requirements of Her Majesty in that behalf.

In the schedule and specification referred to, the paper to be supplied, and the price to be paid therefor, are described in these terms:—

Per ream of 500 sheets, No. 1, Double Royal, for the laws, to weigh 52 lbs. per ream, per sample "A".....$5.95

Per ream of 500 sheets, No. 1, Double Royal, for the laws, to weigh 52 lbs. per ream, per sample "E"..... 5.95

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Per ream of 500 sheets, No. 1, Royal, to weigh 26 lbs. per ream, per sample "A"..... 2.97½

Per ream of 500 sheets, No. 1, Royal, to weigh 26 lbs. per ream, per sample "E"..... 2.97½

Per ream of 500 sheets, No. 2, *Gazette* paper, double quadruple foolscap, to weigh 64 lbs. per ream of 500 sheets, per sample No. 2 "A"..... 5.05

Per ream of 500 sheets, No. 2, *Gazette* paper, quadruple cap, to weigh 32 lbs. per ream, as per sample No. 2 "A"..... 2.52½

It will be observed that the material difference between the schedule and specification attached to the first contract and that attached to the second lies in the omission from the latter of any reference to double demy, in which respect it follows the form of tender already referred to. Now, double demy was the paper ordinarily but not exclusively used for departmental printing, for which also both double royal and royal were at times used. There was, apart from size and weight, no difference in the quality of double royal, royal and double demy, and the prices charged therefor per ream give nearly the same rate per pound, so that the difference is not material. It also appears that from the manufacturer's standpoint the question of size was of no consequence.

For the respondent it is contended, and the referees are of opinion, that the second contract was limited to paper required for the *Gazette* and the statutes, and that the provision as to the supply of paper for departmental printing was introduced by inadvertence or error in drawing up the formal document. This conclusion is arrived at, to state the grounds very briefly: (1) because there is in the tender, and in the schedule and specification, no reference to the class of paper described in the first contract as double demy; and (2), because in the Queen's Printer's letter, and in the recitals contained in the contract, paper for printing the *Gazette* and statutes only is mentioned.

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So far as the recital is concerned it is not, and does not profess to be, a complete description of tenders advertised for, and is not, I think, in any way inconsistent with the covenant for the supply of paper for departmental printing.

The form of tender, the letter of acceptance, and the schedule and specification forming part of the second contract, are matters of more importance; and unexplained, tend no doubt to support the view entertained by the referees.

It is not unimportant, however, in this connection to observe that the Queen's Printer's Department and the Government Stationery Office were, in 1879, separate branches of that part of the public service which was under the direction of the Secretary of State. The Queen's Printer had, under both contracts, to do with the paper for the *Gazette* and the statutes, while the paper for departmental printing was, under the Minister's direction, ordered by the Chief Clerk of the Stationery Office; and perhaps there is nothing singular in the fact that the Queen's Printer should, in the letter accepting the tender, have described only the paper with which he was concerned. In any event, this circumstance standing alone would not, I think, be of sufficient importance to justify the rejection of the express agreement contained in the contract.

A few days before the date of this letter of acceptance the contractor, writing to the Chief Clerk of the Stationery Office in respect to other matters, adds the following:—

> According to the *Globe* we have been awarded the contract for the departmental paper, but have no official information to that effect. Mr. Chamberlin said that you would probably have the paper added to your Department, which we hope will prove correct.

The meaning of the concluding sentence is not very clear. At first it occurred to me that perhaps it indicated a knowledge on the part of the contractor that he had not tendered for the paper for departmental

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printing; but that he hoped, in case his tender for paper for the *Gazette* and the statutes were accepted, that this would be added. But on consideration I think he was referring to the departmental arrangements to which I have referred, and expressing the hope that the Stationery Branch would be given the control of the purchase of all the printing paper required by the Government, as well that used by the Queen's Printer's Department as that used by the other departments of the Government. If this was the writer's meaning, it is clear from the letter as a whole that the contractor believed that he had tendered for the paper for departmental printing, and from this circumstance, and other facts of the case, such as the course of business under the first contract and the terms of the advertisement, I am satisfied that such was the contractor's belief at the time. So far as I can see, there never was any intention on his part to enter into a contract from which the paper for departmental printing would be excluded. Nor is it at all clear that the Governor-in-Council ever had any such intention. The contract of 1874, it is admitted, covered paper for departmental printing. The contract of 1879 was, so far as appears, the only contract entered into for printing paper during the period that it was in force. The advertisement of 22nd September, 1879, called expressly for tenders for paper for departmental printing. The form of the tenders was settled by the officers of the Crown, and was probably drafted at the same time or, at most, within a day or two after the advertisement, for copies were to be ready for delivery on application on and after the 24th.

Now, if the intention of the Crown, clearly indicated in the advertisement, of entering into a contract for paper for departmental printing as well as for printing the *Gazette* and the statutes, was changed, that change

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must have taken place during the few days that intervened between the date of the advertisement and the delivery of the forms of tender. It is fair, too, I think, to assume that if any such change of intention had taken place it would have been indicated in a manner more intelligible to contractors in general than the omission of any reference in the form of tender to paper known as double demy, and would have been evidenced in some manner capable of proof.

But there is no evidence of any such intention, except the omission referred to, and the importance of such omission is lessened by other considerations,—such as the fact that double royal and royal could be and were used for a part of the departmental printing; that the size was a matter of comparative indifference to the manufacturer, and that ordinarily he would, under such a contract as the one in question, have been willing to supply double demy (if that size had been desired) at the contract price fixed for double royal or royal.

Then, too, we have the further fact that both parties have acted upon the contract as though it covered paper for departmental printing. During the period it was in force the Stationery Office from time to time ordered from the contractors not only double royal and royal but also double demy; the former being charged and settled for at the contract price, and the latter at a proportionate price, having regard to its weight. And we find, further, that, when in 1886 the suppliants complained of the breaches of the two contracts, they were not told that after 1879 there was no contract for the paper for departmental printing, but they were informed by the Under-Secretary of State that His Excellency was advised that during the pendency of the contracts in question no paper had been ordered, either by the Queen's Printer or the Stationery Office, from any one but the contractor.

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Then by the express terms of the contract the contractor agreed to supply the Crown, and the Crown by implication agreed to purchase from the contractor (1), not only the paper required for printing the *Gazette* and the statutes, but also the paper required for departmental printing. This agreement, the result of negotiations that commenced with an invitation to contractors to tender for such printing, ought not, it appears to me, to be set aside, except for reasons the most satisfactory. No doubt the report of the referees presents, and, I may add, forcibly presents, reasons entitled to the most careful consideration. They come to the conclusion that, prior to the drawing up and execution of the formal document, the parties being of one mind, had by the tender and acceptance made a contract limited to paper for the statutes and *Gazette*, and that in giving expression to such contract a mistake had occurred. But the facts, it appears to me, do not warrant that conclusion. I do not think that the parties ever intended to enter into any such contract. On the contrary, I am of opinion that from the first they had in mind a contract covering as well the paper for the departmental printing; and I do not feel myself compelled to an opposite view because difficulties, which in the result did not arise, might have been occasioned by the omission to designate more clearly the paper required for departmental printing.

The matter will be sent back to the referees, with a direction to admit the evidence tendered of the purchase from parties other than the contractor of paper required for departmental printing.

Case remitted to referees.

Solicitors for suppliants: *Maclaren, Macdonald, Merritt & Shepley.*

Solicitors for defendant: *O'Connor & Hogg.*

(1) *McLean* v. *The Queen*, 8 Can. S.C.R. 210.

HENRY N. PAINT.....CLAIMANT ; 1890

AND Mar. 24.

HER MAJESTY THE QUEEN.....RESPONDENT.

Expropriation—Prospective capabilities of property—Value to owner—Unity of estate—Advantage accruing to paper town from railway.

In assessing damages in cases of expropriation, regard should be had to the prospective capabilities of the property arising from its situation and character.

2. In awarding compensation for property expropriated, the court should consider the value thereof to the owner and not to the authority expropriating the same.

Stebbing v. *The Metropolitan Board of Works* (L. R. 6 Q. B. 37) followed.

3. In assessing damages where land has been expropriated, the unity of the estate must be considered, and if, by the severance of one of several lots so situated that the possession and control of each give an enhanced value to them all, the remainder is depreciated in value, such depreciation is a substantive ground for compensation.

4. The advantage resulting to the owner of a paper town from the Crown making it the terminus of a Government railway, and constructing within its limits a station-house and other buildings, is one that should be taken into account by way of set-off under 50-51 Vic. c. 16, sec. 31.

THIS was a claim arising out of an expropriation of land at Port Hawkesbury, N.S., for the purposes of the Cape Breton Railway.

The facts of the case are fully set out in the judgment.

November 21st, 22nd, 23rd, 25th, 26th and 28th, 1889.

Henry, Q. C. for the claimant:

With the exception of a few lots, all the land within the township of Guernsey belonged to the claimant at the time of the expropriation. The unity of possession has been destroyed by the taking, because the whole harbor front of the proposed town is gone, and it is

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robbed of its principal feature in respect of its commercial value. It will no doubt be contended that the railway will be an advantage to the property, and that the court should, under *The Expropriation Act*, set off such advantage against the damage suffered by the claimant because of the expropriation. It has been decided, I think, in this court, that the term "advantage" as employed in the statute must be narrowed and confined to such advantage as is *special* to the claimant's estate and not such as is common to the lands of all the proprietors in the vicinity. Here the other proprietors within the township share whatever advantage accrues to the claimant from the railway, but the disadvantage resulting therefrom is special to the lots held by him. The lots, separated as they now are and cut off from access to the harbor-front, have lost most, if not all, the commercial value they formerly had.

As to the streets that were dedicated to the public prior to the taking, I submit that by such expropriation the claimant's title is revived in them. He holds the fee in them, and is entitled to compensation for the taking.

Maclennan, following for claimant, dealt with the question of claimant's right to damages for the loss arising from the severance of his property in view of its prospective value for shipping and commercial purposes. He cited thereon:—*Mayor etc., of Montreal* v. *Brown, et al.* (1); *The Queen* v. *Brown* (2); *Boom Company* v. *Patterson* (3); *Lyon* v. *Fishmongers' Company* (4); *Metropolitan Board of Works* v. *McCarthy* (5); *Duke of Buccleuch* v. *Metropolitan Board of Works* (6).

Borden for the respondent:

With respect to the streets, the Crown has substi-

(1) 2 App. Cas. 168.
(2) L.R. 2 Q.B. 630.
(3) 98 U.S. Rep. 403.
(4) 1 App. Cas. 662.
(5) L.R. 7 H.L. 243.
(6) L.R. 5 H.L. 418.

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tuted a new road for the one expropriated, and, therefore, under the statute, no damage should be allowed on that head except in so far as the substituted way may not be as convenient as the old one. But, undoubtedly, the claimant here is not entitled to compensation in respect of the streets. He has parted with his possession of them and transferred it to the public. He could not apply them to any purpose inconsistent with his dedication of them to the public, and they are, therefore, practically valueless to him. (Cites *Stebbing* v. *Metropolitan Board of Works* (1)

Then, with regard to the natural facilities of the place for utilization for commercial purposes, such facilities will lie dormant until the railway builds up the place and makes it a commercial centre. Moreover, it is so situated that no railway can be constructed there without injuring the water-front. This is an inherent natural disadvantage for commercial purposes, which must be considered as well as its natural advantages for such purposes.

Again, it must be held that the advantage accruing from the railway is special to the property of the claimant. With the exception of a few lots, all the land in the proposed town belongs to the claimant, and the benefit to him greatly exceeds the benefit to all the other proprietors put together.

Macdonald followed on the same side.

BURBIDGE, J. now (March 24th, 1890) delivered judgment.

The claimant claims from the respondent $93,403.60, of which amount the sum of $73,403.60 is alleged to be the reasonable value of certain lands of the claimant, situate at Point Tupper, in the County of Richmond and Province of Nova Scotia, expropriated for

(1) L. R. 6 Q. B. 37.

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the purposes of the Cape Breton Railway, and the sum of $20,000 to be the reasonable amount of damages to the residue of his lands in the vicinity of and adjoining those expropriated.

The lands in question are part of a property that the claimant caused to be laid out as the Town of Guernsey, and of which, in the year 1866, he filed a plan in the registry office at Arichat. Of the 237 lots into which the town was divided, he has sold 71 and mortgaged 149. These mortgages are, for the most part, in the form of deeds absolute upon their face; but it appears that the grantees have undertaken to reconvey to the claimant upon payment of their respective claims. In the seventy-one lots sold, I have included seven lots mortgaged in the manner mentioned to Wm. J. Stairs, and thirteen lots so mortgaged to Thomas F. Jenkins, both of whom have claims before the court in their own names in respect of such lots. The seventeen lots that the claimant still holds in his own name appear, by an admission of counsel filed in the case, to be subject to certain judgments recorded against him in the office of the registrar of deeds at Arichat. But, as neither the mortgagees (with the exceptions mentioned) nor the judgment creditors have appeared and filed their claims, there is no occasion, at least at present, to consider their rights to any portion of the compensation money that may be awarded to the claimant, whom I shall, for the purposes of this case, treat as the owner of one hundred and sixty-six of the said lots, of which five and portions of two others have been expropriated.

With reference to the use of the word "town," I ought, I fancy, at the outset, to guard against being misunderstood, and to state that Guernsey is a town upon paper and in name only. Its streets are not graded and for the most part are not indicated in any

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way on the ground, and a large part of the land upon which it is expected that it may one day be built, is at present rough and uncleared. Apart from the marine hospital, the light-house, and the Canseau Marine Railway slip, and the houses and shops of a few of the workmen employed thereon, there were in 1888 very few buildings within the limit of the town.

The questions to be determined are as follows:—

1. The amount of compensation to which the claimant is entitled for the value of the land expropriated, consisting of:

(*a*) Lots 1, 5 and 9 in Block "P," North Range, portions of lots 6 and 12 in Block "M," North Range, and the triangular Blocks "O," in the North Range, and "A," in the South Range, containing in the whole 66,473 superficial feet, or the equivalent of about $6\frac{2}{3}$ lots of the size adopted in laying out the town; and

(*b*) A narrow strip of slopes lying between Nicholas and Paint streets and high-water mark, containing about 53,700 superficial feet, or $1\frac{256}{1000}$ acres.

2. Whether the claimant is entitled to more than nominal damages in respect of the expropriation of some eleven acres of the streets of the town, and of the highway leading therefrom to the Port of Hawkesbury.

3. Whether the claimant is entitled to damages in respect of the injurious affection of the remainder of the lots owned by him, none of which immediately adjoin the railway, and in respect of which there is no actual severance except in the case of lots 6 and 12 in Block "M," North Range, portions whereof were taken for a substituted street.

4. Whether the case falls within the rule prescribed by 50-51 Vic. c. 16, s. 31, that the advantages accruing or likely to accrue to the claimant or his property as

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well as the injury or damage occasioned by the public work was to be considered.

5. The amount of compensation that should be allowed in respect of any excess of disadvantage or damage over such advantages.

With reference to the value of the property expropriated there can be no doubt that regard should be had, as counsel for the claimant contended, to its situation and prospective capabilities (1), and that its adaptability for the purpose of a crossing-place from the Island of Cape Breton to the main-land is a circumstance which the owner has a right to insist upon as an element in estimating such value (2).

The value to be ascertained is, however, that which under such circumstances the property expropriated had in April, 1888, when it was taken for the purposes of the public work mentioned (3).

Applying the principles stated to the facts of the case, I assess the value of the property expropriated, of which in proportion to the area of that immediately adjoining Ship Harbor is considerably the more valuable, at $6,250.

With reference to the streets, it will be seen from the evidence, that from the head of the harbor to McLean Street, the Minister, in pursuance of the provision of section 3 (*d*) of *The Expropriation Act* then in force, substituted another convenient road in lieu thereof. For the rest the case is governed by the case of *Stebbing* v. *The Metropolitan Board of Works* (4) in which, at page 42, Cockburn, C.J. says :—

> The case, I think, is well illustrated by the instance suggested by my Brother Hannen. Suppose that a right of way exists over land, which prevents it from being built upon, and that a public body has powers conferred by statute to apply that land to some purpose inconsistent

(1) Mayor of Montreal vs. Brown, *et al.* 2 App. cas. at p. 185.
(2) Boom Company vs. Patterson, 98 U. S. Rep. 403.
(3) 50-51 Vic. c. 16, s. 32.
(4) L. R. 6 Q. B. 37.

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with the right of way, could the owner of the property be admitted to allege that, although he could not apply the land to a profitable purpose, and although he lost nothing by being deprived of it, yet as it would be of some value in the hands of the public body, he was to receive compensation in respect of that value? the answer would be, that as compensation is to be given for the loss which has been sustained, he would be entitled to none because he had suffered no loss.

The third question as to whether or not the claimant is entitled to compensation for any depreciation in value that the construction and proposed operation of the railway may have occasioned to the 160 lots of which he is still possessed, is, I think, settled by the case of *Cowper Essex* v. *The Local Board for Acton* (1) where it is said that in such cases the unity of the estate must be considered, and in which Lord Watson expresses the opinion that if several pieces of land, owned by the same person, are so near to each other and so situated that the possession and control of each give an enhanced value to all of them, such lands are held together and if one piece is compulsorily taken and converted to uses which depreciate the value of the rest, the owner has a right to compensation.

It is not denied that the property as a whole is benefited by the construction of the railway. On this point the witnesses, speaking generally, agree. But it is said that the advantages accruing therefrom are common, at least, to all the owners of lots in the Town of Guernsey, and therefore ought not to be considered for the purpose of cutting down the damages to which the claimant would otherwise be entitled. It is true, I think, that the enhancement in value resulting from the construction and proposed operation of the railway is common to all the property in the town, but such benefits may, nevertheless, fall within the rule as to special, as contra-distinguished from general, advantages (2). Here

(1) 14 App. cas. 153.

(2) *Sutherland on Damages*, vol. 3, p. 454.

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again, I think that the unity of the estate should be regarded. The claimant is the founder of the town. He still owns, or is interested in more than two-thirds of the lots into which he has divided it. The Government makes it the terminus of the Cape Breton Railway, and constructs, within its limits, stations, freight-sheds, round-houses, wharves and all the works usually found at a terminus. That certainly is an advantage, and I think a special advantage to the claimant and to the property. If the Act to which I have referred does not apply to such a case, it would, I think, be difficult to suggest a case to which it would apply.

With reference to the amount of compensation that should be allowed to the claimant in respect of the excess of disadvantage or damage over the advantages, the case is not free from difficulty.

The appropriation of the entire shore along Ship Harbor, and the cutting off of the rest of the town from access to the harbor, are the circumstances that contribute most to the depreciation of the value of the part of the property not expropriated. This circumstance does not, however, affect all such property equally, as part of it is situated at a considerable distance from the harbor, and part on the Straits of Canseau.

It will be seen too that the Crown has, in pursuance of the Act 52 Vic. c. 38, s. 3, undertaken to construct two crossings from the street south of the railway to high-water mark, by which the residents of the town will be able to obtain access to the harbor. This is, of course, a measure of relief, but I agree with Mr. Henry that it falls far short of obviating the disadvantages complained of.

Another circumstance contributing to the depreciation of the value of the property mentioned is the fact that the substituted highway from the head of the

harbor to McLean street, to which I have referred, has at one place a steeper and more difficult grade than had the highway for which it was substituted. This is another element to be considered in assessing damages in the case (1).

Since the location of the railway at Point Tupper a few lots have changed hands, and at prices in excess of those formerly obtained, and there is other evidence tending to the view that, notwithstanding the serious disadvantages to which I have referred, the advantages accruing from the construction of the railway are such that on the whole the value of property at Point Tupper has not been lessened by such construction, in the manner mentioned. I am not sure, however, that, up to the time of the trial, the effect of the necessary appropriation by the Government of the shore front of Ship Harbor for the purposes of the railway had been fully appreciated, and I am, on the whole, disposed to think it fair to allow the claimant reasonable damages. In doing this, I am fully aware that the near future may show conclusively, what is now a matter of conjecture, that so far from depreciating the value of the claimant's property the railway enhances it, and for that reason I think I should be careful not to allow damages in any way excessive.

As I have stated the claimant owns or is interested in about 160 lots, the average value of which Kenneth Morrison, one of the witnesses called by him, stated to be $100, giving for the whole a value say of $16,000. I do not overlook the fact that the credit to be given to Morrison's opinion is greatly weakened by the fact that he estimated the damages to this property, apart from the land taken, at $30,000; but on the whole I accept his valuation of the lots, though probably somewhat excessive, as a not unreasonable basis upon which

(1) *Caledonian Railway Company* v. *Walker's Trustees*, 7 App. Cas. 259.

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to calculate the damages to which the claimant is entitled, and which I assess at $2,000.

In the views that I have expressed as to the amount of compensation that should be awarded for the property expropriated and for such damages, Mr. Compton, who sat with me as assessor, and who had, with me, the advantage of hearing all the witnesses and of viewing and inspecting the premises, concurs.

There will be judgment for the claimant for $9,223.50 (in which sum is included interest), and a declaration that he is entitled to have constructed the two crossings mentioned. He is also entitled to his costs.

Judgment for claimant with costs.

Solicitors for claimant : *George Irvine and Donald Macmaster.*

Solicitor for respondent : *Wallace Graham.*

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Mar. 24.

THE MONTREAL AND EUROPEAN SHORT LINE RAILWAY CO. AND JOHN J. McCOOK, (AND BY THE ADDITION OF PARTIES, WILLIAM STEWART AND WILLIAM H. CHISHOLM, TRUSTEES UNDER AN INDENTURE DATED 27TH JULY, 1883.) ..... PLAINTIFFS ;

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Expropriation of a railway by the Crown—Special Act therefor, 50-51 *Vic.* c. 27—*Construction*—"*Present value of work done*"—*Allowance for capital expended in railway.*

The plaintiff company had entered into an agreement with the Dominion Government to construct, in consideration of a certain subsidy per mile, a line of railway between Oxford and New Glasgow, N. S. They entered upon the construction of the railway, but when it was partially completed abandoned active work upon it for lack of funds. The Government, having previously obtained from Parliament authority to pay all claims standing against the company on account of their partial construction of the line, and to set the same off against the company's subsidy, was empowered by 50-51 Vic. c. 27 s. 1 to acquire "by purchase, surrender or expropriation the works constructed and property owned by the said company" paying therefor the amount adjudged by the court "for the present value of the work done on the said line of railway by the said company."

Held, that the statute contemplated the taking of all the works constructed by the company and not a portion thereof; and where a portion only was taken compensation should be assessed in respect of the total value of the works.

2. That the words "present value of the work done" as contained in section 1 of the said Act, should, in view of the preamble and surrounding circumstances, be construed to mean the value of the works constructed and the property owned by the company at the time of the passing of the Act.

3. That the word "value" as used in the Act must be taken to mean the value of the property to the company and not to the Govern-

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ment; and that compensation for the taking should be assessed at the fair value of the property at the time contemplated by the Act.

4. The company were in possession of a right of way that had been acquired by proceedings taken under certain provincial statutes not applicable to the case, and for which the County Councils of Cumberland and Colchester had, in aid of the company's undertaking, paid the proprietors whose lands were situated in such counties.

Held, that the company were entitled to compensation therefor.

Argument of Counsel.

5. *Held*, that the company were entitled to an allowance for the use of capital expended in the enterprise.

THIS was a claim arising out of an expropriation of a railway in the Province of Nova Scotia by the Crown in pursuance of a special Act of the Parliament of Canada,—50-51 Vic. c. 27.

The facts of the case are fully stated in the judgment.

September 9th to 24th and November 18th and 19th, 1889.

Henry, Q. C., *Ross* and *Sedgewick* (with whom was *P. F. Greene*, of the New York Bar) for the plaintiffs:

(1) The Crown must take all the works constructed, and not part.

(2.) The Act contemplates reimbursement and not compensation, otherwise Parliament had no reason to pass the special Act. Mere compensation would not be adequate or equitable in view of the fact that the Act, by its use of the phrase "present value of work done," bars any claim for compensation for the future value of the work to the company. We are entitled to be reimbursed for the value of the right of way, of the works constructed at the date of the passing of the Act, and for all necessary expenditure incidental to the construction of the works and the management and maintenance of the company.

Graham, Q. C., *Borden*, *Ritchie* and *Gregory* for the defendant:

The expression "present value of the work done"

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indicates that the legislature had in view the probable depreciation of the works between the time of their construction and the passing of the Act. The value must be determined upon the evidence of the engineers who have examined the works for the purposes of this case, and not upon the cost of their construction to the plaintiffs. The company are not entitled to compensation for the right of way because, 1st, the Act only contemplates compensation for "work done," and the right of way does not fall within the meaning of those words; 2ndly, the municipal councils of the counties through which the right of way ran paid for it and not the company; 3rdly, the company proceeded in an irregular manner to get the right of way, and, consequently, have never properly acquired any property in it. Again, no allowance should be made to the company for the expenses of organization. That is clearly not within the contemplation of the Act which only speaks of compensation for the value of the work done on the railway itself.

With regard to the basis upon which damages are to be assessed here, in view of the authorities the case, after all, resolves itself into the simple exercise by the Crown of the right of eminent domain. The value of property taken in this way must be held for the purposes of compensation to be its market value. The company cannot be allowed anything that does not strictly enter into the value of the works in the market. The standard of its value is its means of producing pecuniary returns in the markets of the country (1).

BURBIDGE, J. now (March 24th, 1890) delivered judgment.

This case comes before the court on a reference by the Minister of Railways and Canals. By their state-

(1) *Cooley's Constitutional Limitations*, 5th ed. s. 565.

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ment of claim the plaintiffs, the Montreal and European Short Line Railway Company, and John J. McCook, claim from the defendant six hundred thousand dollars as compensation for the value of a line of railway, partially constructed by the company, between Oxford and New Glasgow, in the Province of Nova Scotia, with a branch to Pugwash, and for railway materials and other property of the company expropriated by the Crown.

By the Act of the Parliament of Canada, 45 Vic. c. 14, provision was made for a subsidy not exceeding $3,200 per mile, nor in the whole $224,000, for a railway from Oxford to New Glasgow in the Province of Nova Scotia.

By the Act of the Parliament of Canada 45 Vic. c. 73, "The Great American and European Short Line Railway Company" was incorporated with power, amongst other things, to lay out, construct, equip, maintain and work a continuous double or single track iron or steel railway, and also telegraph and telephone lines throughout the entire length of the said railway, with the proper appurtenances, from a point at or near Cape North, in the Island of Cape Breton, to the Strait of Canso, and from New Glasgow to a point at or near Oxford, Amherst, or some other suitable point of intersection with the Intercolonial Railway of Canada; and for the purpose of making the railway line and connection with the City of Montreal more direct, the company was empowered in so far as might be consistent with the laws for the time being in force in the State of Maine, and other States in the United States of America, through which the said line, or any branch thereof might pass, intervening between the Province of New Brunswick and the Province of Quebec, to hold, acquire and maintain a part of such railway across any part of the State of Maine, or of the said in-

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tervening States. The company was also authorized to build, purchase, lease, charter, possess and operate steam or other vessels or ships for the purpose of transporting freight or passengers across the Strait of Canso, and between the terminus of the said railways in the Island of Cape Breton and the Island of Newfoundland, and between the said Island and Europe; and to acquire by lease, gift or purchase, or by amalgamation with any other railway company or companies, any railway projected, in course of construction or constructed, either in the United States or in Canada, in the general direction of the lines authorized as mentioned.

On the 28th day of July, 1882, an agreement was entered into between The Great American and European Short Line Railway Company of the one part and Her Majesty the Queen, represented by the Minister of Railways and Canals, of the other part, by which for the subsidy therein mentioned, the company undertook to construct, in accordance with the terms thereof, a line of railway from Oxford Station on the Intercolonial Railway to New Glasgow, with branches from said railway to Pugwash, Wallace, River John, Tatamagouche and Pictou. The company made surveys of the lines between Oxford and New Glasgow and commenced work in the summer of 1882, and continued its operations until about the 26th of July, 1883, when there was a complete cessation of work. By the 1st of September of that year, speaking generally, the outstanding accounts of the company had been adjusted, but not paid, and thereafter the company's expenditure in Nova Scotia was limited to maintaining its organization and the works theretofore constructed by it; in looking after its interests and rights; and in making efforts to secure other terms and arrangements with the Government, and the capital necessary to enable it to proceed with its works.

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During the session held in the year 1884, the company obtained from Parliament an Act (47 Vic. c. 55) by which its name was changed to "The Montreal and European Short Line Railway Company," and some alteration was made in the description of its line through the Provinces of Nova Scotia and New Brunswick. This Act was followed by negotiations between the company and the Minister of Railways and Canals, which, so far at least as the case under consideration is concerned, were without results.

By the Acts 48–49 Vic. c. 41, (Acts of 1885, vol. 1, p. 78) Parliament appropriated $125,000.

"in aid of the Short Line Railway in Nova Scotia, for settling the "unpaid claims of sub-contractors and others for labor, board, &c., in "the construction of the said railway between Oxford and New Glas- "gow, and for acquiring their rights in the railway, and in the said "claims, the expenditure to be under order-in-council, and to be a first "charge on the subsidy for such railway, under 45 Vic. c. 14 ;

and by 49 Vic. c. 1 (Acts of 1886, vol. 1, p. 9) and 50–51 Vic. c. 1 (Acts of 1887, vol. 1, p. 8) Parliament appropriated the further sums of $25,000 and $397.35, respectively, for the same purpose.

And by 50–51 Vic. c. 27, the Minister of Railways and Canals was authorized to construct, as a public work, a railway from a point on the Pictou Town Branch of the Intercolonial Railway, or from a point on the Pictou Branch at or near the East River Bridge, to a point at or near Oxford Junction on the main line of said railway. The preamble and first section of the Act last referred to are as follows:—

Whereas by the Act passed in the forty-fifth year of Her Majesty's reign, chapter fourteen, the sum of two hundred and twenty-four thousand dollars was granted by Parliament as a subsidy for a railway from Oxford to New Glasgow, both in the Province of Nova Scotia, and the Great American and European Short Line Railway Company with whom an agreement was entered into for the construction of the said line of railway, in accordance with the provisions of the said Act, failed to carry the said agreement into effect ; and whereas the sum of

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one hundred and fifty thousand dollars was subsequently granted by Parliament to constitute a first charge on the subsidy granted as aforesaid, and to be expended in settlement of unpaid claims of sub-contractors and others for labor, board and like matters, in the construction of the Short Line Railway between Oxford and New Glasgow, and for acquiring their rights in the railway and in the said claim; and whereas the company with whom an agreement was entered into, as aforesaid, for the construction of the said line of railway having represented that they had expended a considerable sum of money in prosecuting the said work prior to failure in carrying out the agreement, it is desirable that they should be reimbursed such sum, if any, as they shall establish in court that they are entitled to for the present value of the work done on the said line of railway by the said company, or such sum as may be awarded by arbitrators and approved by the Governor-in-Council, subject to the deduction hereinafter mentioned ; and whereas in view of the construction of a line of railway in Cape Breton as a Government work it is desirable that, for the purpose of completing the line of railway hereinbefore mentioned, the portion thereof from a point on the Pictou Town Branch of the Intercolonial Railway, or from a point on the Pictou Branch at or near the East River bridge, to a point at or near Oxford Junction on the main line of the said railway should be constructed and completed as a Government railway, and that the unexpended balance of the grant hereinbefore mentioned, and an additional sum of five hundred thousand dollars should be applied to such construction : Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. The Minister of Railways and Canals may lay out, construct, equip and work a branch line of railway from a point on the Pictou Town Branch of the Intercolonial Railway or from a point on the Pictou Branch at or near the East River bridge to a point at or near Oxford Junction on the main line of the said railway, and such branch line shall be a part of the Intercolonial Railway ; and the Minister may, if he sees fit, acquire by purchase, surrender or expropriation, the works constructed and the property owned by the said company, its assigns or legal representatives, in connection with the said line of railway between Oxford and New Glasgow, and may pay to the said company, its assigns or legal representatives, the amount adjuged by the court or by arbitrators, less the amount already expended out of the one hundred and fifty thousand dollars above mentioned, for the present value of the work done on the said line of railway by the said company.

In pursuance of the authority given him by this Act

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(50-51 Vic. c. 27), to which I shall hereafter refer as the Special Act, the Minister of Railways and Canals, in July, 1887, took possession of a portion of the company's line and works and proceeded to construct the line of railway thereby authorized. From Oxford Junction to Pugwash the Government line is identical, substantially, with the company's line; but from Pugwash Junction, easterly, only four miles of the latter have been followed and utilized in constructing the former. This fact and the circumstance that a large part of the materials provided by the company for the construction of the road were not used by the Minister, give rise to an important question whether, under the Act last referred to, the Minister could acquire by expropriation a portion only of the

> "works constructed and the property owned by the company in con-
> "nection with the said line of railway between Oxford and New
> "Glasgow;"

or whether if he took part he was not bound to take, or at least to pay for, the value of the whole of such works and property.

Under the general expropriation Acts, the Minister could undoubtedly have taken part only of the company's works and property; but in that case the company would have been entitled to compensation not only for the part so taken but also for damages for injuriously affecting the portion that was not taken. The Special Act, however, makes no provision for compensation for any injurious affection, but limits the compensation to the then value of the work done on the said line of railway by the company, less the amount expended out of the one hundred and fifty thousand dollars voted for the settlement of unpaid claims of sub-contractors and others for labor, board and like matters in the construction of the railway. There are, it will be seen, no words in the Act expressly authoriz-

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ing the Minister to take part of the company's works, making due compensation to the company therefor. The authority is to acquire the company's works and property, paying for the value of the work done, not on part of the line of railway, but on the line of railway. It appears clear to me, therefore, that whether the Minister made use of all the works constructed and the property owned by the company, in connection with the line of railway between Oxford and New Glasgow, or not, the compensation to which it is entitled is in either case to be determined by the value in 1887 of the work done on the line of railway.

This leads us to consider what the company is entitled to under the words "present value of the work done." Mr. Henry and Mr. Ross, for the company, contended that, looking at the Special Act and the surrounding circumstances, something more than compensation, or the mere value of the work done, was intended; that such compensation would be inadequate and inequitable, and that the Special Act contemplated reimbursement. But while I readily agree that a narrow construction should not be given to the words "work done," I do not think that it was the intention of Parliament to reimburse the company for all its expenditure upon the railway between Oxford and New Glasgow, irrespective of the question as to whether or not such expenditure had contributed to, or was then represented in, the value of the company's works and property. That appears to be clear from the preamble in which we find it recited that the company

"having represented that they had expended a considerable sum of "money in prosecuting the said work prior to failure in carrying out "the agreement, it is desirable that they should be reimbursed,"

not the sum so expended, but

"such sum, if any, as they shall establish in court that they are entitled

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"to for the present value of the work done on the said line of railway "by the said company,"

and the words quoted are followed as will be seen in the enacting clauses of the Act. I think that it is reasonable and proper to conclude that the words "work done" are used in as large a sense as the words "works constructed and property owned by the said company," but that the duty devolves upon the court of determining the value thereof in the year 1887.

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There are two ways in which such value may be determined, the one by taking the actual cost of the works and property, making proper deductions for depreciation and for any moneys uselessly or wastefully expended, and the other by taking the value of such works and property as estimated by competent witnesses. The evidence affords the materials, not in either case wholly satisfactory, of proceeding in either of the two ways mentioned, and of comparing to some extent the results of such methods.

In the first place it will, I think, be found convenient to examine the evidence in respect of the money expended in the undertaking and ascertain the conclusion to which it leads. Now as to this, with one exception to which I shall refer, the evidence as to the amount of money expended is satisfactory, and there can, I think, be no doubt that on the whole the prices paid by the company for labor and materials were fair and reasonable. But the evidence as to the amount of labor done and materials furnished for the work is open to the serious objection, made by Mr. Graham for the respondent, that the engineers immediately in charge of the different branches of the work were not called to testify to the correctness of the measurements and returns that they rendered to the Chief Engineer, and on which he made the estimates and gave the certificates that constituted the authority and evidence for

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the payments made both by the company and His Honor Judge Clark, the commissioner appointed by the Government to expend the appropriations made by Parliament for settling the unpaid claims of sub-contractors and others for labor, board, &c., to which I have referred. That omission is the more unfortunate seeing that there can, I think, be no doubt that the company in some cases, of which Dewar's Bridge is an example, failed to get value for the money expended by it because of the neglect, if nothing worse, of the officer in charge of his duty to see that all work was done in a proper manner in accordance with the contract and specifications. There appears to be no doubt that in some instances the engineers immediately in charge passed work not properly done; and this fact tends to weaken the probability that their measurements and the reports made by them to the Chief Engineer were faithfully and honestly made. It is only fair, however, to observe that almost all of the contractors were called, and that their evidence, so far as the opinion of men who made no measurements but who had experience in such work and matters could do so, sustained the measurements and quantities which the Chief Engineer certified; and in the cases in which such contractors were not called there is no occasion for any suspicion that their evidence would have taken a different direction. With reference to the timber account it should also be added that Mr. Salter, the company's inspector of timber, was called as a witness and that he produced his books.

Attached hereto, marked "A,"* is a statement of the moneys expended by the company and by the Government in respect of work done and liabilities incurred by the company up to September, 1883. From this statement it will be observed that in some cases the Government, through Judge Clark, paid balances due

* REPORTER'S NOTE.—See page 187.

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for work done and materials supplied in respect of which the company had paid part, and in other cases the whole amount was paid by the Government, the company not having paid anything, and it might at first sight appear reasonable to conclude that after making such payments it would not be open to the Government to contend that the measurements or quantities were not correct. But more consideration of the circumstances under which payments were made by the Government leads, I think, to a different conclusion. The appropriation was made by Parliament to settle claims against the company, and when the commissioner was furnished by the claimants with certificates from the Chief Engineer, given at the time when the company was expecting itself to pay such claims, and before the intention of Parliament to make the appropriation was disclosed, and for that reason free from suspicion, I do not see that he was called upon to carry his investigation any further, or to go to the great expense of examining into the correctness of the measurements and returns upon which such certificates had been given. The company admitted the liability ; there was nothing to suggest collusion between it and any of the claimants, and there was no occasion to pass upon the measurements referred to, and therefore it appears to me that it would be unreasonable to conclude that in this enquiry the Government are precluded by what was then done from contesting their accuracy. There is another matter in reference to the final estimates given by the Chief Engineer of the company to which I ought to refer. It appears that he told Judge Clark that he had estimated quantities amounting in value to about $20,000 more than he would have certified for if the company had gone on with the work ; but he explained that materials had been provided by the contractors and

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work had been done by them which would have been taken up in the monthly estimates if the company had continued its operations, but which, as work had stopped, the engineers were instructed to include in the final estimates. For instance there were, he stated, stone on the line and in quarries, timber at the mill, cement and other materials and work. The engineers, he added, were instructed to give a full estimate of these in the sense of a final estimate, and not in the sense of an excessively liberal estimate, and the quantities returned did not, he states, exceed the amount of work done.

But to return to the examination of statement "A" of money expended, as mentioned, on the undertaking by the company and the Government, and to the deductions to be made therefrom, to ascertain the value, in 1887, of the works constructed and property owned by the company,—assuming the measurements and quantities given in the certificates of the Chief Engineer to have been correct.

The total amount expended for engineering and instruments and camp equipage ($37,158.22) is no doubt very large. Mr. Burpee, one of the witnesses says, that for a road such as this he has been accustomed to allow $500 per mile for a complete railway; and at that rate the sum expended ought not to have been exceeded had the railway been finished. There were, it appears, more trial lines surveyed than is usual; but I cannot, under the evidence, say that, looking to the arrangements of the company with the Government, and all the circumstances of the case, any of them were unnecessary. The same is true, I think, of the surveys at Pictou Harbor, which involved a very considerable expenditure. The items now under consideration include a sum of $6,144.23 alleged to have been expended by Mr. W. S. Green, who was the Chief

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Engineer of the company when the first preliminary surveys were made. Strictly speaking, there is no legal evidence before the court that this amount was disbursed, no witness with any personal knowledge thereof having been called. It is clear, however, from the evidence, that Mr. Green was at work on these preliminary surveys, and that he had assistant engineers and others employed under him, but that their surveys were not conducted with prudence and economy. In a letter to the secretary of the company, of September 26th, 1882, he mentions the criminal extravagance of two engineers who had been discharged, and elsewhere in his correspondence he explains the causes that led to such large expenditure for this service.

With reference to the expense incurred for instruments and camp equipage, Mr. Snow says that the amount of $225 represented by voucher 40 for instruments for Brett, was refunded and should not appear anywhere, and it is a question whether any part of this expenditure which seems to have been rendered necessary because of the employment, during the early part of the company's operations, of engineers from the United States who had no instruments, should be allowed. In addition to the deduction of $225 the following deductions should be made in respect of the items under consideration, as the expenditure was not incurred on account of the Oxford and New Glasgow Railway, but on account of other enterprises of the company :—

Part of amount of voucher 244 paid to C. L. Snow in respect of starting surveys in Cape Breton and New Brunswick.....	$240 00
Part of amount of voucher 245 paid to Snow in respect of surveying party in New Brunswick...	90 00
Part of amount of voucher 248 paid C. L. Snow to reimburse balance paid moving Cushing's camp to Port Hawkesbury.....	5 00

Amount of voucher 247, certain expenses of engineers at Port Hawkesbury	97 83
Amount paid by Conant to one McLellan for services as axeman in Cape Breton	14 00
(Conant also advanced $206 to Cushing, but that was charged against the latter by Judge Clark in settling up the accounts of the Oxford and New Glasgow branch.)	
	$446 83

Reasons for Judgment.

The total expenditure for superintendence, stationery, printing, advertising, telegraph bills, and sundry and general expenses amounted to $16,127.18. At the hearing of the case, on objection taken by counsel, I expressed the view that legitimate and proper disbursements of the classes mentioned were represented in the value of the work done by the company, and I have since seen no reason to change the opinion I then expressed. It is obvious, I think, that no company or person can construct a railway without being at some charge for such services, and that such expenditures increase the cost and must, if prudently made, be represented in the value of the works constructed.

With reference to the amount of such charges in the present case, it appears to me that some ought not, under any circumstances, to be allowed, and others are referable to the larger enterprises of the company, and not to the Oxford and New Glasgow Railway. I shall, therefore, make the following deductions :—

Part of amount mentioned in voucher 11 paid to Charles L. Snow, for certain expenses at Pictou.	$ 18 00
Part of amount mentioned in voucher 50, to Charles L. Snow, for expenses at New York, Toronto, Ottawa, Montreal, and Halifax	142 80
Part of amount mentioned in voucher 51 paid to Charles L. Snow, for expenses at Halifax, getting legislation in regard to Eastern Extention and Cape Breton	82 85
Amount of voucher 197 paid to C. L. Snow, in	

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respect of expenses incurred in April and May, 1883, relative to obtaining legislation at Ottawa.	1,056 57
Amount of voucher 208 paid to Burland Lithographic Company, Montreal, in May, 1883, for pamphlets, maps, &c.....	99 50
Part of amount of voucher 244 paid to C. L. Snow, in respect of expenses of getting subsidy in New Brunswick (evidence p. 280).....	100 70
	$1,500.42

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The furniture for which a charge is made in the accounts has been retained by the company and is still in its possession. It appears from the evidence of Mr. Snow that its value at present is not considerably less than when it was new. In the nature of things, however, there must have been some depreciation, and as any company constructing the railway in question would, I think, have been at some charge in this respect, I shall allow $100 for the use of furniture during the time that the company's operations on the railway were in course of progress.

The charge for claims paid is made in respect of the price paid for a steer killed by one of the surveying parties, and should be deducted.

The horses, waggons, sleighs, harness, and things of that class, representing the expenditure of $474.50, have either been sold or retained by the company. I think, however, that a sum say of $100 should be allowed for the use made of them by the company's officers during the construction of the works in question.

In addition to the sum of $104.50 paid for legal expenses, the company incurred a liability for the salary of a solicitor at Halifax for three years at $1,000 per year. For the year during which the company was engaged on the works in question this salary constitutes, I think, a proper charge against such works.

I do not think the item of $71.86 for cutting ice

around piling should be allowed. The expenditure may have been very necessary to preserve or protect the piling, but it could not have added anything to its value.

The track cars and trolleys have, with Mr. Snow's consent, been used by one of the contractors under the Government, under an agreement to pay the Government or the company according as to which is determined to own them. I think they were part of the company's property that the Government were under the Act bound to pay for if they acquired any of such property, and I shall therefore allow the charge made in respect of the same.

It will be observed that in the amounts indicated in statement "A" as having been paid by the Government, are included several items, aggregating $7,756.79, which are connected with the distribution of the appropriation made by Parliament to which I have referred and which cannot be said to be represented in the value of the works. To these, the last five items in the statement, I shall have occasion to refer at greater length in discussing another branch of the case.

The result of the present examination of statement "A" is indicated in the paper attached hereto marked "B,"* showing the cost of the works and property of the company, without the right of way, to have been $271,070.85, of which the company disbursed the sum of $129,991.85, and the Government the sum of $141,079.

In the autumn of the year 1887, the Minister of Railways and Canals, desiring to procure a fair and reasonable estimate of the then actual value of the work done by the company, instructed Messrs. E. R. Burpee and Richard C. Boxall, two engineers of standing and experience, to make an examination of the company's works and to report to him. Neither Mr.

* REPORTER'S NOTE.—See page 190.

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Burpee nor Mr. Boxall was able to be present at the examination of witnesses before the court, but their report was put in evidence, and both were examined by commission, and stated the manner in which they carried out the instructions of the Minister. I have, for convenience of reference and comparison, attached hereto, marked "C," a copy of Mr. Burpee and Mr. Boxall's evidence *, and a statement giving an analysis of their report, showing the amount of work done and the average prices allowed; from which it will appear that they found the value of all the work done to be less than the amount paid by the Government in respect thereof, to say nothing of the amount disbursed by the company. It is obvious, however, that they have not made any allowance for many things in respect of which the company incurred expenses, and which, in the view I entertain of the matter, ought to be taken into consideration. But it will be seen that, having regard only to works constructed, there is a large and, in some cases, I think, an unaccountable difference between the quantities of such works as indicated by the certificates of the company's Chief Engineer and by the measurements and calculations made by Messrs. Burpee and Boxall. To take a single instance: the company paid for 462,812 cubic yards of earth, while Messrs. Burpee and Boxall return only 303,340 cubic yards, showing the large difference of 160,000 cubic yards. Making every allowance for waste, this difference cannot be explained on any other theory than that either the measurements and returns which the Chief Engineer of the company took as the basis of his estimates, or those made or used by Messrs. Burpee and Boxall, or both, were not correct. It appears from

* REPORTER'S NOTE: The evidence of Messrs. Burpee and Boxall has not been printed here, but the analysis of their report will be found on page 191.

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their evidence that Messrs. Burpee and Boxall relied considerably upon measurements that had been previously made by Mr. Cushing and Mr. Dickie. Both of the gentlemen were witnesses in this case, and it must, I think, be conceded that, so far as Mr. Cushing's measurements were concerned, they appear to have been as carefully and accurately made as was possible under the circumstances in which they were made. On the other hand, Mr. Burpee says that in certain cases in which he verified Mr. Dickie's measurements he found them too small.

Now, I confess that the difficulty of deciding as to whether I should follow the measurements returned during the progress of the work by the company's engineers, and accepted and certified by the company's Chief Engineer, or those subsequently made by the gentlemen to whom I have referred, appears to me very great, but it is one from which I cannot escape. And on the whole, looking to all the circumstances of the case, I have concluded to adopt the former, making what appears to me proper allowance and deductions for defective work, extravagant or unnecessary expenditure, and for depreciation in value of the works constructed. But while I do not adopt Messrs. Burpee and Boxall's report, I desire to say that I think it entitled to the greatest consideration, especially in determining such allowances and deductions.

By reference to the Act 50-51 Vic. c. 27, already cited, it will be seen that the court is to adjudge

"the present value of the work done on the line of railway by the "company."

At the date when that Act became law nearly four years had elapsed since the company had ceased to prosecute its works of construction, and Parliament, in the use of the language I have quoted, had, without doubt, in view that the value of the works and pro-

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perty of the company had, during the interval, depreciated to a very considerable extent. That would be in the nature of things, and the evidence shows clearly that such was the fact. Now, it is obvious that all of such works and property would not have deteriorated equally, but it would, I think, be found difficult, if not impossible, to adopt any mode of determining such deterioration, except that of ascertaining some fair percentage of deduction applicable to the whole expenditure.

But before discussing that question I wish to say a word or two with respect to the word "value," as used in the Act. If this word should be construed as indicating the value to the Government, I should, of course, be obliged to make much larger deductions than I propose to make, and it might be that, so far as the works only are concerned, the value, as given by Messrs. Burpee and Boxall, would not be far out of the way; for, it is very clear that much of the work done and property acquired by the company was of no use or value to the Government. But the general rule in cases of expropriation is to allow the value of the property expropriated to the person from whom it is taken, and I see nothing in the present case, or in the Act, to lead me to depart from that rule; and I shall endeavor to ascertain, as well as I can, what would have been the fair value in 1887 of the works and property of the company, to itself, if it had then been in a position to resume work, or to any company that might have been in a position to purchase them and continue the undertaking upon the same grades and standard as that upon which the company had proceeded, for I think that it is possible that a company would have utilized some of the works that the Government, rightly enough according to the grades and standards adopted by them, condemned.

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To return, then, to the question of what would, in ascertaining the value of the company's works and property, be a fair percentage of the whole cost to deduct for the reasons I have mentioned, let us examine briefly a number of the larger items of expenditure mentioned in statement "A."* The expenditure for engineering, superintendence, &c., cannot, of course, be referred to any particular part of the company's work that could be examined, and the deterioration thereof determined. Such expenses are referable to the work generally, and share, I think, any general depreciation in the value of the whole. Besides, we have seen that some of the expenditure for engineering was incurred extravagantly and without useful practical results to the company.

With reference to the earth work, the apparent quantity thereof would be lessened by both sinkage and shrinkage, but this would occur in any case, and does not, so I understand it, lessen the value of the work. But apart from this, the embankments would, I fancy, be subject to some waste from the wash of water during seasons of rain. There is evidence of such waste, but I am not prepared to conclude that it would be represented by the percentage of cost that I propose to adopt as the measure generally of depreciation and loss in the present case. But this consideration, taken in connection with the large discrepancy between the quantities of earth work certified to by Mr. Snow on the statements and returns of persons whose evidence is not before me and the quantities returned by Messrs. Burpee and Boxall, satisfies me that the course I am about to adopt is not an unfair and unreasonable one. A deduction of 20 per centum from the quantity of earth for which the company paid still leaves them nearly 67,000 cubic yards more than Messrs. Burpee and Boxall report that they found upon the ground.

*REPORTER'S NOTE.—See page 187.

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With reference to the masonry, I think, as I have before intimated, that the conclusion is inevitable that much of it was not properly laid in the first place, and it is clear that it deteriorated much during the four years that it was exposed to the weather, especially the portions of it that were in course of construction at the time the company stopped work. I am of opinion that its value as a whole was not in 1887 more than two-thirds of its first cost; and the same, I think, was true of the timber and other materials of wood and works constructed of wood, taking them as a whole. It is of course obvious that all would not decay equally, as that would depend largely upon the character of such materials, the position in which they were placed, and the exposure to which they were subjected.

I think that all payments for materials not delivered were made, not by the company, but by Judge Clark for the Government, and I have had some doubt as to whether or not the rights acquired by such payments could properly be taken to fall within the term "works constructed and property owned by the company." Under the agreements with the contractors the company acquired no title, and were not bound to pay for any such materials until they were delivered. They were included in the final estimates because the work on the railway had ceased, and they represented labor expended by the contractors. Seeing, however, that the Government, having knowledge of the settlements between the contractors and the company, paid the amounts agreed upon between the former and the latter in respect thereof, and took assignments of the contractor's claims, they were, I think, in a position when they took possession of the railway to get the benefit of the work so done and paid for.

Then, too, it seems to me that if the company had been a going concern when the Government expro-

priated its property, it would hardly have occurred to any one to think that the preparation of materials in the woods or quarries, whether this were done directly by the company or through contractors, was not part of the work done by the company, and I do not see that the case under consideration differs very greatly in principle from that suggested. There would, of course, be an equal, or perhaps a greater deterioration in the value of materials of wood so situated, but subject to this, I am of opinion to allow the items.

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I am of opinion, therefore, under all the circumstances, to deduct from the cost of the company's work and property, as given in statement "B," twenty per centum, as being a proper allowance to make on the whole for extravagant or useless expenditure, bad or defective work, and for depreciation.

The company organized under the charter obtained from the Parliament of Canada. The persons who constituted the company had also obtained legislation from the Legislature of Nova Scotia, but no organization ever took place thereunder. It happened, however, that by the laws of Nova Scotia provision was made whereby municipal bodies could aid railway enterprises by procuring for them the right of way, the cost thereof being assessed against the county. Either through inadvertence or in order to obtain the aid of the county councils of Cumberland, Colchester and Pictou in the acquisition of its right of way, the company proceeded to acquire the same according to the provincial laws, and not in acordance with the laws of the Dominion which they should have followed. The right of way was staked out through the three counties, and the company went into possession thereof, the county council of Cumberland paying to the proprietors in respect of that part thereof which was situated in that county the sum of

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$3,144.47, and the county council of Colchester paying for a like purpose in respect of the portion of the line traversing Colchester the sum of $5,397. Nothing was paid in respect of the right of way in Pictou county. It was strongly urged by counsel for the Crown at the trial, that no allowance ought to be made to the company in respect of its right of way. I am unable, however, to take that view. The irregular proceedings do undoubtedly present difficulties, but I cannot overlook the fact that the company was in possession of a right of way for which the sum of $8,541.47 had been paid. I do not see that the county councils of Cumberland and Colchester could make good any claim upon the Government to be reimbursed the amounts so paid by them respectively. That, it appears to me, is a matter to be settled between the municipal councils interested and the company; and, besides, the company's possession was worth something. I shall allow the company in respect of its right of way the sum of $10,000.

In addition to the moneys expended in connection with the construction of the works, and the acquisition of the property to which reference has already been made, the company has disbursed $42,479.38, as per statement "D,"* in the maintenance of its organization and works, in its attempts to secure concessions from the Government, and in looking after its interests generally. With reference to this expenditure, however, I have no hesitation in agreeing with the contention made by Mr. Graham at the trial, that it in no way added to the value of the company's works or property; even the portions of such expenditure that were more immediately incurred for the preservation of the company's works from damage by ice, added nothing to the value of such works.

The company also claimed to be reimbursed for a fair proportionate part of the expenses incurred at

* REPORTER'S NOTE.—See page 192.

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the head office at New York. Statement "E"* is a copy of the particulars of the whole of such expenditure, some $20,000 of which represent, speaking generally, money paid and liabilities incurred to third parties; and the balance the salary of the president of the company, for which he took stock of the company. So far as the construction of the Oxford and New Glasgow Railway was concerned, the services rendered at New York were those which are rendered by the person or company that supplies the money for and promotes the undertaking, and it appears to me that while a reasonable amount should be allowed in respect of such services, that they are of the class that fall within and are covered by any allowance that is made for the use of money expended in the undertaking.

As to that, it appears to me reasonable to make an allowance for the use of the capital expended in the enterprise, which should, I think, be sufficient to cover the risks incurred by the company, and any profit to which it is entitled. Especially do I think that a proper course to adopt in a case of compulsory sale, such as results from the expropriation in this case. In coming to that conclusion I do not overlook the fact that it might be said that the expropriation in this case differs from ordinary expropriations, and that looking to the chance that the company might never have been able to use or dispose of its works and other property to advantage, the Special Act, to which I have referred, was to some extent a measure of relief to it. I cannot from the evidence, however, think that the company so regarded it, although I may entertain somewhat strongly the view that the difficulties in the way of its resuming its work, or of making an advantageous disposition of its property, were in 1887 very great.

Had the company disbursed the money representing

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the total cost of the works, I should not have thought it unreasonable to have allowed a sum of $20,000 or $25,000 in respect of the matters now under consideration. But of the capital expended upon the works the Government provided more than one-half, besides incurring an expense of $7,756.79 in closing up the company's business and settling with the contractors. Of the amount of $7,756.79 a sum of $4,727.81 was paid to the contractors to indemnify them for losses sustained by the breach by the company of its contracts. The amount paid was small, but it saved the company, I have no doubt, a great deal of money, trouble and litigation. Mr. Snow, the company's Chief Engineer, had in his final estimates included interest, but this Judge Clark did not pay. He thought it fair, however, in certain cases to make to the contractors the allowance amounting to $3\frac{3}{4}$ per cent. of the estimates to which reference has been made. When Mr. Snow was first asked in respect of this allowance he said that he had, at the time when it was paid, no knowledge that Judge Clark was paying it, but it appears that on the 23rd of August, 1886, he wrote Dr. Norvin Greene that, as he had telegraphed him, all their contractors had been settled with in full, had given full and final releases and assignments, and for all claims for damages for stoppage of work had been paid $3\frac{3}{4}$ per cent. on the face of their estimates, and that the company was thus saved $40,000, which he (Snow) considered good work.

It appears to me reasonable, therefore, to take these matters also into consideration in determining the allowance to be made on this branch of the case, which, in view of all the circumstances of the case, I fix at the sum of $15,000.

The result, then, of the whole matter, according to

the views I have expressed, may be briefly stated as follows:—

Total cost of works and property.	$271,070.85	
Deduct 20 per centum for extravagant expenditure, bad work and depreciation.....	54,214.17	
	$216,856.68	
Add for right of way.....	10 000.00	
Add for use of money, expenses at Head Office, &c., and in respect of compulsory sale.....	15,000.00	
Total value of works and property in 1887.....		$241,856.68

Of this sum of $241,856.68 there was expended by the Government, out of the appropriation of $150,000 made by Parliament, the sum of $141,079 in settlement of unpaid claims of sub-contractors and others for labor, board and like matters in the construction of the Oxford and New Glasgow Railway.

I am of opinion, therefore, and I adjudge that the value of the work done on the said line of railway by the said company, construing the words "work done" in as large a sense as "works constructed and property owned by the company," was, on the first of July, 1887, $241,856.68. From that sum, if I may properly express an opinion in respect of the matter, the Minister of Finance should, I think, deduct the sum of $141,079, leaving the sum of $100,777.68 to be paid to the company, or to whomsoever is entitled thereto. On the latter sum, interest should, it seems to me, be allowed from the date last mentioned (July 1st, 1887).

A number of other questions were discussed during the progress of the case arising out of the transaction between Snow and the trustees, to whom he purported

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to give an assignment of the company's property in Nova Scotia, and to confirm which the Legislature of Nova Scotia passed an Act; and out of the assignments given by the creditors of the company to the Crown, the relation of the construction company to the plaintiff company and other like matters. It appears to me, however, that the important question is the one of value, and that it is unnecessary at the present to determine the others. I shall, therefore, reserve them, giving any party the right to apply for further directions.

The original plaintiffs are entitled to their costs.

*Judgment for plaintiffs with costs to original plaintiffs.**

Solicitor for plaintiffs: *William B. Ross.*

Solicitor for defendant: *Wallace Graham.*

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* REPORTER'S NOTE :—On the pages immediately following will be found the Statements referred to by the learned Judge in the above reasons for judgment.

A

CONSOLIDATED STATEMENT OF DISBURSEMENTS FOR SHORT LINE RAILWAY, OXFORD AND NEW GLASGOW, NOVA SCOTIA.

Particulars.	Quantities.	Amounts paid by Company.	Amounts paid by Comm'r, Judge G. M. Clark.	Total Paid.	Average Cost.
Engineering	.....	$30,457 21	$ 6,282 88	$ 36,740 09	
Superintendence	.....	10,198 55	2,087 94	12,286 49	
Stationery, printing and advertising	.....	1,390 35	110 55	1,500 90	
Sundry and general expenses	.....	2,205 79	32 97	2,238 76	
Telegraph bills	.....	.....	101 03	101 03	
Furniture	.....	461 71	.....	461 71	
Instruments and camp equipage	.....	418 13	.....	418 13	
Legal expenses	.....	104 50	.....	104 50	
Claims paid	.....	40 00	.....	40 00	
Wagon, sleigh, harness, etc	.....	261 50	.....	261 50	
Horses	.....	213 00	.....	213 00	
Clearing	$2,184\frac{75}{100}$ stations	1,826 37	6,512 31	8,338 68	$3.81 per sta.
Close Cutting	$121\frac{25}{100}$ "	171 00	273 30	444 30	3.66 "
Grubbing	$786\frac{20}{100}$ "	1,615 90	3,714 72	5,330 62	6.78 "
Earth	462,812 cu. yds.	37,869 12	55,823 29	93,692 41	$0.20.3 cu. yds.
Loose rock	27,744 "	6,253 95	8,047 70	14,301 65	0.51.5 "
Solid rock	2,297 "	421 89	1,487 25	1,909 14	0.83.1 "
Fencing	$7\frac{4}{10}$ miles.	774 59	1,222 00	1,996 59	269.81 per mile.
Extra work (sundry work not classified)	.....	1,191 51	1,771 56	2,963 07	
Culvert masonry	$2,646\frac{8}{10}$ cu. yds.	8,353 17	5,509 20	13,862 37	$5.24 per cu. yd.

CONSOLIDATED STATEMENT OF DISBURSEMENTS, ETC.—*Concluded.*

Particulars.	Quantities.	Amounts paid by Company.	Amounts paid by Comm'r Judge G. M. Clark.	Total Paid.	Average Cost.
Riprap	2,819 75/100 "	1,675 35	4,167 40	5,842 75	2.07 " "
Wooden drain	9	64 35	7 96	72 31	8.03 a piece.
Piles on line	72,456 lin. ft.	2,693 88	1,345 08	4,038 96	0.05⁵ per lin. ft.
Bridge masonry	520 7 cu.y.m'y. 736 " d. stne	8,198 22	.....	8,198 22	M'y.$9.50 c.yd. Stone$4.26 c. "
Arch masonry	274 6/10 cu. yds.	.....	708 06	708 06	$11.00 per cu. yd.
First class masonry	810 4/10 "	.....	7,319 23	7,319 23	9.02 " "
Second class masonry	16 4/10 "	.....	131 20	131 20	8 00 " "
Cross ties	89,265	6,248 61	8,445 77	14,694 38	0.16⁴ per tie.
Cross ties, not delivered	6,811	.....	953 54	953 54	0.14 " "
Extra haul	96,343 cu. yds.	506 72	488 70	995 42	0.01 per cu.y.
Rough stone on line	259 "	.....	823 00	823 00	3.17 " "
do in quarries	592 "	.....	1,619 00	1,619 00	2.74 " "
Dressed stone on line	999 "	.....	6,993 00	6,993 00	7.00 " "
do in quarries	766 "	.....	3,830 00	3,830 00	5.00 " "
Broken stone for riprap	110 "	.....	55 00	55 00	0.50 " "
Sand, delivered	17 "	.....	6 80	6 80	0.40 " "
Cement	89½ barrels	.....	447 50	447 50	5.00 barrel.
Fence poles	7,087 poles	.....	141 75	141 75	0.02 per pole.
Telegraph poles	600 "	.....	642 00	642 00	1.07 " "
Bridge superstructure and trestles	.....	8,060 17	.....	8,060 17	
Cutting ice around piling	.....	71 86	.....	71 86	
Piles, in place, driven	5,266 lin. ft.	.....	473 88	473 88	0.09 per lin. ft.
Trestle timber, put up	92,450 ft. b. m.	.....	739 59	739 59	8.00 per M.
Truss timber, do	13,577 " "	.....	135 77	135 77	10.00 "
Bridge iron and blacksmithing		.....	372 19	372 19	2½ to 4½ c., and l'g.

White pine timber	49,166 " "		1,438 02	1,438 02	$29.25 per M.
Hemlock timber	67,454 " "		544 53	544 53	8.07 "
Hardwood pins	280		5 60	5 60	0.02 "
Track cars and trolleys for laying rails	5 Push cars. 1 Track car.	264 77		264 77	
Cattle guard timber	30,720 ft. b m.		215 04	215 04	7.00 "
Heavy slabs for matting, in place	77,875 " "		311 50	311 50	4.00 "
Heavy slabs for matting, delivered	140,000 " "		420 00	420 00	3.00 "
Work and expenses on hemlock timber in woods	850,000 " "		2,550 00	2,550 00	3.00 "
Work and expenses on logs for cross ties	370,000 feet.		925 00	925 00	2.50 "
Tools, &c. on Sec. D			108 60	108 60	
Laborers on Sec. A			738 98	738 98	
Test piles, driven			50 70	50 70	
Extra quantities allowed			105 60	105 60	
Sundry accounts not classified			242 94	242 94	
Sundry accounts not classified, no assignments			599 37	599 37	
Compensation 3.75 per cent			4,727 81	4,727 81	
Wallace Graham			393 45	393 45	
Wm. Stewart			1,000 00	1,000 00	
Expenses of commission			683 53	683 53	
G. M. Clark			952 00	952 00	
Totals		$132,012 17	$148,835 79	$280,847 96	

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B.

DEDUCTIONS FROM AND ADDITIONS TO AMOUNTS PAID BY THE COMPANY.

		Amt. Paid.	Deductions	Additions.
Engineering	$36,740 09			
Instruments and camp equipage	418 13	$37,158 22	$671 83	
Superintendence	12,286 49			
Stationery, printing and advertising	1,500 90			
Telegraph bills	101 03			
Sundry and general expenses	2,238 76	16,127 18	1,500 42	
Furniture		461 71	361 71	
Claims paid		40 00	40 00	
Horses, sleigh, wagon, &c.		474 50	374 50	
Legal expenses		104 50		$1,000 00
Cutting ice around piling.		71 86	71 86	
			$3,020 32	$1,000 00

DEDUCTIONS FROM AMOUNTS PAID BY THE GOVERNMENT.

Compensation 3¾ per cent		$4,727 81		
Wallace Graham		393 45		
Wm. Stewart		1,000 00		
Expenses of commission		683 53		
G. M. Clark		952 00	$7,756 79	
			$7,756 79	

		Deductions	Additions.	Balance.
Amount paid by the Company	$132,012 17	$3,020 32	$1,000 00	$129,991 85
Amount paid by the Government	148,835 79	7,756 79		141,079 00
Total cost of works, &c.				$271,070 85

C.

This statement contained the evidence in full of the witnesses Burpee and Boxall, which has been omitted, and the following :—

ANALYSIS OF MESSRS. BURPEE AND BOXALL'S REPORT.

		Quantities.	Rate.	Amount.
Clearing	Acres.	458	$11 40	$ 5,227 00
Grubbing	do	25¼	64 92	1,639 00
Earth excavation	C. yds.	303,340	0 22	67,000 00
Rock do	do	460	0 67	308 00
Loose rock excavation	do	6,636	0 53	3,542 00
Riprap	do	150	1 00	150 00
Broken stone	do	567	1 00	567 00
Quarried stone delivered	do	474	2 00	948 00
Ashlar do do	do	285	5 00	1,425 00
Stone from Doherty Creek Bay	do	180	4 00	720 00
Paving	do	3	2 00	6 00
Culvert masonry	do	1,437	4 84	6,960 00
Masonry in cement	do	1,346	9 86	13,274 00
Timber in cattle guards	B.M.	7,000	5 00	35 00
Pine timber	do	15,875	10 00	159 00
Hemlock timber	do	34,250	5 00	171 00
Hemlock ties	No.	57,400	0 10	5,740 00
Spruce ties	do	11,577	Nil.	
Pole fencing	Rods	1,095	0 22½	245 00
Box drains	No.	6	10 00	60 00
Pile bridging	L. Ft.	1,970	5 32	10,480 00
Telegraph poles	Each	413	0 50	207 00
Cofferdams and pumping		300		300 00
Examining and locating		18,000		18,000 00
Not classified				477 27
				$137,640 27

1890

THE MONTREAL AND EUROPEAN SHORT LINE RAILWAY COMPANY v. THE QUEEN.

Reasons for Judgment.

D.

EXPENDITURES IN CANADA BY EUROPEAN AND MONTREAL SHORT LINE RAILWAY CO., SEPTEMBER, 1883, TO NOVEMBER, 1885.

LEDGER PAGE, L. 4.	PARTICULARS.		AMOUNT.
9	Expense.—Voucher No. 245	$232 11	
	" 250	34 45	
	" 251	57 28	
		$323 84	
	Less $4,16 already credited	$4 16	
			$ 319 68
68	Maintenance, Road Bed		679 39
73	" Organisation		1,061 73
	Advances on account of salaries and rent :—		
23	R. H. Cushing	$ 13 00	
38	B. A. L. Huntsman	175 00	
64	R. F. Boyd	5 00	
29	J. H. Black	50 00	
29	Alex. McLellan	14 00	
56	W. Conant	1,422 08	
58	C. L. Snow, (Snow charges himself with $14,652.96 for this)	14,630 42	
65	J. R. Salter	930 33	17,239 83
			$19,300 63
67	Amount sent up by Dr. N. Greene	$19,255 63	
21	" for which horse "Ned" was sold	45 00	
		$19,300 63	
	Since Statement of Sept., 1883 :—		
4 35	Voucher No. 252, P. P. Dickinson, $35,00 had been credited to him and charged to Engineering Survey.		
46 64	Also Voucher No. 253, J. R. Eaton, $15.50 had been credited to him and charged to Engineering Construction.		
	The totals of expenditures, however, are not changed by these transfers.		
	Disbursements by W. Conant, (see above).		19,255 63
	" by C. L. Snow, Nov., '85, to July, 1887.		12,779 32
	Disbursements by C. L. Snow, July, '87, to Oct., 1889.		$32,034 95 10,444 43
			$42,479 38
	See Snow Voucher, ex : P. 7, P. 8, P. 9, P. 10.		

E.

EXPENDITURES OF THE NORTH AMERICAN CONSTRUCTION Co., EXECUTIVE OFFICE, FROM OCTOBER, 1882, TO DECEMBER, 1888.

	OFFICE FURNITURE.		
Oct., 1882.....	Carpets, desks, chairs, presses, &c ..	$500 00	$ 500 00
	OFFICE RENT.		
From Oct., 1882, to May, 1885...	31 Months, at $100 per month.....	$3,100 00	
From May, 1885, to May, 1887...	24 Months, at $28 per month.....	672 00	3,772 00
	EXECUTIVE SALARIES.		
From July, 1882, to Dec., 1888...	President's salary, at $7,500 p. annum	47,500 00	
From Oct., 1882, to Nov., 1885...	Secretary's salary, at $500 p. annum.	1,500 00	
From Oct., 1882, to May, 1885...	Clerk (Stenographer), at $40 p. mth.	1,240 00	50,240 00
	STATIONERY.		
From Oct., 1882. to May, 1887...	Stationery, Postage, Copying, &c...	280 00	280 00
	LEGAL SERVICES.		
Oct., 1882.....	F. S. Joline, (procuring certificate, &c.).....	100 00	
From Mar., 1883, to Nov., 1887...	Wm. McDougall, (advice drawing papers, &c.).....	900 00	
Oct., 1882. } Sept., 1884. } ...	Alexander & Greene, (drawing two sets of bonds and mortgages).....	1,000 00	2,000 00
	PRINTING AND ENGRAVING.		
Aug. 30, 1884....	John Polhemus, (printing pamphlet)	87 50	
Dec. 1, "	" "	15 38	
Sept. 3, "	Snyder and Black, (engraving map).	103 50	
March, 1883.....	Franklin Bank Note Co., (engraving bonds).....	1,200 00	
Dec. 2, 1884.....	" "	2,600 54	4,006 92
	TRAVELLING EXPENSES.		
From May to Sept., 1883.....	Norvin Greene, Agent, (in London)..	2,000 00	
From July, 1884, to Feb., 1885...	P. F. Greene, Agent (in London)....	3,500 00	
From July, 1885, to Nov., 1887...	P. F. Greene, Prest. (in Canada).....	750 00	
From Feb., 1884, to Nov., 1887...	N. Greene, (in Canada)....	500 00	
From March 1883, to Nov., 1887...	Erastus Wiman, (in Canada)....	250 00	
Sept. 3, 1885.....	Edward Kamper (in Canada)....	500 00	7,500 00
	TAXES.		
1882 to 1888, inclusive.....	7 Years' Taxes, at $22 per annum...	154 00	154 00
	TOTAL.....		$68,452 92

1890
Sept. 11.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... } PLAINTIFF;

AND

DANIEL SIGSWORTH..... DEFENDANT.

Expropriation of lands for P.E.I. Railway—34 Vic. (P.E.I.) c. 4—Construction of—Effect of non-entry of Commissioners on land taken.

Under an Act of the Legislature of Prince Edward Island (34 Vic. c. 4 s. 13) the Commissioners who had charge of the construction of the Prince Edward Island Railway were authorized to enter upon and take possession of any lands required for the tracks of the railway, and, to the end that such taking should operate as a dedication to the public of such lands, they were required to lay off the same by metes and bounds and record a description and plan thereof in the office of the Registrar of Deeds and Keeper of Plans for the Island.

By arrangement between the Commissioners and the defendant the boundary line between the railway and the latter's premises was deflected from the course originally intended, so that the same might not interfere with his buildings, and the land damages were paid and boundary fences erected and maintained in accordance with such arrangement. Commissioners subsequently appointed recorded in the office of such Registrar a description and plan which covered the land that their predecessors had by such arrangement left in the possession of the defendant, but they never laid off the same by metes and bounds, nor were in possession thereof.

Held:—That they had not complied with the statute, and that the Crown had not acquired title to such land.

INFORMATION of intrusion to remove the defendant from certain property situate at Cardigan, King's County, Prince Edward Island, to which the Crown claimed title as forming part of the right of way of the Prince Edward Island Railway.

This railway was constructed under the provisions of an Act of the Legislature of the Province of Prince

Edward Island, 34 Vic. c. 4. By section 13 of that Act it was enacted that :—

"The Commissioners or contractors are authorized "to enter upon and take possession of any lands requir- "ed for the track of the railways, or for stations, and "they shall lay off the same by metes and bounds, and "record a description and plan thereof in the office of "the Registrar of Deeds and Keeper of Plans for this "Island, and the same shall operate as a dedication to "the public of such lands, &c."

The Commissioners who were first appointed under the said Act caused a survey to be made with a view to running the right of way through the defendant's property at Cardigan ; and a part of the line of the track so surveyed would have run through the centre of the defendant's dwelling-house. The defendant thereupon claimed a large sum for damages if that location were adhered to, and the Commissioners had the line of the track altered so that it ran around the defendant's house and left him a sufficient right of way between his house and the track. In consideration of this fact the defendant agreed to accept a much smaller sum than that originally claimed by him, and gave a receipt in full of all claim for damages or compensation on account of the railway running through his property. The line as laid off by metes and bounds was then altered in accordance with the agreement.

Subsequently, when the contractors proceeded to construct the railway, they ran that portion of the line in the immediate vicinity of the defendant's house differently from the course so settled upon ; and, after some time, defendant agreed, without consideration, to the track being constructed with such alteration, leaving himself in possession of one hundred and twenty-three one-thousandths of an acre of land between his house and the railway track, which is the portion of

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THE QUEEN v. SIGSWORTH.

Statement of Facts.

land claimed by the Crown in the information. No plan and description of the land taken was recorded by the Commissioners first appointed, as required by the statute.

The original Commissioners having resigned office, they were succeeded by others, who, in December, 1874, recorded a description and plan in the office of the Registrar of Deeds, by which they purported to expropriate the land in question together with that which was covered by the right of way. These Commissioners did not enter upon and take possession of such land, nor did they cause it to be laid off by metes and bounds.

In the year 1885, after the defendant had been in undisputed possession of the property in question some twelve years since the date of his agreement with the first Commissioners, and had erected thereon certain buildings for use in connection with his business, a demand was made upon him to remove such buildings and vacate possession of the property mentioned, as belonging to the Crown.

The defendant not complying with such demand, an information of intrusion was filed. To the Crown's allegations in such information the defendant pleaded a specific denial.

Issue joined.

September 11th, 1890.

Hodgson, Q.C. for the plaintiff;

Peters for the defendant.

The facts appearing upon the evidence are substantially the same as those above stated.

BURBIDGE, J: It is clear that the Commissioners first appointed did not acquire the lands in question for the Prince Edward Island Railway. They did not take the necessary steps to devest the defendant's title by per-

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THE QUEEN v. SIGSWORTH.

Reasons for Judgment.

fecting their own, but by an arrangement with him left him in possession. They settled the land damages on the basis of such arrangement, and the boundary fences between the railway and defendant's property were erected and have since been maintained in accordance therewith. Then, in reference to the proceedings taken by their successors, we find that they never laid off the land in dispute by metes and bounds, and that they never entered upon or were in possession of the same. They have recorded a plan and description covering such land, but that alone, even if it were not unintentionally done, is not a sufficient compliance with the statute. There will be judgment for the defendant with costs.

Judgment for defendant with costs.

Solicitor for plaintiff: *E. J. Hodgson.*

Solicitor for defendant: *L. H. Davies.*

1890
Sep. 18.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... ..... } PLAINTIFF;

AND

JAMES McKENZIE, MARY McKENZIE AND JOHN STEWART... } DEFENDANTS.

Expropriation of land—R.S.C. c. 39—Agreement to accept a certain sum as compensation—Specific performance.

Defendants entered into a written agreement to sell and convey to the Crown, by a good and sufficient deed, a certain quantity of land, required for the purposes of the Cape Breton Railway, for the sum of $1,250. At the date of such agreement the centre line of the railway had been staked off through the defendants' property, and they were fully aware of the location of the right of way and the quantity of land to be taken from them for such purposes. Thereafter, and within one year from the date of such agreement, the land in dispute was set out and ascertained, and a plan and description thereof duly deposited of record, in pursuance of the provisions of *R.S.C. c. 39*. Upon the defendants refusing to carry out their agreement on the ground that the damages were greater than they anticipated, and the matter being brought into court on the information of the Attorney-General, the court assessed the damages at the sum so agreed upon.

Quære :—Is the Crown in such a case entitled to specific performance?

THIS was an information, filed by Her Majesty's Attorney-General for the Dominion of Canada, praying, *inter alia*, for a decree for specific performance of an agreement made between the defendants and the Crown touching certain lands required for the purposes of the Cape Breton Railway.

The property from which the land in dispute was taken is situated in the town of Sydney, Cape Breton. On the 3rd day of December, 1887, the defendant Mary McKenzie, wife of the defendant James McKenzie, was owner of an estate in fee simple therein,—the

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THE QUEEN v. MCKENZIE.

Statement of Facts.

defendant John Stewart holding a mortgage thereon to secure payment of a sum of $500 owed him by the said first named defendants. By an agreement entered into upon that date by the defendants James McKenzie and Mary McKenzie, they agreed to sell and convey such property by a good and sufficient deed to the Crown, for the purposes of the Cape Breton Railway, in consideration of the sum of $1,250. At the time of entering into this agreement the said defendants were fully aware of the location of the railway and the quantity of land to be taken from them for the right of way. After such land had been duly set out and ascertained and a plan and description of the same deposited of record with the Registrar of Deeds for the county wherein the land was situated, in pursuance of the provisions of the *Revised Statutes of Canada*, c. 39, the said defendants declined to carry out their agreement,—alleging that the damages were greater than they had anticipated at the time of entering into the same. The Minister of Railways and Canals thereupon adopted the proceedings usual in a case of expropriation.

By the information filed in the case the Attorney-General averred the sufficiency of the amount of compensation so agreed upon by the said defendants, and asked for a declaration by the court that the land was vested in the Crown in virtue of the proceedings taken under *The Expropriation Act*, 52 Vic., c. 13,—adding an alternative prayer for a decree for specific performance of the agreement mentioned.

The defendants by their pleas denied the agreement set out in the information, and claimed a sum of $4,000 as compensation for the lands so taken.

Issue joined.

September 16th and 17th, 1890.

Borden, Q.C. for plaintiff;

Gillies and *Drysdale* for defendants.

1890

THE QUEEN v. McKENZIE.

Reasons for Judgment.

BURBIDGE, J. now (September 18th, 1890) delivered judgment.

In the view I take of this case it is not necessary to consider the question as to whether or not the Crown is entitled to a decree for the specific performance of the agreement of 3rd. December, 1887. I do not, however, accede to the contention made for the defendants that I should wholly disregard such agreement in coming to a conclusion as to the amount of compensation to which they are entitled. I do not think that James McKenzie and his wife were induced to enter into the same by any misrepresentations or other unfair methods. The former had, I think, the means and the opportunity of ascertaining what land was to be taken from them for the railway, and how the property was to be affected thereby. For any misapprehension under which he may have rested, he must himself, I think, accept the responsibility. The centre line of the railway was at the time of the making of the agreement indicated by stakes set in the property. He knew that the right of way was to be 100 feet in width. The plan exhibited to him by Mr. McKeen showed the land to be taken and the location of the railway, which it is clear has not since been altered. The agreement was followed by the filing with the proper Registrar of Deeds, and within a year, of a plan and description corresponding in respect of the land taken and the location of the railway with that exhibited to him at the time the agreement was come to, a fact to which, perhaps, some additional importance attaches by reason of the terms of the 6th section of the *Revised Statutes of Canada* c. 39, now in substance to be found in 52 Vic. c. 13 s. 19.

I also desire to add that I come to the conclusion that I am about to state independently of the undertaking given by the Crown to re-convey to the defen-

1890

THE QUEEN v. McKENZIE.

Reasons for Judgment.

dants a portion of the land taken, though I am glad to be in a position to give effect to such undertaking as I think it will be of advantage to the defendants.

I find and declare:—

1. That the lands and premises described in the information in this case are vested in Her Majesty as therein set out:

2. That the defendants are entitled to be paid the sum of $1,250; which is a sufficient compensation to them for the lands taken, and for the injurious affection of their other lands in the pleadings and evidence mentioned:

3. That the defendants are entitled to have re-conveyed to them the land mentioned and described in the undertaking filed in court.

I am inclined to the view that the Crown is entitled to costs, but for the present I reserve that question; and it may be that, under all the circumstances of the case, the Crown will not move for judgment therefor.

I reserve leave to either party to move for further directions.

Judgment for plaintiff; costs reserved.

Solicitor for plaintiff: *W. Graham;*

Solicitor for defendants: *J. A. Gillies.*

REPORTER'S NOTE.—The case of *The Queen* v. *McKinnon, et al* arose upon a state of facts similar in all material respects to those which govern the above case, and judgment (BURBIDGE, J. 24th September, 1890) was given therein for the Crown upon the same grounds as indicated by the learned judge in the foregoing reasons for judgment.

1890
Nov. 4.

THE SAINT CATHARINES MILLING AND LUMBER COMPANY, AND JOSEPH O. B. LATOUR..... PLAINTIFFS;

AND

HER MAJESTY THE QUEEN..... DEFENDANT.

Crown domain—Territory in dispute between Dominion of Canada and Province of Ontario—Permit to cut timber—Implied warranty of title—Sale of chattels—Breach of contract to issue license—Damages.

A permit, issued under the authority of the Minister of the Interior, under which the purchaser has the right within a year to cut from the Crown domain a million feet of lumber, is a contract for the sale of personal chattels, and such a sale ordinarily implies a warranty of title on the part of the vendor; but if it appears from the facts and circumstances that the vendor did not intend to assert ownership, but only to transfer such interest as he had in the thing sold, there is no warranty.

(2.) The Government of Canada by order-in-council authorized the issue of the usual annual license to the plaintiff company to cut timber upon the Crown domain, upon certain conditions therein mentioned. The company did not comply with such conditions, but before the expiry of the year during which such license might have been taken out, proceedings were commenced by the Government of Ontario against the company under which it was claimed that the title to the lands covered by the license was vested in the Crown for the use of the Province of Ontario, and that contention was ultimately sustained by the court of last resort.

Held, that there was a failure of consideration which entitled the company to recover the ground rent paid in advance on the Government's promise to issue such license.

Quære:—Will an action by petition or on reference lie in the Exchequer Court against the Crown for unliquidated damages for breach of warranty implied in a sale of personal chattels?

THIS was a claim for the value of certain logs cut under a permit, issued under the authority of the Minister of the Interior, upon territory then in dispute between the Province of Ontario and the Dominion of

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

Canada,—such logs having been seized by the Government of Ontario; and for damages for loss of profits upon the lumber which might have been manufactured from such logs.

The claim came before the court upon a reference by the Minister of the Interior under the provisions of 50-51 Vic. c. 16 sec. 23.

The facts appearing upon the evidence are fully stated in the judgment.

February 17th, 18th, 19th and 20th, and May 10th, 1890.

McCarthy, Q.C. for the plaintiffs:

The case for the plaintiffs may be divided into two branches: 1st. a claim for damages for a breach of warranty of title under the permit to cut timber issued to the plaintiffs; and 2ndly. a claim for damages for breach of contract on the part of the Crown to issue a license to cut timber to the plaintiffs.

The plaintiffs allege, with reference to the subject of the first branch of their case, that under the permit they had cut some one and three-fourths million feet of timber in saw logs, which, before they had converted it into lumber and brought it to a market, was taken from them by the paramount authority of the Ontario Government, and they were thus deprived of the value the timber would have had to them when sawn and sold.

The question of law which arises here is, was there any implied warranty of title in the contract between the Government and the company?

The language of the permit is that the timber should be cut for "barter and sale." It contemplates the transfer of property in goods to be immediately severed from the soil; the purchase money not to be paid until, and only payable upon, the timber being cut and measured. Therefore, I submit that the

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THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

contract was executory,—an executory contract for the sale of chattels; and this being the case the law implies a warranty of title on the part of the vendor. It was a sale of chattels to be severed from the soil within the period covered by the permit, viz., twelve months; and it makes no difference whether the purchaser is to take delivery of the goods himself or whether the vendor has to make delivery so far as the principle of implied warranty of title on the part of the latter is concerned. (Cites *Marshall* v. *Green* (1), *Summers* v. *Cook* (2), *Johnston* v. *Shortreed* (3), *Steinhoff* v. *McRae* (4), *Blackburn on the Contract of Sale* (5).

We contend that this was a sale of standing timber with a view to immediate severance from the soil. In the case of *Steinhoff* v. *McRae*, and the other cases I have cited, the distinction drawn between sales of chattels and the sale of an interest in land appears to be that if standing timber be sold and no specific time is given in which the purchaser must take it off the land, he has a right in the growth of the timber and its development, and, therefore, an interest in the land itself; but if the sale is with a view of immediate severance from the soil, the land is then regarded simply as a storehouse where the goods are to be kept till the severance takes place.

The reference to *Blackburn on the Contract of Sale*, just given, shows the law to be precisely as I am now stating it. *Marshall* v. *Green* is there referred to at some length, and Brett, J.'s tests of the two kinds of contracts are there quoted at length. All the latest cases bearing on the question before us are given in *Benjamin on Sales* (6), viz.: *Morley* v. *Attenborough* (7),

(1) 1 C. P. Div. 35.
(2) 28 Grant 179.
(3) 12 Ont. 633.
(4) 13 Ont. 546.
(5) P. 14.
(6) 4th ed. p. 629, *et seq.*
(7) 3 Ex. 500.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

Sims v. *Marryat* (1), *Eichholz* v. *Bannister* (2). The most recent case is one at *nisi prius*, *Raphael* v. *Burt* (3).

In *Benjamin on Sales* (4) a number of rules are laid down in relation to implied warranty of title in sales of personal chattels. Under rule 1, if not under rule 2, the facts in evidence establish our right to damages upon the 1st branch of our case; rule 3 does not apply.

With reference to the second branch of our case, it is in evidence that plaintiffs made a regular application for a license to cut timber upon the territory in question, and that there was an order-in-council passed authorizing the issue to them of such license. The regulations in force when the order-in-council was passed, and which governed the issuance of such a license, required the licensee to pay a ground rent of $5 per square mile. The plaintiffs performed that condition. Another condition which governed the granting of the license was that the licensee should cause a survey of the limits to be made and a plan and field-notes thereof filed in the Department of the Interior. The plaintiffs had twelve months in which to perform this condition, but before the expiry of that time the timber cut by them was seized by the Ontario Government and proceedings taken against them to restrain them from cutting any more logs upon the territory. The contract to give plaintiffs a license is clearly established, and they have performed all conditions, possible to be performed, precedent to the accrual of their right to have the license issued to them. They claim that they are entitled to damages for loss of profit on the lumber that could have been taken from the territory in question during the winter of 1884 and the year 1885. Now, I submit that the

(1) 17 Q. B. 281.
(2) 17 C. B. N. S. 708.
(3) 1884, Cab. & El. 325.
(4) 4th ed. p. 622 *et seq.*

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Argument of Counsel.

only way possible for the court to estimate the damages here is to ascertain the quantity of timber that could have been so cut by plaintiffs and what it would be worth in its proper market when manufactured into lumber, less the cost of sawing and transportation. (Cites *Bennet* v. *O'Meara* (1); *Brown* v. *Cockburn* (2).) The two questions of damages, namely, that respecting the timber that had been cut down and reduced to the shape of saw-logs during 1883, and the standing timber which might have been cut during the winter of 1884 and the year 1885, might be conveniently considered together.

[BURBIDGE, J.—It was the plaintiffs' fault that the lumber was not manufactured from the saw-logs.]

That does not affect the question as to our right to recover damages upon the basis I have indicated. If the markets fell between 1883 and 1884, and we did not manufacture our lumber in 1883, we cannot get the price ruling in the proper market of that year. We claim the value of the lumber in that market in 1884, when the logs were seized and when we would have manufactured them into lumber. (Cites *Hendrie* v. *Neelon* (3); *Hadley* v. *Baxendale* (4).

[BURBIDGE, J.—What do you say as to the measure of damages in respect of the standing timber that might have been cut?]

There the court must deduct from the market price the cost of getting out the timber as well as the cost of sawing and transportation.

[BURBIDGE, J.—The license which you say should have been granted to plaintiffs would have covered the year 1884 only. How can you claim damages for the probable cut of the following year?]

The license would undoubtedly have been renewed.

(1) 15 Grant 396.
(2) 37 U. C. Q. B. 592.
(3) 12 Ont. App. 41.
(4) 9 Ex. 341.

The regulations of 1878 expressly provide for such renewal, and it was the practice of the Department to renew upon the fulfilment of certain conditions.

[BURBIDGE, J.—The Crown was not bound to renew.]

Not in the sense that we could enforce the renewal by petition of right ; but the Crown having taken the money from the plaintiffs for the second year, damages should be recovered for the breach of its promise to renew.

Ferguson followed on the same side, and reviewed the evidence in support of plaintiffs' case.

Robinson, Q. C. for the defendant: The contract in this case was not a contract for the sale of chattels. The whole current of the authorities is against the drawing of such an inference from the facts in evidence. (Cites and comments upon *Marshall* v. *Green* (1) ; *Ferguson* v. *Hill* (2) ; *McLean* v. *Burton* (3) ; *Summers* v. *Cook* (4) ; *MacDonell* v. *McKay* (5) ; *McCarthy* v. *Oliver* (6) ; *Mitchell* v. *McGaffey* (7) ; *McGregor* v. *McNeil* (8) ; *McNeill* v. *Haines* (9).)

[BURBIDGE, J.—Do not most of these cases arise under the Statute of Frauds ?]

Yes, my Lord, upon the question whether the facts arising in the several cases make them fall within the sections of the statute regulating, respectively, the sale of goods and the sale of an interest in land.

In the case of a breach of contract to give a title to land, the purchaser is entitled to get back his deposit, and all plaintiffs could, under any circumstances, get in this case is what they have paid the Crown for the

(1) 1 C. P. Div. 35.
(2) 11 U. C. Q. B. 530.
(3) 24 Grant 134.
(4) 28 Grant 179.
(5) 15 Grant 391.
(6) 14 U. C. C. P. 290.
(7) 6 Grant 361.
(8) 32 U. C. C. P. 538.
(9) 17 Ont. 479.

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purpose of obtaining a license. This is clearly a case of contract for the sale of an interest in land. (Cites *Reed on Statute of Frauds* (1); *Baker on Sales* (2); *Benjamin on Sales* (3).) As to what damages are recoverable on breach of a contract for the sale of an interest in land, I would refer to *Mayne on Damages* (4).

Argument of Counsel.

Now with regard to the more important branch of the case, namely, that the permit was obtained in the first instance by misrepresentation and fraud. That is an indisputable conclusion to be drawn from the evidence. The whole negotiations between the promoters of the company and the Government with reference to the permit show unmistakable fraud on the part of the former. By means of misrepresentations by Bertrand and Prudhomme, the original applicants for the permit who assigned their rights to the promoters of the company, the permit was obtained, and the company undoubtedly took it with knowledge, at least on the part of its promoters, of the doubtful character of the title and the fraudulent way in which it was obtained. Now, although a corporation may not be liable to an action on account of the misrepresentations of its promoters made before it came into existence, yet it cannot afterwards take advantage of such misrepresentations without becoming responsible for the results which flow from them. (Cites *Earl of Shrewsbury* v. *North Staffordshire Ry. Co.* (5), *Edwards* v. *Grand Junction Ry. Co.* (6), *Robertson* v. *Dumaresq* (7), *The Queen* v. *Robertson* (8), *Thomas* v. *Crooks* (9), *Williams* v. *St. George's Harbour Co.* (10), *Brice on Ultra Vires* (11), *Lindley on Companies* (12).)

(1) Vol. 2 § 707.
(2) P. 152.
(3) 4th ed., p. 122.
(4) 4th ed., 186.
(5) 1 L. R. Eq. 593.
(6) 1 M. & C. 650.
(7) 2 Moo. P. C. (N.S.) 66.
(8) 6 Can. S. C. R. 52.
(9) 11 U. C. Q. B. 579.
(10) 2 DeG. & J. 547.
(11) 2 ed. p. 576.
(12) 5 ed. 149.

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The company petitioning in this case cannot recover damages arising upon a permit which was obtained through the fraud of its promoters; neither can it succeed in respect of the breach of contract to give a license, because that was only a modification of the first arrangement made at the request and for the benefit of the company.

Hogg, following on the same side, discussed the effect of the failure by plaintiffs to satisfactorily show that the logs had all been cut inside their limit.

McCarthy, Q.C. in reply: There is not the slightest difficulty about the application of the law to the facts in this case. The principles are clear and consistent, up to the present time, as laid down in the cases affecting the two classes of contracts.

The *ratio decidendi* of the cases is that whether the contract is or is not to be treated as a sale of timber or an interest in land depends altogether upon whether or not the purchaser has to take the timber off the land within a limited time. If that be found to have been the intention of the parties, the contract is to be treated as a sale of timber. (Refers to the judgment of Ferguson, J. in *McNeill* v. *Haines* (1); and the cases of *Summers* v. *Cook*, *Johnston* v. *Shortreed*, and *Steinhoff* v. *McRae* (cited *ante*); *Lock* v. *Furze* (2), and *Crowley*, *et al.* v. *Vitty* (3).

With reference to the acts of the promoters of the company which took place before it came into existence, I submit that we have nothing to do with them in this case. There was no contract between the Government and Bertrand and Prudhomme to begin with. No permit was ever issued to them; and we are not claiming under them, and are, therefore, not affected by notice to them. They had no legal rights

(1) 17 Ont. at p. 486.
(2) L. R. 1 C. P. 441.
(3) 7 Ex. 319.

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to assign, and the promoters of our company only took the assignment from them at the instance of the Department of the Interior to settle the difficulty of conflicting applications. The permit was not granted to the company as assignees, but in their independent capacity. Then, again, with regard to notice of defective title, notice to a director is not notice to the company unless he has authority to act for the company and the reception of such notice is within the scope of his authority; and if but one of the shareholders lack notice it is not notice to the company. The company in this case cannot be charged with notice of defective title. (Cites *Lindley on Companies* (1); *McArthur* v. *The Queen* (2).)

BURBIDGE, J. now (November 4th, 1890) delivered judgment.

The plaintiffs seek to recover from the defendant the value of certain logs cut by the Saint Catharines Milling and Lumber Company from off a timber berth situated in what was formerly known as the disputed territory, and damages for loss of profits on lumber that they might have taken therefrom had the title to such territory been in the Crown for the Dominion of Canada; or, failing that, to be indemnified for the expenses incurred by them in getting out such logs, and in carrying on operations incident thereto. The plaintiff Latour is assignee by way of mortgage of such timber berth.

The plaintiff company were incorporated on the 6th of February, 1883, for the purpose and with the powers, among others, to acquire, hold and sell timber lands and timber, to manufacture timber and lumber, and the products thereof, and to carry on all business incidental to lumbering and the timber trade.

The shareholders of the company named in the char-

(1) 5th Ed. 156, 204. (2) 10 Ont., 191.

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ter were Messrs. James Murray, of Saint Catharines, Pierre H. Chabot and James A. Gouin, of Ottawa, and Noé Chevrier and Henry Alfred Costigan, of Winnipeg. Afterwards Mr. Olivier Latour, of Ottawa, became a shareholder. At the first meeting of such shareholders, held on March 1st, 1883, Messrs. Murray, Gouin, Costigan, Chevrier and Chabot were elected directors; and, at an adjourned meeting held on the day following, the directors were authorized and directed to apply to the Minister of the Interior for the issue of a permit to the company to cut timber to the extent of two million feet of lumber in the territory on the Three Tongue River, Wabigoon Lake, from a plan made by A. Charest then on file in the Department of the Interior, and to take steps to have such permit granted. At a meeting of directors held on the same day, the following appointments were made: James Murray to be President; J. A. Gouin, Vice-President; P. H. Chabot, Secretary-Treasurer; Olivier Latour, Manager, and A. J. St. Pierre, Book-Keeper and Acting Secretary.

On the 3rd of March, the company, by letter from their President to the Minister, applied for such permit, it being alleged in such letter of application that two permits of one million feet each had already been granted to Messrs. L. A. Prudhomme & Co. and H. A. Bertrand & Co. to cut timber in the same territory, but they having surrendered their rights thereto in favor of the company there was no objection on that ground to the application. The language used in this letter may be taken, perhaps, to express in a general and popular sense, but not accurately, what had previously taken place in reference to the transactions therein referred to.

On the 24th December, 1881, there was received at the Department of the Interior a letter dated at Winnipeg the 15th of that month and purporting to be from

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L. A. Prudhomme & Co. of that city, by which application was made for "a timber berth of one hundred "and fifty square miles on Three Tongue River, a "tributary running into Eagle Lake, Province of Kee- "watin." On the 27th of the same month a like letter, also dated at Winnipeg of the 15th, and purporting to be signed by A. H. Bertrand & Co. of that city, was received by the Minister, by which letter a similar application was made "for a timber limit on Three "Tongue River, a tributary running into Eagle Lake, "Province of Keewatin." It appears from the assignments of March 29th, to which I shall have occasion to refer, that the firm name "L. A. Prudhomme & Co." was used to designate Mr. L. Arthur Prudhomme, then an advocate residing at Winnipeg, and now a Judge of a County Court in Manitoba; and the name "A. H. Bertrand & Co." was used to designate Mr. Antoine Honoré Bertrand of the same city, of whom Chevrier speaks as a speculator living at Winnipeg. To the Bertrand letter there does not appear to have been any reply, but on the 4th January, 1882, the Acting Surveyor-General, by direction of the Minister, addressed a letter to Prudhomme & Co. acknowledging the letter of the 15th of December and stating in reply thereto that, as the land described was in the territory covered "by the late but unconfirmed award to the Province of Ontario," no action could then be taken on the application.

On the 15th February the two letters following were received at the Department of the Interior, the one purporting to be from A. H. Bertrand & Co., and the other from L. A. Prudhomme & Co.: –

WINNIPEG, February 8th, 1882.

To the Right Honorable
Sir John A. Macdonald,
Minister of the Interior.

SIR,—We are informed that your Department cannot grant us just

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now a yearly license on the Three Tongue River Territory of Keewaydin, because that part of the territory is in dispute at present.

But having contracts to fulfil and being in great need of timber, we now ask a permit of cutting on said Three Tongue River, and on same area as mentioned in our prior application, according to the regulations to cut timber on Dominion Lands under section 52 of 1879, as annexed. We further state that we will humbly submit ourselves, and abide by any further decision that may take place in reference to the above disputed territory.

We remain yours
Most truly,
(Sgd)., A. H. BERTRAND & Co.

WINNIPEG, February 9th, 1882.

To the Right Hon.
Sir John A. McDonald,
Minister of Interior.

SIR,—In answer to yours of the 4th Jany. we have the honor to submit to your Department that we have a contract to fulfil and being in great need of timber, we now ask you a permit of cutting timber on the Three Tongue River, a tributary of the Eagle Lake, on same area as already applied for in our prior application, and according to the regulations to cut timber on Dominion Lands under section 52 of the Act of 1879, as memo. annexed.

We beg to state that we will respectfully submit ourselves to any decisions respecting that part of the disputed Territory of Keewaydin.

We have the honor to be
Your most obedt. servts.,
(Sgd)., L. A. PRUDHOMME & Co.

The signature attached to the Prudhomme letter is not his, and there is no evidence that it was signed by his authority. The Bertrand letter, though dated at Winnipeg, was written and signed at Ottawa by one Troop, a clerk in the employ of Gouin, then the proprietor of the "Russell House" at Ottawa. Neither Gouin nor Troop knew Bertrand. That Troop wrote and signed the Bertrand letter with Gouin's knowledge and by his direction, I have no doubt. As to his own authority to act in the matter, the most that Gouin would say was that he would not have signed the letter without some authority, but he could not recollect, and would not undertake to say, that he had Bertrand's,

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authority. To avoid repetition I may as well state now that the same is true of the other letters written by Troop, to which reference will be made.

On the 23rd of February, following, two other letters purporting to be from Prudhomme & Co. and Bertrand & Co., respectively, were received by the Minister of the Interior. They bear date at Ottawa of the 21st of that month, and are in the following terms:—

OTTAWA, Feby. 21st, 1882.

To the Right Honorable
Sir John A. McDonald,
Minister of Interior.

SIR,—In ours, of date 9th instant, asking permit to cut timber on the Three Tongue River, we humbly state that we have contracted with Colonization Companies to furnish them fifteen million feet, board measure, of red and white pine, also spruce and tamarack lumber; five million feet per annum. On exploration we find timber small, so that we require the large area mentioned in our first application to cut the said quantity of fifteen million.

We have the honor to remain,
Yours respectfully,
(Sgd)., L. A. PRUDHOMME & Co.,
of Winnipeg.

OTTAWA, Feby. 21st, 1882.

To the Right Honorable
Sir John A. MacDonald,
Minister of the Interior.

SIR,—In reference to our letter of the 8th instant asking for a permit to cut on the Three Tongue River, we beg leave to state that we have contracts with Colonization Companies for fifteen million feet, board measure, of red and white pine lumber, also of spruce and tamarack lumber, that we have three years to supply said quantity at the rate of five million feet each year. The timber being small and scattered it requires a very large tract of land to cut said quantity; that was our reason for asking, in our first application, the area mentioned.

We have the honor to remain,
Yours most truly,
(Sgd)., A. H. BERTRAND & Co.,
of Winnipeg.

The Prudhomme letter appears to have been written and signed by the person who wrote and signed that

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of February 9th, and that perhaps is all that can, with certainty, be said of it, except that the signature thereto is not Prudhomme's. The Bertrand letter, as in the other case, was written and signed by Troop. On the representations contained in these letters, the Minister of the Interior, on the 17th March following, authorized the issue of a permit to Prudhomme & Co. to cut one million feet of timber in the territory referred to, and a like permit to Bertrand & Co., and caused letters to be written to them to inform them of the action taken. These letters bear date of the 17th March, 1882, and are signed by Mr. Lindsay Russell, then the Deputy of the Minister of the Interior. A few days after Mr., Mousseau, who was at the time Secretary of State, addressed the following letter to Prudhomme & Co., and another in the same terms to Bertrand & Co.:—

OFFICE OF THE SECRETARY OF STATE, CANADA,
OTTAWA, 24th March, 1882.

L. A. PRUDHOMME & Co.,
Traders,
WINNIPEG, MAN.,

GENTLEMEN,

When I delivered, the other day, the permit granted to you by the Department of the Interior, to cut one million feet of timber in the place described in your application, I was too busy to give you the reasons why the Government did not think proper to grant the permit for a larger quantity.

Many parties apply for timber licenses or permits which they don't utilize themselves, and sell to others, making thereby large benefits which the Government cannot countenance, because all speculations in that direction would greatly enhance the price of timber and thereby thwart the colonization of our Great North-West.

If, as I am sure, you are in earnest, if you build mills and go seriously cutting timber, your timber permit will be renewed as soon as you will have cut the first one million granted, even before the expiration of the year.

From the moment the Government will see you have built mills, and you are cutting timber to fill your contracts, it has no reason to refuse you as many millions as you want.

Most truly yours,
(Sgd)., J. A MOUSSEAU.

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It appears that Mr. Mousseau had no authority from the Minister of the Interior to speak for him in this matter, and no permit had then issued, or was ever issued, to either Prudhomme or Bertrand. But apart from any question of renewal, as to which Mr. Mousseau's letters fairly enough, I think, indicate the course of action the Government, although not bound to take, usually takes in such matters, Prudhomme and Bertrand were entitled under the concessions made to them, and the practice of the Department, to take out the permits and cut the timber at any time before May 1st, 1883.

On the 29th March, 1882, Prudhomme, by an instrument under seal and in consideration of one dollar, assigned his interest in the permit therein alleged to have been granted to him to Noé Chevrier, Pierre H. Chabot, James A. Gouin, and one Donald Cameron, of Winnipeg, gentleman. An inspection of the document will show, however, that Cameron's name is erased in the premises though subsequently retained in the *habendum* clause in respect of an one-eighth share or interest, and that the erasure is not noted by Mr. Olivier, the subscribing witness to the execution of the instrument by Chabot and Gouin, or by Bellemare, a clerk in Chabot's employ, whose name is falsely subscribed as a witness to Chevrier's signature. Chevrier says that the signature of Prudhomme set to this document, though not witnessed, is genuine; and in that he is corroborated by Mr. Burgess, the Deputy of the Minister of the Interior. On the same day, the 29th of March, 1882, Bertrand, in like manner, in consideration of one dollar assigned to Chevrier, Chabot and Gouin his interest in the permit which, it was alleged, had been granted to him. The signature of Bertrand set to this assignment was assumed to be genuine, but, if this assumption is justified, the conclusion to be drawn from

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a comparison of the handwriting is that Bertrand did not sign the application of the 15th December, 1881; and, in like manner, from a comparison of Prudhomme's signature to his assignment of the 29th March, with that set to the letter of December 15th, 1881, purporting to be from Prudhomme & Co., I conclude that the letter was not signed by Prudhomme.

In September or October, 1882, Chevrier represented to Olivier Latour, who was then engaged in the lumbering business, that there were some good timber limits on the Three Tongue River, which could be obtained from the Government and something made out of them, and he wanted Latour to go to the North-West and explore the limit and take it up. Thereupon Latour, about the 1st of October, sent Antoine Charest to explore the territory and to see how the matter stood, and whether or not Chevrier's representations could be relied upon. Charest is the person who made the plan referred to in the resolution authorizing the directors of the company to apply for a permit in the territory on the Three Tongue River.

On the 17th November following, the Minister of the Interior received a further communication purporting to be addressed to him by Prudhomme & Co. and Bertrand & Co. It was in the following terms :—

OTTAWA, Nov. 16th., 1882.

To the Right Honorable
The Minister of the Interior,
Ottawa.

SIR,—After having explored all rivers emptying into Eagle Lake repeatedly last summer and fall, we have discovered, only recently through our last explorer, Mr. A. Charest, that our first explorer Mr. Donald Cameron, of Winnipeg, made a mistake in his report to us in March, 1880, by having reported that Three Tongues River was a tributary of Eagle Lake, when it has been found and ascertained by our said last explorer, Mr. A. Charest, that the said Three Tongues River is a tributary of Wabigoon Lake, and having made so heavy expenditures for the said exploration and the purchase of a saw mill for the pur-

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pose of fulfilling the contract of our permit with your Government, we respectfully ask you to let us cut the timber as your permit grants us to do, and that we may be allowed to do so in the said Three Tongues River, a tributary of Wabigoon Lake, as shown by the map and plan, marked red, with its description annexed to this present, and to allow our permit to be corrected by having the words "Three Tongues River" a tributary of "Eagle Lake" changed, and the following words inserted in lieu thereof: "Three Tongues River" a tributary of "Wabigoon Lake."

We have the honor to be,
Sir,
Your most obedient servants,
(Sgd)., A. H. BERTRAND & Co.,
Per J. A.G.,
(Sgd)., L. A. PRUDHOMME & Co.

This letter and the signatures "A. H. Bertrand & Co. per J. A. G.," are in Troop's handwriting. The initials "J. A. G." were intended to indicate that Gouin had signed for Bertrand. As in the other cases, there is nothing to show who signed the communication for Prudhomme.

Neither Prudhomme, Bertrand nor Troop were called as witnesses, and, consequently, much is unfortunately left to inference that might have been made clear.

There is no reason to doubt, however, that there was a large quantity of valuable timber in the territory south of Lake Wabigoon, and that this fact was known in 1882; for as early as August, 1881, Thomas Marks, of Prince Arthur's Landing, had caused a survey of a timber limit on the southern shore of the lake to be made, and had filed the plan of such survey and his application for such limit in the Department of the Interior. If it were safe, as I fear it is not, to give credit to the representations, other than such as refer to Charest's exploration, contained in the letter of November 16th, 1882, to the Minister of the Interior, hereinbefore set out, one would be justified in concluding that the territory had also been explored by Donald Cameron prior

to March, 1880, and that he had in that month reported to Prudhomme and Bertrand. Then we have the further facts that the consideration expressed in the assignments of March 29th is nominal, and that Chevrier does not claim to have paid Bertrand more than one hundred dollars for the concession that the latter had obtained from the Crown, or Prudhomme more than fifty dollars. In view whereof, it is not, I think, reasonable to conclude that either of them ever had any such contracts as those mentioned in the letters of the 8th, 9th and 21st of February, 1882, or that in order to obtain concessions to which they attached so little importance, they falsely represented to the Minister that they had entered into the same. The fair inference is, I think, that at most they were applicants in name only, and not aware of the fraud that was committed in their names.

Chevrier's account of his earlier connection with the matter is in substance as follows:—in the month of March, 1882, he was talking to Bertrand about the matter, and the latter showed him the Russell letter of the 17th of that month and told him that Prudhomme had a similar letter, both of which he saw at the same time. This happened at Winnipeg about the time they received such letters, and was his first connection with the matter. Thereupon negotiations were entered into for the purchase by him of Prudhomme and Bertrand's interests. Afterwards, but whether before or after the completion of such negotiations, he is unable to say, they showed him the Mousseau letters of March 24th. These four letters came into his possession and were all that he got from them, or saw. After agreeing with Prudhomme and Bertrand, he wrote to Chabot at Ottawa to have the assignments drawn up, and to insert Gouin's name if he thought proper, and that was done. Previously he had not spoken with either Chabot or Gouin on the subject and did not then communicate with

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Gouin. He had not asked either for authority to insert his name in the transfers, the reason assigned being that Chabot was a partner with him in other licenses, and that Gouin was, he thought, interested with Chabot in another limit. When the assignments of March 29th were executed no permits had been issued, the Russell letters of March 17th being the documents referred to as such permits. These letters were what he had, and what induced him to get the assignments. He also says that he never saw the letter of January 4th, 1882, and never had any knowledge of the letters of the 8th and 9th of February, and that he cannot in any way account for the statements made about contracts with colonization companies in the Prudhomme and Bertrand letters, which he saw for the first time on the trial. He did not hear from any one that the Government was disposing of the disputed territory and letting the purchasers take the chances of getting a good title, or that the licenses or permits in that country were not the same as elsewhere. He believed them to be the same.

Chabot was not asked as to his knowledge of the contents of the Prudhomme and Bertrand letters, but his evidence is incompatible with any knowledge thereof, for he says that he never heard that applicants for permits in the territory in question took such permits at their own risk. I take it to be clear, however, that before February 15th, 1882, Gouin knew of the applications of the 15th December preceding, of the Minister's refusal to grant the same and the grounds of such refusal, and that then, and subsequently, he became privy to the making of the representations on which the Minister acted. As he was not acquainted with either Prudhomme or Bertrand, I would have expected to find some person with such acquaintance acting in concert with him. Chevrier was at Winni-

peg at the time. He knew both Prudhomme and Bertrand. He admittedly came into the matter shortly after, and, but for his positive statements, I should, without hesitation, have concluded that he was equally well informed as Gouin in all that took place. But if I credit him with the ignorance he professes, I must, I think, deny to him the leading part that he claims to have taken in the acquisition of Prudhomme and Bertrand's rights in the concession referred to, and venture to doubt that Gouin owed his subsequently acquired interest therein to the accident of a supposed connection with Chabot in another limit, and for that reason was a fair object for Chevrier's bounty, generously exercised by giving him in each case a larger share than fell to the lot of either Chevrier or Chabot.

Subsequently, Chevrier, Chabot and Gouin promoted the organization of the plaintiff company, and Murray, Costigan and Latour became associated therewith as already mentioned. Neither Murray nor Latour knew anything of the Prudhomme or Bertrand correspondence, or had even heard that the Government declined to issue permits or licenses to cut timber in the disputed territory except at the applicant's risk. Personally Murray knew nothing of the statements made in the company's application for a permit, the letter having been written by the acting Secretary and submitted to him. Having, as President, signed it, he had nothing more to do with it. Mr. Burgess, who was at the time the Acting Deputy of the Minister of the Interior, says that Mr. Gouin gave him this application at the Department of the Interior, and that at the same time he handed him the Prudhomme and Bertrand assignments as evidence of their "surrender" of their rights to the company. Gouin, who was then, and subsequently, a director and the Vice-President of the company, admits seeing Burgess relative to the matter, but

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denies that he took the application to the Department. Burgess thinks, but is not positive, that Chabot accompanied Gouin. Chabot says he did not. Burgess says that he called their attention to the fact that the assignments were not made in favor of the company but of three individuals, and that on the following day they brought him a letter from Chabot to the Minister, stating that Chabot and Chevrier were members of the company and also assignees of Prudhomme and Bertrand. In this letter, which bears date of March 3rd, no mention is made of Gouin, although he was in a like position. The company's application for the permit, the two assignments, and the letter last referred to, bear the impression of the stamp of the Department of the 5th March. There is also in evidence another letter of the 3rd March. It is from the Surveyor-General to the Crown Timber Agent at Winnipeg, advising him that Bertrand & Co. and Prudhomme & Co. had assigned their rights to the permits he had been instructed to issue to them, in the Three Tongue River, to the Saint Catharines Lumber Company, and authorizing him to issue a permit to the company for the amount and on the ground on which he had been instructed to issue the permits to Bertrand and Prudhomme. There is nothing to show when this letter was mailed, but on the 5th a telegram to the same effect was sent from the Department to the Crown Timber Agent.

Now, there is a promptness and despatch about this that one would not look for in the case of papers entrusted to the mails and fortune ; and I have no doubt that Burgess is right when he says they were handed to him, and by Gouin. Whether Chabot was present is not material, though I should, perhaps, add that I am inclined to credit Chabot's statement that he was

not. His letter appears to me to some extent to corroborate his testimony in that behalf.

To one other conflict between the evidence of Burgess and that of Gouin I must briefly refer. Burgess says that in 1883 it was part of his instructions from his Minister, and his duty, to call the attention of applicants for concessions in the disputed territory to the fact of the dispute relative thereto between the Governments of Canada and of Ontario, and to put them upon their guard. This had been particularly impressed upon him by Sir John Macdonald. He thinks it is likely that when Gouin came about the application he told him of the position of affairs between the Department and Prudhomme and Bertrand, but he has no positive recollection of doing so. The Prudhomme and Bertrand correspondence was at the time before him. He has no doubt that he acted on his instructions, and his recollection, as well, is, that he told Gouin that the limit applied for was situated in the disputed territory, and that the title would not be as good as the title in territory outside of the disputed boundaries. Gouin in his direct examination in reply says that Burgess did not tell him anything of the kind, and that he never heard that he took the permit at his own risk. But in his cross-examination he says that he will not undertake to contradict Burgess as to this, but that he does not remember being told about the dispute and the state of the title.

Apart from that general knowledge of the dispute between the two Governments, which was public property, Gouin, from his connection with the Bertrand correspondence, to which I have referred, must, at the time when the company's application was made, have known that the Minister was not issuing permits in the territory in question except at the applicant's risk; and, having this knowledge, it may be that what Burgess told

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him would make no strong impression on his mind. Burgess, on the other hand, knew nothing of the part Gouin had taken in respect to the Bertrand correspondence; and believing him to be ignorant of the course that the Minister was pursuing in regard to such permits, would be likely, I think, to follow his instructions, as his duty was, and to give Gouin when he came with the company's application, the usual warning. I think the probabilities are, and, for the purposes of this case, I find, that Burgess did this.

The company having, as stated, obtained the Minister's authority for the issue of a permit to cut two million feet of timber in the territory described, applied on the 30th of April to the Crown Timber Agent at Winnipeg for, and, on May 1st, obtained from him, a permit to cut one million feet on Dominion Lands "described in a tracing in the Department." This application was made upon a form printed for the use of settlers, and upon the face of which there is a notice from the Crown Timber Agent containing three paragraphs, the first and third of which are in terms limited to settlers, the third being in these words:—

> Any person applying for a permit and through error receiving the same on land which is no longer owned or in possession of the Crown, or on which any person has a claim, will not be entitled to any compensation, protection or redress from the Government.

During that season the company caused to be cut, on what they supposed to be the lands described in the permit, one million six hundred and fifty-one thousand nine hundred and ten feet of timber, board measure. The company used, I think, a tracing of the Charest plan, which was made without reference to the Marks' application and which showed a limit of fifty square miles on the south of Lake Wabigoon, while the reference in the permit is to a tracing made from a plotting based upon the Marks' survey and Charest's plan, which

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placed the company's limit to the south of the Marks' limit. In this way, it appears to me, it happened that of the timber cut, the company, without doubt, cut one hundred and fifty thousand feet on lands not covered by their permit; and as to the rest it is, I think, impossible, without a new survey, to say whether or not any of it was cut on land covered thereby. Dumais' survey, made in September, 1889, obviously established nothing. No action was taken against the company either in respect of cutting in excess of the million feet authorized by the permit, or of any cutting outside the limits; and subsequently accounts were rendered to them charging them with the usual dues upon all the timber cut.

It was the intention of the company to erect a saw mill at Elm Bay, on Lake Wabigoon, at a point contiguous to the Canadian Pacific Railway, and there to manufacture into lumber for the Winnipeg market the logs that they had cut. They purchased the machinery for the mill, but could not put it up until they got the Canadian Pacific Railway Company to put in a siding for them. During 1883 and 1884, they made frequent applications to the railway company for the siding, and though, as it appears, promises were made, nothing was done in that direction. This is, I think, the rock on which the company's enterprise, so far, at least, as the permit is concerned, came to grief. If they could have manufactured the logs in 1883, or during the first six months of 1884, they would, in all probability, have escaped the seizure and consequent loss which overtook them later. But without the siding they were unable to erect their mill, or manufacture their logs; and for the same reason, I take it, they refrained in 1884 from perfecting their right to the license to cut timber to which I am about to refer, and from prosecuting lumbering operations thereunder. Chevrier in answer to the

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question: "What prevented them from going on with the work in 1884?" stated that the siding was not put in in September or October in time to ship men and to prepare for operations; that they were depending upon the siding, and it was not put in.

In August, 1883, the Government of Canada changed its policy in respect of the administration of timber lands in the disputed territory, and commenced to issue yearly licenses to cut timber there instead of permits. The holder of a permit, according to the regulations then in force, was charged dues upon the quantity of lumber he was allowed to cut within the year for which it was issued (in the case mentioned two dollars and fifty cents per thousand feet), while a licensee was required to pay a ground rent of five dollars per square mile, and five per centum royalty on the sales of the product. The holder of a permit was not required to make any survey, but in the case of a license, the person to whom it was promised, in respect of unsurveyed territory, was bound before the license issued, and before he cut any timber, to cause to be made at his own expense, under the instructions of the Surveyor-General, a survey of the timber berth by a duly qualified Dominion Land Surveyor, the plan and field-notes of which were to be deposited of record in the Department of the Interior. The regulations respecting licenses also contained provisions for inviting competitive tenders (where there were more applicants than one for a berth), for the erection of mills, and the renewal of such licenses. The payment of the ground rent appears to have been exacted when the license was promised. A license was not assignable without the consent of the Minister.

By order-in-council of November 1st, 1883, confirmed, with a change in the description of the limit, by a subsequent order of December 27th, authority was, on the

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company's application, given for the issue to them, on the usual conditions, of a license to cut timber in the territory covered by the permit issued to them in May. This territory was unsurveyed.

By a report of the Judicial Committee of the Privy Council of the 23rd July, 1884, adopted by Her Majesty on the 11th of August following, the dispute as to the western boundary of Ontario, to which I have made frequent reference, was determined in favor of Ontario; and on the 30th October following, an action was commenced by the Queen, on the information of the Attorney-General for Ontario, against the company for a declaration that they had no right in the timber cut by them in the territory mentioned, and for an injunction and damages. An order for an interim injunction was made by the Chancellor of Ontario on the 20th of January, 1885. The company defended the action, raising the question of the Indian title, which was subsequently, in December, 1888, definitely determined by the Judicial Committee of the Privy Council in favor of the Province of Ontario.

In May, 1885, the company, on grounds mentioned in their petition, prayed the Minister of the Interior to be indemnified against any expense, loss or damage that they might sustain in defending their title to the said timber, and to be protected in the rights conferred upon them by the permit. It does not appear that the Minister of the Interior replied to this communication; but on September 29th, 1885, the Superintendent-General of Indian Affairs, by letter addressed to the company, promised to indemnify them against the costs of an appeal from the judgment of the Chancellor to the Court of Appeal for Ontario. That promise has been kept; and I also understand that all the costs incurred by the company in its litigation have been paid by the Crown.

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The dues on the timber cut under the permit, with a fee of fifty cents therefor, amounted to $4,125.50, of which sum the company paid $500.50 when the permit was issued, and $1,625 in the following October, leaving a balance of $2,000 due to the Crown. In December, 1883, or January, 1884, the company paid to the Minister :

One year's ground rent ($250.00), in advance, from the first of December, 1883, for the timber berth for which the Minister of the Interior was authorized by order-in-council to issue a license to them.

On the 25th May, 1885, in response to a request preferred by the company in September, 1884, a change in the account as it stood in the books of the Department was approved, by which the dues paid on the permit of 1st May, 1883, were applied as if the timber cut thereunder had been cut under a license. This change in the account was favorable to the company ; and after making a charge therein of $21.23 for ground rent for December, 1884, and of $250 for ground rent for the year 1885, the account showed a credit in their favor of $119.77, instead of a debit of $2,000 against them.

The company never perfected their right to the issue of a license by performing the conditions on which it was promised to them, and never asked to have the same issued. As to that, they say, however, that when the Attorney-General of Ontario commenced proceedings against them there remained one month of the year for which they had paid the ground rent in which to make the survey ; and they rely upon the action of the Minister in crediting them with the ground rent for the month of December, 1884, and the year 1885. They claim, therefore, that in addition to the value of the logs seized, to be ascertained by reference to what could have been realized from them by their manufacture and sale, they are entitled to

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damages for loss of profit on the lumber that could have been taken from the territory in question during the winter of 1884 and the year 1885.

As to the permit issued to the company, I agree with Mr. McCarthy that, whichever view may be taken of the grounds upon which *Marshall* v. *Green* (1) can be supported (2), it is a contract for the sale of personal chattels. The property in the timber was not to pass until severed, and it was not in the contemplation of the parties that the purchasers were to derive any benefit from its further growth in the soil. I agree, too, that such a sale ordinarily implies a warranty by the vendor that the chattels are his. But in this case there are, it appears to me, facts and circumstances which show that the Crown did not intend to assert ownership, but only to transfer such interest as it had in the chattels sold; and that of this the plaintiff company must be taken to have had notice. No doubt some difficulty arises from the fact that the permit issued to a joint-stock company, whose shareholders consist not only of the promoters of the company, the assignees of the Prudhomme and Bertrand concessions, but of persons ignorant and innocent of the means by which such concessions were obtained. But, I take it that the distinction made by Mr. Robinson between cases in which remedies are sought to be enforced against companies in respect of the acts and contracts of their promoters, and cases in which companies seek to obtain the benefit of such acts or contracts, is good in principle, and not, I think, inconsistent with authority (3). Looking at the terms of the company's application, and the surrounding circumstances, it appears to me that

(1) 1 C. P. D. 35.

(2) Benjamin on Sales, 4th ed. 122.

(3) Brice on *Ultra Vires*, 2 ed. 666-694; Lindley on the Law of Companies, 5th ed. 151.

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it would be inequitable to permit them to escape the consequences resulting from the conditions attached to the Prudhomme and Bertrand concessions, to which they, in effect, succeeded. I do not overlook the fact that such permits as those promised were good for one year only, and on 1st May, 1883, when the permit in question was issued to the company, the Government was in law free to issue it to them without reference to Prudhomme and Bertrand's assignees. But apart from any pretension which the latter were in a position to make—that in the fair administration of the public domain they were entitled as against third persons to a continuance of the concessions mentioned—we have the not unimportant fact that the authority for the issue of such permit was given nearly two months before its issue, and at a time when such assignees might have taken advantage of the promises given by the Minister. For which reason, no doubt, we find the officers both of the Crown and company, in the negotiations preceding the issue of the permit, acting in the view that it was important that the company should be considered the virtual successors of Prudhomme and Bertrand.

Then, I have no doubt that Gouin was acting for the company in the negotiations that in March, 1883, he had respecting the issue of the permit; and that notice to him must be taken to be notice to the company. I do not in this connection refer to the knowledge that Gouin had by reason of his connection with the Bertrand correspondence, which he cannot, perhaps, be taken, as against the company, to have communicated to them, and which, in fact, he did not so communicate, but to the actual notice given to him by the Acting Deputy of the Minister of the Interior, and which it was, I think, his duty to have communicated to the company. We have also the notice

printed upon the face of the form used by the company in making their application to the Crown Timber Agent; and though there is, from the connection in which such notice occurs, some reason for concluding that it is applicable to settlers only, yet one would think, that had it not been well understood that the company were to take the risk of the Crown's title, such a notice would have put the company on their guard and, at least, have suggested the necessity for making further enquiry.

Then as to the orders-in-council authorizing the issue of a yearly license to the company, there was, I think, a failure of consideration which entitles them to recover the two hundred and fifty dollars paid for the ground-rent for the year ending November 30th, 1884. As to the claim for unliquidated damages there was not, in my opinion, any breach by the Crown of its contract. The company never perfected their right to the issue of a license in the year 1884, and never demanded the issue thereof. It was not contended that they had performed the conditions on which it was promised, but that they were discharged from the performance of such conditions, not by the definite determination in 1884 of the boundary dispute, but by the proceedings subsequently commenced against them by the Attorney-General of Ontario, in which the question of the Indian title was the principal question in issue. Those proceedings were commenced on October 30th of that year, and the injunction order was made on the 20th of January following; while the year for which the license was promised expired on the 30th November, 1884. At the latter date the defect in the Crown's Indian title had not been established ; it had not done anything to put it out of its power to issue the license ; and it had not refused to issue it. On the contrary, I infer that the license would have issued had the company

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perfected their right to it, for I observe by a return put in evidence that licenses to cut timber in the disputed territory were actually issued in October and November of 1884, and April and June of 1885.

But, assuming for a moment that there was a breach of the contract to issue such a license for the year 1884, the plaintiffs would not be entitled to recover more than nominal damages. The company could not without the Minister's consent have sold or assigned the license in case it had been issued to them. It would have been of value to them for the purpose of carrying on lumbering operations only, and they do not contend that they suffered loss except in being prevented from prosecuting such operations thereunder. But it is clear that it was not any defect in the Crown's title, but the fact that they had no siding on the Canadian Pacific Railway, that stood in the way of such operations in the year 1884. With reference to 1885, the plaintiffs' case rests wholly upon the change that was made in the departmental accounts to which I have referred. That, however, was a concession made to the company, at their request, without consideration so far as I can see, and as a mere act of grace, whereby the relations of the parties, if altered, were not, I think, altered otherwise than in respect of the disposition to be made of the moneys that had been paid on account of dues which had accrued under the permit; except, perhaps, that it might also be taken to have been an intimation to the company that the Crown was at the time still ready to issue the license on the performance by them of the conditions prescribed in the orders-in-council and regulations therein referred to.

In the view I have taken of this case I have not thought it necessary to consider the question, mooted at the argument, as to whether an action by petition or

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on a reference will lie against the Crown for unliquidated damages on a breach of a warranty implied in the sale of a chattel.

The Crown by its statement in defence alleges that it has always been ready and willing to repay to the plaintiffs the moneys paid by the plaintiff company for ground rent and timber dues; and, without admitting any legal liability, tenders the plaintiffs the sum of two thousand three hundred and seventy-five dollars and fifty cents in full of such moneys. In this sum is included the two hundred and fifty dollars that I have said I think they are entitled to recover for the ground rent paid for the year 1884. In giving effect to the defendant's offer to pay the larger sum, I do not wish to be understood as intimating more than this: that, under all the circumstances, the offer is, in my opinion, eminently fair. There will be judgment for the plaintiffs for $2,375.50.

Judgment for plaintiffs; costs reserved.

Solicitor for plaintiffs: *A. Ferguson.*

Solicitor for defendant: *W. D. Hogg.*

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THE VACUUM OIL COMPANY.....SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Customs duties—The Customs Act, 1883, *ss.* 68, 69, 102, 198, 207—*Money deposited in lieu of seizure—Market value—Waiver of notice of claim —Penalties—Prescription.*

The suppliants, who were manufacturers of oils in the United States, sold some of their oils in retail lots to purchasers in Canada. The price of such oils to the consumer at Rochester was taken as a basis upon which the price per gallon to the Canadian purchaser was made up, but the goods were entered for duty at a lower value,—two sets of invoices being used, one for the purchaser in Canada, and the other for the company's broker at the port of entry.

Held: That the oils were undervalued.

2. The suppliants, having established a warehouse in Montreal as the distributing point of their Canadian business, exported oils from the United States to Montreal in wholesale lots. The invoices showed prices which were not below the fair market value of such oils when sold at wholesale for home consumption in the principal markets of the United States.

Held: That there was no undervaluation.

3. When goods are procured by purchase in the ordinary course of business, and not under any exceptional circumstances, an invoice correctly disclosing the transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad is, as a general rule, assumed to indicate the market value thereof. It is presumed that he buys at the ordinary market value.

4. It is not the value at the manufactory, or place of production but the value in the principal markets of the country, *i. e.*, the price there paid by consumers or middlemen to dealers, that should govern. Such value for duty must be ascertained by reference to the fair market value of such, or like goods, when sold in like quantity and condition for home consumption in the principal markets of the country whence they are exported.

5. The neglect of an importer, whose goods have been seized, to make claim to such goods by notice in writing as provided by section 198 of *The Customs Act*, 1883, may be waived by the act of the

Minister of Customs in dealing with the goods in a manner inconsistent with an intention on his part to treat them as condemned for want of notice.

Quære: Does section 198 apply to a case where money is deposited in lieu of goods seized?

6. The additional duty of 50 per cent. on the true duty, payable for undervaluation under section 102 of *The Customs Act*, 1883, is a debt due to Her Majesty which is not barred by the three years' prescription contained in section 207, but may be recovered at any time in a court of competent jurisdiction.

Quære: Is such additional duty a penalty?

PETITION OF RIGHT for the return of moneys deposited with the Customs authorities at the port of Montreal in lieu of goods seized for alleged breaches of the Customs laws.

The facts of the case are fully stated in the judgment.

November, 7th 1890.

Gormully, Q. C., *H. Abbott*, Q. C. and *Campbell* for suppliants.

Osler, Q.C. and *Hogg*, Q.C. for the respondent.

BURBIDGE, J. now (November 17th, 1890) delivered judgment.

The suppliants, who are manufacturers of oils doing business at Rochester, in the State of New York, bring their petition to obtain repayment of the sum of five thousand dollars held by the Crown in substitution for a quantity of oils seized at the port of Montreal for fraudulent undervaluation. The principal part of the company's business in the United States is done directly with consumers, and not through middlemen; their sales to jobbers constituting only a small percentage of their total business. In conducting their business they use a large number of brands to indicate the different oils sold by them. Some of such brands distinguish different classes or grades of oils, but many, it appears, are nothing more than trade devices used

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to gratify the prejudices of purchasers; and in neither case is the price of any particular brand of oil that happens to become a favorite with consumers advanced for that reason. The advantage to the company results from the fact that in this way they are enabled the more easily to obtain and retain purchasers. Oils similar in all substantial particulars of grade, quality, test and value to those manufactured and sold by the company are obtainable in the principal markets of the United States.

In 1882, the company, desiring to do business in Canada, sent to the Minister of Customs their wholesale and retail price lists and samples of their oils, and invited him to fix the value for duty of the several brands of oils. The Minister in reply sent to the company the Customs Acts directing their attention to the provisions relating to the valuation of goods for duty, and intimating that a scale of values for duty could not be established as requested, but that such values would have to be determined on the entry of the goods at the port of entry in Canada. Thereupon the officer of the company who had charge of their shipping and billing department, upon consultation with the vice-president and manager of the company, made a schedule of values for duty for their different brands of oil.

From 1882 to 1885 the company from their office at Rochester, through their travellers, did business in Canada directly with the Canadian consumer. In the course of this business some oils were sold duty-paid, and in other cases the consumer paid the duty. In the latter case the oils were invoiced at the price at which similar oils were sold to consumers in the United States, and the Canadian purchaser paid duty on that price. But when such oils were sold duty paid they were entered for duty at a price less than that at which they were sold to the consumer in the United States;

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although such price was taken as the basis of the price charged to the Canadian purchaser, which was ascertained by adding thereto the cost of transportation and the duty. From their Rochester office the company sent the Canadian purchaser an invoice showing the duty-paid price, and to their broker at Prescott they sent another invoice showing the name and place of residence of the purchaser, and giving as the value of the oils the arbitrary value they had established as already mentioned.

In 1885 the company put their Canadian business on a different basis. They established a warehouse and office at Montreal, and shipped their goods from Rochester to Montreal in wholesale lots, consigned to themselves or their agent; and Montreal instead of Rochester then became the centre and distributing point of their Canadian business. At first, and until a stop was put to the practice by the Customs authorities, the company entered at the port of Brockville the oils destined for Montreal. It is in connection with the Prescott and Brockville entries principally that the questions to be discussed arise.

In June, 1885, the Customs authorities seized, for fraudulent undervaluation, the oils in store at the company's Montreal warehouse. The value of such oils was estimated to be $8,765.66, and the sum of $5,000 was deposited with the Crown in lieu thereof. On enquiry, and after examining the Customs entries made by the company at several ports of entry, the Minister acquitted the company of the offence of fraudulent undervaluation, but found that the fair market value of the oils imported by them into Canada was $23,415.93, the duty on which amounted to $5,853.98; that there had been an undervaluation of $6,514.24, and that there was due to the Crown for unpaid duty $1,603.81; and for the further duty resulting from such

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undervaluation $2,926.99, making in all the sum of $4,530.80, upon payment of which the Minister consented to release the seizure. This decision the company declined to accept, and no further action for the condemnation of the goods seized having been taken within the three years mentioned in section 207 of *The Customs Act*, 1883, this petition was brought to recover the deposit.

The main question to be determined is the value for duty of the oils in question.

By the 68th and 69th sections of *The Customs Act*, 1883, it was provided, as by the corresponding sections of the Acts now in force it is provided, that where any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value, in the usual and ordinary acceptation of the term, of such goods when sold for home consumption at the usual and ordinary credit in the principal markets of the country whence, and at the time when, the same were exported directly to Canada; and not the cash value of such goods, unless by universal usage they are considered and known to be a cash article, and so *bonâ fide* paid for in all transactions relating to such goods. The words "market value" and "principal markets of the country" were, in Canada, first used in the Act of the old Province of Canada, 12 Vic. (1849), c. 1, s. 6, by which the value of goods for duty was declared to be

> the actual cash value thereof in the principal markets in the country where the same were purchased, &c.

By this Act each appraiser was required

> by all reasonable ways and means in his power, to ascertain, estimate and appraise the true and actual market value and wholesale price, &c., of such goods.

In 1853, by the Act 16 Vic. c. 85 s. 3, the 6th section of 12 Vic. c. 1 was repealed, and it was enacted that

the value for duty of goods imported into the Province should be " the fair market value thereof in the prin- " cipal markets, &c," and it was provided that the Customs appraisers should appraise the value for duty of such goods at such fair market value.

By the Act of the Province of Canada 29-30 Vic. (1866), c. 6, s. 11, it was provided that the fair market value for duty of goods imported into the Province should be the fair market value of such goods

" in the usual and ordinary commercial acceptation of the term at the " usual and ordinary credit, and not the cash value of such goods, " except in cases in which the article imported is by universal usage " considered and known to be a cash article."

The first Customs Act of the Dominion of Canada, 31 Vic. c. 6, is founded on the Acts previously in force in the Province of Canada; and the enactments to which I have referred have remained in the subsequent consolidations substantially as they were in 1867 (30 Vic. c. 6, ss. 29-31; 40 Vic. c. 10, ss. 30-32; 46 Vic. c. 12, ss. 66-68). To this there is one exception, to which I think I ought to refer. In the Act of 1883 it was declared that the value for duty should be the market value of the goods " when sold for home consumption " in the principal markets, &c.," the intention of Parliament being, in part, no doubt, to prevent Canada becoming a slaughter market for the surplus stocks and products of other countries, to the injury of Canadian manufacturing industries.

The words " market value " and " principal markets of the country " occur in the Act of the Congress of the United States of August the 30th, 1842, and in other subsequent Acts; and have been the subject of judicial interpretation by the courts of that country.

In British Columbia, before that Province became part of the Dominion, the value for duty was, as in the old Province of Canada, determined by the " fair

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market value" of the goods "in the principal markets &c." (1). In the other Provinces before the Union the basis of the value for duty was, speaking generally, ascertained by reference to the real and true value of the goods at the place whence they were imported, and the importer was liable to be called upon to declare that the invoice price indicated the current value at such place (2). In this, as in many other respects, the Customs laws of such Provinces followed substantially the Act of the Parliament of the United Kingdom 8-9 Vic. c. 93, as did also the Act of the Province of Canada 10–11 Vic. c. 31.

In a number of the Acts of the Province of Canada and of the Dominion passed prior to 1883, to which I have referred, there will be found, preceding the enactments authorizing the appointment of appraisers and the valuation of goods for duty, the following recital :

> And inasmuch as it is expedient to make such provisions for the valuation of goods subject to *ad valorem* duties as may protect the revenue and the fair trader against fraud by the undervaluation of any such goods, therefore, &c (3)

It is a matter of common knowledge that, commencing with the year 1879, the Parliament of Canada has also sought by Customs laws to give a measure of protection to Canadian manufacturers, to one instance of which I have adverted. So that now it may, I think, be said that, by the provisions of the Customs Acts relating to the valuation of goods for duty, Parliament intends to protect the revenue, the fair trader and the Canadian manufacturer.

Another matter that should, it appears to me, be kept in view is the distinction more or less clearly recognized in *The Customs Act* of cases where the

(1) R. S. B. C. (1871) No. 79 s. 7.

(2) See 30 Vic. (N. B.) c. 1 s. 2 (1866) ; Rev. Stat. Nova Scotia 3rd series (1864) c. 13 s. 25 ; 36 Vic. (P.E.I.) c. 1 (1873.) s. 2.

(3) 12 Vic. (P.C.) c. 1 s. 5 ; C. S.C. c. 17 s. 23 ; 31 Vic. c. 6 s. 29 ; 40 Vic. c. 10 s. 30.

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importer procures his goods by purchase, and cases in which he is the manufacturer or producer thereof, or in which he obtains them otherwise than by purchase. If the goods are procured by purchase in the ordinary course of business and not under any exceptional circumstances, an invoice disclosing truly the transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad is, as a general rule, assumed to indicate the actual market value thereof. It is presumed that he buys at the ordinary market value (1). The value in such a case being ascertainable by reference to an invoice showing the true transaction, no appraisement is, in fact, necessary. But if there is no invoice, or the invoice does not truly disclose the transaction, or if the purchase is not made in the ordinary course of business, but under exceptional circumstances and at a price less than the fair market value, at the time, of such goods when sold for home consumption in the principal markets of the country where they are purchased and whence they are imported into Canada, or if the goods are manufactured or produced by the importer, or obtained by him otherwise than by purchase, then it is necessary that their value for duty be ascertained and determined by reference to such fair market value. Now it is clear, I think, on principle and authority, that the manufacturer's or producer's price to wholesale dealers in the country whence the goods are exported to Canada does not of necessity determine the fair market value for duty. It is not the value at the manufactory, or the place of production, but the value in the principal markets of the country—the price there paid by consumers or dealers to dealers—that governs (2). Then there is the further

(1) Blatchford, J. in 3109 Cases of Champagne, 1 Ben. 241.

(2) Attorney-General *v.* Thompson 4 U. C. C. P. 548; Cliquot's Champagne, 3 Wallace 114; 3109 Cases of Champagne, 1 Ben. 241.

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question as to whether or not the value for duty is in the cases mentioned to be ascertained by reference to the wholesale market value only. That ordinarily, I fancy, is the result; because the larger part of the importations of the country are made by wholesale merchants and dealers. I think, however, that the true meaning of the Act is that the value for duty of goods imported into Canada should be ascertained by reference to the fair market value of such or like goods when sold in like quantity and condition for home consumption in the principal markets of the country whence so imported. That is the view that Chief Justice Macaulay gave expression to in *The Attorney-General* v. *Thompson* (1), and must, it seems to me, be taken to be the true view; otherwise, that uniformity of operation would not be maintained, without which, as was said by Mr. Justice Blatchford in the case I have already alluded to (2), every *ad valorem* system of revenue would become oppressive and unjust.

Leaving then this general discussion of the provisions of *The Customs Act*, under which the questions depending in this case are to be decided, and coming to such questions, I am of opinion that the oils mentioned in the invoices, on which the company's entries were made at Prescott, were undervalued, and that such invoices were, in that respect, untrue invoices. The cost of the oils to the Canadian purchaser, less the duty and transportation, was the actual selling price in the United States under like circumstances. At that price, representing at once the true transaction between the parties and the fair market value in the United States, the company should have entered their oils. It is unnecessary to enquire whether the undervaluation was fraudulent or not. The goods are not within reach of the court, and are not represented by

(1) 4 U.C. C. P. 548. (2) 3109 Cases of Champagne, 1 Ben. 241.

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any part of the $5,000 for the recovery of which the petition is brought. The most to which the Crown is entitled in this proceeding is to set-off the duties still payable upon such goods against the sum mentioned, and it is equally so entitled whether the undervaluation was fraudulent or not fraudulent. The company are liable to pay to the Crown the duty on the difference between the true value for duty of such goods and the value at which the same were entered, and, whenever the former exceeds the latter by more than twenty per centum, to a further duty equal to one-half the duty leviable on such true value.

The importations from Rochester to Montreal, by way of Brockville, were made in car-load lots, that is, I think, wholesale lots. The specific goods had not been sold and set apart for the Canadian purchaser. The company were importing goods manufactured by themselves, and were entitled, I think, to enter them for duty at the fair market value of the same or like goods when sold in like quantity and condition for home consumption in the principal markets of the United States. The evidence shows, I think, that, taking the entries as a whole, these oils were not entered below such fair market value. I have not, either in the case of the Prescott entries or of the Brockville entries, examined each entry. From what was said by counsel at the trial, I have no doubt that the officers and experts of the Crown and the company can readily ascertain the amount in which the company are indebted to the Crown, the rule of valuation being once determined. But if not, there will be a reference to ascertain such amount.

I must now briefly refer to two questions of less importance. Counsel for the Crown argued that as the company did not within one month from the date of the seizure, by notice in writing, make a claim to

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the goods seized, as provided in section 198 of *The Customs Act*, 1883, the goods, and, consequently, the money deposited in lieu thereof, became forfeited. But even admitting that this section applied to a case where money was deposited in lieu of goods seized, the circumstances disclosed by the evidence show most clearly that the Minister waived such notice. It would, I think, be most unreasonable to hold that the Minister could invite or allow the importer to submit evidence to show whether there was an undervaluation or not, give full opportunity for the presentation of the case, make his decision, and then say that all this went for nothing, that he had no notice in writing, within the strict letter of the law, that the importer intended to claim the goods, and that, consequently, the law had effected a condemnation that he, after hearing the parties, did not believe the goods were liable to.

By their reply, the company raised an objection to the form of the Crown's set-off or counter-claim, but this was abandoned at the hearing; and it was conceded that if there was found to be any undervaluation, the duty thereon should be deducted from the $5,000 in question. It was, however, contended that the further duty (of fifty per centum of this true duty) payable under section 102 of *The Customs Act*, 1883, was in the nature of a penalty, and therefore prescribed by section 207 of the Act; and in support of such contention I was referred to *Swanston* v. *Morton* (1); *United States* v. 67 *packages of dry goods* (2); and *Ring* v. *Maxwell* (3), and to the Act of the Congress of the United States of the 30th of August, 1842, section 17. The argument that the additional duty levied in this case is a penalty is not without weight, but the case, I think, falls within the express terms of the 15th

(1) 1 Curtis (C. C. R.) 294. (2) 17 How. 85.
(3) 17 How. 147.

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section of the Act of 1883 (4), by which it is in effect enacted that the true duty payable on any goods imported into Canada, and the additional sum, if any, payable under section 102, shall constitute a debt due and payable to Her Majesty, which may at any time be recovered in any court of competent jurisdiction. I am of opinion that both the true duty and the additional sum or duty mentioned, for which the company are liable on the transactions to which I have referred, may be set-off against the $5,000 claimed in this action.

In agreeing to the amount for which judgment should be entered for the suppliants, in accordance with the conclusions to which I have given expression, neither party will be understood to accept or adopt such conclusions. If they cannot agree, there will be a reference to the Registrar to ascertain the amount; and in the meantime the question of costs will be reserved.

Judgment as ordered, costs reserved.

Solicitors for suppliants: *Abbotts & Campbell.*

Solicitors for respondent: *O'Connor & Hogg.*

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(4) R. S. C. c. 32 s. 7.

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Jan. 19.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

WILLIAM THOMAS ..... DEFENDANT.

Cancellation of a land-patent—The Manitoba Act—33 Vic. c. 3 s. 32 sub-sec. 4, and 38 Vic. c. 52 s. 1—R. S. C. c. 54 s. 57—Improvidence in granting patent.

T., a half-breed, was on the 15th July, 1870, in actual peaceable possession of a lot of land in the Province of Manitoba, previously purchased by him, and of which he had been for some years in undisturbed occupancy. On the 3rd of August, 1871, he shared in the gratuity given to certain Chippewa and Swampy Cree Indians under a treaty then concluded with them, and in the years 1871, 1872, 1873 and 1874 he participated in the annuities payable thereunder. But before taking any moneys under the treaty he enquired of the commissioner who acted for Her Majesty in its negotiation, whether by accepting such money he would prejudice his rights to his private property, and was informed that he would not; and when in 1874 he learned for the first time that by reason of his sharing in such annuities he was liable to be accounted an Indian and to lose his rights as a half-breed, he returned the money paid to him in that year. Subsequently his status as a half-breed was recognized by the issue to him in 1876 of half-breed scrip.

Held, that under *The Manitoba Act*, and amendments, (33 Vic. c. 3 s. 32 sub-sec. 4, and 38 Vic. c. 52 s. 1) he was entitled to letters-patent for the lot mentioned.

THIS was an information, filed by Her Majesty's Attorney-General for the Dominion of Canada, whereby the Crown sought to obtain a declaration by the court that a certain patent for land had been improvidently granted to the defendant and should be delivered up to be cancelled.

The facts of the case are fully stated in the judgment.

June 5th and 6th, 1890.

Aikins, Q.C. and *Culver* Q.C. for the plaintiff:

The defendant assented to the treaty, and admitted

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Argument of Counsel

he was an Indian. He must be bound by his action in accepting treaty-money. The defence admits that the land in question formed part of the Reserve; and that being so, and there being no surrender to the Crown, it could not properly be disposed of by the Crown's patent. The Crown is bound to look carefully to the execution of the treaty, and to see that the lands belonging to the Indians are maintained for their benefit. The question is not what the Crown may or ought to do as to the patent, but whether or not it was properly advised in issuing such patent (Cites *The Attorney-General* v. *Contois* (1); *Graham* v. *The Northern Railway Co.* (2); *The Attorney-General* v. *McNulty* (3); *Martyn* v. *Kennedy* (4); *Rees* v. *The Attorney-General* (5); *The Attorney-General* v. *Fonseca* (6); Reg ex. rel. *Gibb* v. *White* (7).)

Howells, Q.C. and *Cumberland* for the defendant:

The taking of treaty-money under a mistake of his rights and position as a half-breed should not deprive defendant of his property. He was in possession of the property before the patent issued, as a settler, and outside the patent altogether he has a good right to the land. He is not an Indian within the meaning of the Indian Act of 1874. He did not belong to any band or tribe of Indians. As soon as he discovered his position with respect to receiving treaty-money, he returned the money he had received for the then current year. The *onus* to establish improvidence in the granting of the patent is on the Crown, but so far from doing that the evidence shows that all the facts were before the Crown.

(Cites the judgments of Gwynne and Patterson, JJ in *Fonseca* v. *The Attorney-General* (8).)

(1) 25 Grant 346.
(2) 10 Grant 259.
(3) 8 Grant 324.
(4) 4 Grant 61.
(5) 16 Grant 467.
(6) 5 Man. L. R. 173, and 17 Can. S. C. R. 612.
(7) 5 Pr. R. 315.
(8) 17 Can. S. C. R. 612.

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Aikins, Q.C. in reply, cites *The Queen* v. *Clarke* (1); *The King* v. *Clarke* (2); *The Attorney-General* v. *Garbutt* (3); *Bacon's Abridgement* (4); *Stephen's Blackstone* (5).

Reasons for Judgment.

BURBIDGE, J. now (January 19th, 1891) delivered judgment.

This information is brought to annul letters-patent issued on the 27th of October, 1887, in favor of the defendant, for lot numbered 22 in the Parish of Saint Peter and Province of Manitoba.

The ground upon which the cancellation of the patent is sought, is, briefly, that the defendant is not, as at the time when it was issued he was supposed to be, entitled to the lot in question under *The Manitoba Act* and its amendments (6), and that, therefore, it was issued through error and improvidence within the meaning of the 57th section of chapter 54 of the *Revised Statutes of Canada*.

It is admitted that the defendant is a half-breed, and it appears from the evidence that he has during all his life lived after the manner of white men, and never according to the mode and habits of life of the Indian. He is by trade and occupation a carpenter and farmer. For many years he was a warden of the church at Saint Peter; and on several occasions he has been a representative from that church to the Synod. After the transfer of Rupert's Land and the North-West Territory to Canada, and before the Treaty to which reference will be made, he was appointed a Justice of the Peace.

It is also clear that since the year 1864, when for the sum of seventy-five dollars he purchased the lot in question from one Robert Sandison, he has been in

(1) 7 Moo. P. C. 77.
(2) Freem. 172.
(3) 5 Grant 181.
(4) Vol. 8 p. 150.
(5) Vol. 1 p. 624.
(6) 33 Vic. c. 3 s. 32 sub-sec. 4, and 38 Vic. c. 52 s. 1.

undisturbed occupancy thereof, and that on the 15th of July, 1870, the date of the transfer, he was in actual peaceable possession of the same. This is not denied, but it is said that by participating in the gratuity given to certain Chippewa and Swampy Cree Indians in 1871, under a Treaty made with them at Lower Fort Garry on the 3rd of August of that year, and in the annuities payable thereunder, the defendant lost his status as a half-breed, and forfeited his right to the lot and letters-patent in question.

The defendant admits that in 1871, 1872, 1873 and 1874 he received for himself, his wife and two daughters, the annuity of three dollars for each person payable under the Treaty, and it appears that he shared in the gratuity given when the Treaty was concluded He says, however, that before taking any money under the Treaty he asked Mr. Simpson, the commissioner acting for Her Majesty, if by taking the same he would interfere with his private property, and that Mr. Simpson told him he would not; and that when, in 1874, he learned for the first time that by the acceptance of such annuities he would deprive himself of his rights as a half-breed, he returned the amount paid to him in that year, and that since he has not taken any money under the Treaty; and that the Crown has recognized his rights as a half-breed by the issue to him, in October, 1876, of half-breed scrip.

The enquiry is, I think, somewhat narrowed by the fact that none of the statutes of the Dominion relating to Indians and Indian Affairs were in force in Manitoba prior to 1874, when by 37 Vic. c. 21 certain provisions of 31 Vic. c. 42, and of 32-33 Vic. c. 6, were extended to that province. It may be admitted that if in 1874, and thereafter, the defendant had participated in the annuities payable under the Treaty, he would have brought himself within the definition of an Indian contained in the

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Acts mentioned (1), and that he could not subsequently have regained his status of a half-breed except in accordance with the law or practice in that behalf for the time being in force.

The first question to be decided is : Did the defendant by participating in the gratuity and annuities mentioned make an election and renounce the status and personal condition of a half-breed, and acquire that of an Indian ? Unexplained, his conduct would no doubt raise the presumption that he had done so. But looking at all the circumstances of the case, it does not appear to me that such was at any time his intention. We have seen that he was careful before taking any money under the Treaty to enquire of the commissioner whether his acceptance would prejudice his position in respect of his private property; and that when in 1874 he realized the true state of the case he returned the annuity then lately paid to him, and that in 1876 his status as a half-breed head of a family was formally recognized by the Crown. It is said that Mr Simpson could not bind the Crown by any such assurance as that alleged to have been given to the defendant. Possibly not, and yet it may be right and proper to weigh the defendant's acts in the light of such assurance. But take it that the defendant's status, from the day he received his first payment under the Treaty until he returned the last, must be deemed to be that of an Indian, the further question presents itself: By virtue of what law did he forfeit his interest in the homestead that he purchased, and on which, with his wife and family, he was residing. The only answer suggested in reply to that enquiry is, that such is the effect of the 19th section of *The Indian Act* (*R.S.C.* c. 43), whereby it is, amongst other things, provided that every Indian in the Province of Manitoba who has,

(1) 31 Vic. c. 42 s. 15, and 37 Vic. c. 21 s. 8.

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previously to the selection of a Reserve, possession of a plot of land, included in or surrounded by a Reserve, upon which he has made permanent improvements, shall have, in respect thereof, the same privileges as are enjoyed by an Indian who holds under a location title. But that provision was first enacted in 1876 by 39 Vic. c. 18 s. 10, and cannot, I think, be construed to deprive the defendant of any rights of property theretofore acquired, seeing that there is no pretence that he was at that time an Indian or liable to be considered or treated as an Indian within the meaning of the statute.

Mr. Aikins, for the plaintiff, upon the authority of the cases cited, further contended that although the defendant might be found to be entitled to the letters-patent issued to him, they should be set aside because the Minister of the Interior acted in ignorance of the fact that that the defendant had not refunded the forty-eight dollars paid to him under the Treaty in the years 1871, 1872 and 1873. It seems that this fact was not, as it should have been, brought to the attention of the Minister either in 1876, when half-breed scrip was issued in favor of defendant, or in 1887, when his claim to lot 22 was disposed of. This issue is not, however, raised by the pleadings, and it is not necessary to decide it, or to consider how far the earlier cases referred to have been modified by *Fonseca* v. *The Attorney-General* (1), in which the 57th section of the *Revised Statutes*, chapter 54, has been so recently and fully considered. On the issues presented by the pleadings the defendant is, I think, entitled to succeed.

Judgment for defendant with costs.

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitors for defendant: *Archibald, Howell & Cumberland.*

(1) 17 Can. S. C. R. 612.

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Jan. 19.

THE CITY OF QUEBEC.....SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of Right—Demurrer—Injury to property resulting from negligence of Crown's servants on public work—Crown's liability therefor—50-51 Vic. c. 16, s. 16 (c)—Interpretation.

On the 19th of September, 1889, a large portion of rock fell from a part of the cliff, alleged to be the property of the Crown, under the citadel at Quebec, blocking up a public thoroughfare in that city known as Champlain Street to such an extent that communication was rendered impossible between the two ends thereof.

By their petition of right the suppliants charged that this accident was caused by the execution of works by the Crown which had the effect of breaking the flank side of the cliff, by the daily firing of guns from the citadel, and the fact that no precautions had been taken by the Crown to prevent the occurrence of such an accident. The Crown demurred to the petition on the ground, *inter alia*, that no action will lie to enforce a claim founded on the negligence, carelessness or misconduct of the Crown or its servants or officers.

Held:—(1). There being no allegation in the petition that the property mentioned was a work of defence or other public work, or part of a public work, and it not appearing therein that any officer or servant of the Crown had any duty or employment in connection with the property mentioned, or that the acts complained of were committed by such officers while acting within the scope of their duties or employment, no case was shown by the suppliants in respect of which the court had jurisdiction under *The Exchequer Court Act*, 50-51 Vic. c. 16 s. 16 (c).

(2). Under section 16 (c) of the said Act, the Crown is liable in damages for any death or injury to the person or to property on any public work resulting from the negligence of any officer, or servant of the Crown while acting within the scope of his duties or employment.

(3). The Crown's immunity from liability for personal negligence is in no way altered by section 16 (c) of the said Act.

DEMURRER to a petition of right.

The petition prayed for damages for the obstruction

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of a street in the city of Quebec, alleged to have been caused by the nonfeasance and misfeasance of the Crown and its officers.

The pleadings are sufficiently stated in the judgment.

Argument of Counsel.

November 13th, 1890.

Irvine, Q.C. in support of demurrer:

It will, no doubt, be contended that the remedy against the Crown in such a case as this is created by *The Exchequer Court Act* (1). But that Act only extends the jurisdiction of the court, and does not pretend to enlarge the liability of the Crown in any way,—which, under the provisions of *The Interpretation Act* (2) can only be done by express terms. Now, I submit that it would be a reasonable construction of sub-section (*c*) of section 16 of *The Exchequer Court Act* to say that it was merely intended to give the court jurisdiction to hear and determine cases wherein, by express enactment, the Crown is made liable for the negligence of its officers or servants,—such as, for instance, cases arising under the clauses of this nature to be found in *The Government Railways Act* (3) and *The Public Works Act*, as amended by 41 Vic. c. 8 s. 3.

Again, assuming that the officers or servants of the Crown did, by their acts of omission or commission, contribute to the accident, and that the Crown would be liable therefor in the event of a proper case being substantiated, the citadel at Quebec is not a public work within the meaning of the sub-section in question. It is not within the control of the Public Works Department in any way, but that control is exercised by the Militia Department. (Cites *R.S.C.* c. 41, ss. 4, 6, 7, 8 and 9.)

(1) 50-51 Vic. c. 16 s. 16 sub-sec. (*c*).

(2) R.S.C., c. 1. s. 7, sub-sec. 46.

(3) R.S.C. c. 38, ss. 16, 17, 22, 23 and 36.

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Hogg, Q.C. on the same side: This case differs very little in principle from the case on demurrer of *Brady* v *The Queen* (1), which I argued a few days ago in this court. Assuming, for the purposes of argument, that there is a liability created against the Crown by sub-section (*c*) of section 16 of *The Exchequer Court Act*, the suppliants' petition here does not allege that the citadel is a public work, and on the face of the petition the court has plainly no jurisdiction. The Crown cannot be guilty of a breach of duty where no duty exists. Prior to the passing of *The Exchequer Court Act* no such action as this would lie against the Crown, and it cannot be shown that the Act provides a remedy in such a case. (Cites *Farnell* v. *Bowman* (2); and *Attorney General* v. *Wemyss* (3), and points out the differences between the enactments under which these cases arose and the sub-section of *The Exchequer Court Act* under discussion.)

Belcourt, *contra*: The petition is well founded outside of the statute. At common law a petition would lie where the Crown had taken possession of a street as in this case, and the same right exists under the civil law. The refusal to remove the obstruction from the street is a withholding of possession by the Crown. (Cites *Feather* v. *The Queen* (4).)

Again, this is a public work within the meaning of *R.S.C.* c. 36 ss. 2 and 7; and by ss. 7 and 9 of that chapter the Minister of Public Works is charged with the duty of keeping the work in good repair. Then again, by *R.S.C.* c. 41 ss. 4, 6, 7, 8 and 9 the Minister of Militia and Defence is charged with the duty of maintaining and keeping in repair all forts and fortifications in Canada. Both Ministers of the Crown have failed to do their duty in this regard, and an action will lie therefor. Again, the petition is well founded under

(1) Reported *post*.
(2) 12 App. Cas. 643.
(3) 13 App. Cas. 192.
(4) 6 B. & S. 257.

The Petition of Right Act (*R.S.C.* c. 136 s. 13). A remedy is also afforded by *The Expropriation Act* (52 Vic. c. 13). This is nothing more or less than an expropriation of the street by the Crown. The Crown can acquire title by prescription, and under art. 2211 of the *Civil Code* the subject has a right to interrupt such prescription by a petition of right. (Cites *Laporte* v. *The Principal Officers of Artillery, &c.* (1); *The Exchequer Court Act* s. 18; *C.C.L.C.* art. 4.00.) The action will lie under 50-51 Vic. c. 16, s. 15. (Cites *Redpath* v. *Giddings* (2); Fournier and Henry, JJ. in *The Queen* v. *McLeod* (3).)

Under art. 1057 *C.C.L.C.*, a contract is implied on the part of an owner so to use his property as not to injure his neighbor. The *Civil Code* is binding on the Crown (4). The case is clearly within section 16 (*c*) of 50-51 Vic. c. 16, and it is also within the meaning of section 16 (*d*), because it arises upon a breach of a statutory duty. By repealing section 21 of *The Petition of Right Act*, Parliament has shown an intention to increase the liability of the Crown. (Cites *The Queen* v. *Williams* (5), *Théberge* v. *Landry* (6).) The Crown's liability in a case of this kind existed before *The Exchequer Court Act*, but a remedy was lacking. Now by the use of the words "hear and determine" in section 16 of such Act, both the remedy and a jurisdiction to give effect to it are created. (Cites *Broom's Legal Maxims* (7), *Todd's Parliamentary Government* (8) *Chitty's Prerogatives* (9), *The Queen* v. *McLeod* (10), *Endlich on Statutes* (11).)

Hogg, Q.C. in reply: So far as the common law goes, supposing, for the sake of argument, that the citadel is a public work, and the accident was attributable to

(1) 7 L.C.R. 486.
(2) 9 L.C.J. 225.
(3) 8 Can. S.C.R. 1.
(4) *Exchange Bank* v. *The Queen*, 11 App. Cas. 157.
(5) 9 App. Cas. 418.
(6) 2 App. Cas. 102.
(7) 4 ed. 53.
(8) Vol. 1. p. 2.
(9) P. 339.
(10) 8 Can. S. C. R. at p. 30.
(11) §§. 107, 166, 167, 168, 419, 430.

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failure of duty on the part of those in charge, the doctrine of *respondeat superior* does not apply to the Crown. (Cites *Tobin* v. *The Queen* (1).

Reasons for Judgment.

BURBIDGE, J. now (January 19th, 1891) delivered judgment.

The facts admitted by the demurrer, and material for its consideration, are set out in the first seven paragraphs of the petition of right, as follows :—

1. That for a number of years past, Your Majesty has been and still is proprietor in possession of the lots of land known by the Nos. 2263, 2304, 2305, 2306, 2307, 2308, 2312, 2313, 2314, 2315, 2316, 2320, 2321, 2322, 2323, and 2327 on the official cadastre for Champlain ward of the said city of Quebec.

2. That the said lots form a high, steep, and rocky cliff, extending from the place commonly called Dufferin Terrace, southward to opposite the Citadel, with a short slope at the foot thereof, along a street called Champlain street.

3. That the said Champlain street has been opened there and used by the public for over a century.

4. That during the last ten years, Your Majesty has done and caused to be done to the said cliff, works which have had the effect of breaking the flank side thereof.

5. That the daily firing of guns from the Citadel over the said cliff has also contributed to the splitting of the rocky surface.

6. That during the last ten years, Your Majesty has totally failed to do to its said property the proper, convenient and necessary works to prevent its becoming dangerous, and also to prevent accidents from the sliding of pieces of rock.

7. That owing to the carelessness, want of precautions and gross negligence of Your Majesty, and of Your Majesty's officers, in doing there works which ought not to have been done, and in not doing what was necessary to be done to prevent the said property from becoming dangerous, it is now averred that on or about the 19th day of the month of September last (1889), a very large portion of rock fell from the flank side of the said cliff or cape, and breaking into pieces, formed an enormous heap which totally blockaded the said Champlain street on a considerable length, and rendered almost impossible the communication between the southerly and the northerly portions of the said street.

(1) 16 C. B. (N. S.) at p. 349.

The following are the grounds of the demurrer:—

1. Because the said petition discloses no claim against Her Majesty capable of enforcement by the petition of right.

2. Because the said petition does not disclose any contract or statutory liability on the part of Her Majesty in respect of the matters complained of in the said petition of right.

3. Because there was, and is, no legal duty incumbent upon Her Majesty to do any works, or take any steps, to prevent rocks on the lands mentioned in the first paragraph of the said petition from sliding upon the lands at the foot of the cliff referred to.

4. Because the claims and causes of action of the suppliants are founded in tort and are not enforceable by petition of right.

5. Because the alleged claims and causes of action set out in the petition of right are based upon the gross negligence and want of precautions and carelessness of Her Majesty and Her Majesty's servants in connection with the lands therein mentioned; and no action will lie against Her Majesty to enforce a claim founded on the negligence, carelessness or misconduct of Her Majesty or Her Majesty's servants or officers.

It is admitted that prior to June 23rd, 1887, when the Act of the Parliament of Canada 50-51 Vic. c. 16 was passed, the subject had, in respect of a tort, no remedy against the Crown by petition of right. (1).

It was contended, however, that the reason was to be found in the absence of any means to enforce the subject's right, and not in the Crown's immunity from liability; and that as the court was, by 50-51 Vic. c. 16 s. 16 (*c*), given jurisdiction in respect of torts, the petition would lie. The first part of that contention cannot, I think, be maintained. While no doubt there are frequent references in the authorities to the absence of remedy, the reason of the decisions will be found to go beyond that, and to rest primarily upon the principle that in such cases no liability exists. In *The Queen* v. *McFarlane* (2), Sir William Ritchie, C.J. says that the doctrine of *respondeat superior* has no application to the Crown, and he re-affirms the principle in *The Queen* v.

(1) The Queen v. McFarlane, v. McLeod 8 Can. S.C.R. 1
7 Can. S.C.R. 216; The Queen (2) P. 239.

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McLeod (1), where he states that the maxim *respondeat superior* does not apply in the case of the Crown; that the Sovereign is not liable for personal negligence, and, therefore, the principle *qui facit per alium facit per se*, which is applied to render the master liable for the negligence of his servant, because this has arisen from his own negligence or imprudence in selecting or retaining a careless servant, is not applicable to the Sovereign to whom negligence or misconduct cannot be imputed, and for which, if it occurs in fact, the law affords no remedy.

Mr. Justice Strong in the same cases gave expression to the same view. In the *Queen* v. *McFarlane* (2), he said that the well known case of *Lord Canterbury* v. *The Queen* (3) established that the Crown is not liable for injuries occasioned by the negligence of its servants or officers, and that the rule *respondeat superior* does not apply in respect of the wrongful or negligent acts of those engaged in the public service.

In the case mentioned of *Lord Canterbury* v. *The Queen* Lord Lyndhurst, L. C., at p. 288, says:

> Indeed, if the Crown cannot be guilty of negligence or personal misconduct, and is not responsible for the negligence or personal misconduct of its servants, it follows, of course, that in those cases there can be no such remedy. And, on the other hand, the absence of all trace of the remedy would of itself form a strong argument against the liability.

In *Tobin* v. *The Queen* (4) will be found in the judgment of the court, delivered by Erle, C.J., the following: —

> For the purpose of showing that a petition of right cannot be maintained for this complaint, we propose to refer, first to the principle that the Sovereign cannot be guilty of a wrong, and so cannot be made liable to pay damages for a wrong of which he cannot be guilty.

And in *Feather* v. *The Queen* (5), Cockburn, C.J., de-

(1) 8 Can. S.C.R. at p. 24.
(2) 7 Can. S.C.R. at p. 240.
(3) 12 L. J. Ch. 281.
(4) 16 C. B., N.S. 353.
(5) 6 B. & S. 295.

livering the judgment of the court, states the same principle with great fulness and clearness: —

Not only is there no precedent for a petition of right being entertained in respect of a wrong in the legal sense of the term, but, if the matter is considered with reference to principle, it becomes apparent that the proceeding by petition of right cannot be resorted to by the subject in the case of a tort. For it must be borne in mind that the petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition must therefore show on the face of it some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding. Now, apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. It follows that the petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground. Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a Minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown.

It is further contended that the Act 50-51 Vic. c. 16 has not only provided a remedy by petition of right for an injury occasioned by the negligence of an officer or servant of the Crown, but that apart from the question of procedure it has created, or at least recognized, the existence of a right on the part of the subject to recover damages from the Crown for any such injury.

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By the 23rd section of the Act it is provided that any claim against the Crown may be prosecuted by petition of right or may be referred to the court by the Head of the Department in connection with the administration of which such claim arises. By section 58 the 21st section of *The Petition of Right Act* (*R.S.C.* c. 136) was repealed, the provisions of which were as follows :—

Nothing in this Act contained shall,—

1. Prejudice or limit, otherwise than is herein provided, the rights, privileges or prerogatives of Her Majesty or Her successors ; or—

2. Prevent any suppliant from proceeding as before the passing of this Act ; or—

3. Give to the subject any remedy against the Crown,—

(*a.*) In any case in which he would not have been entitled to such remedy in England under similar circumstances, by the laws in force there, prior to the passing of an Act of the Parliament of the United Kingdom, passed in the session held in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter thirty-four, intituled "*An Act to amend the law relating to petitions of right, to simplify the proceedings and to make provisions for the costs thereof;*" or—

(*b.*) In any case in which, either before or within two months after the presentation of the petition, the claim is, under the Statutes in that behalf, referred to arbitration by the head of the proper Department, who is hereby authorized, with the approval of the Governor-in-Council, to make such reference upon any petition of right.

Sections 15 and 16 of 50-51 Vic. c. 16 deal with the exclusive original jurisdiction of the court, and are as follows :—

15. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

16. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters :—

(*a.*). Every claim against the Crown for property taken for any public purpose ;

(*b.*) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work;

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

(*d.*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor-in-Council;

(*e.*) Every set-off, counter claim, claim for damages, whether liquidated or unliquidated, or other demand whatsover, on the part of the Crown against any person making claim against the Crown.

By comparing section 15 with *R. S. C. c.* 135, s. 75 (2), it will be seen that the jurisdiction which the court had formerly exercised in respect of any matters that might have been the subject of a petition of right is continued, with a general definition of the cases in which such petitions will lie. By section 16 (*a.*) and (*b.*) the court is given the jurisdiction formerly exercisible by the Official Arbitrators in respect to claims for compensation for lands taken for, or injuriously affected by, the construction of public works (1); by section 16 (*c.*) the jurisdiction formerly vested in such Official Arbitrators with respect to claims arising out of any death or injury to the person or property on any public work, with a limitation to which I shall have occasion to refer (2); and by section 16 (*d.*) and (*e.*) a jurisdiction similar to that vested in the Court of Claims by the *Revised Statutes of the United States*, section 1059.

The Official Arbitrators were first given jurisdiction in respect of claims arising out of any death or any injury to person or property on any railway, canal or public work under the control and management of the Government of Canada by the Act 33 Vic. c. 23, by which it was provided that the head of a Department

(1) 31 Vic. c. 12 s. 34; 44 Vic. c. 25 s. 27 (1); and R.S.C. c. 40 s. 6.

(2) 33 Vic. c. 23; R.S.C. c. 40 s. 6.

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being instructed so to do by the Governor-in-Council might refer any such claim (among others) to the Official Arbitrators, if such claim were made within three months after the passing of the Act, or within six months after the occurrence of the accident or the doing or not doing of the act upon which the claim was founded. On any such reference the Official Arbitrators had authority to hear and award upon the claim.

By 41 Vic. c. 8 s. 3, the Minister of Public Works was given power to refer to the Official Arbitrators, for report only, certain claims, including supposed "claims "arising out of any death or any injury to person or "property on any railway, canal or public work under "the control and management of the Department of "Public Works;" but in such cases the duty of the Arbitrators was confined to reporting their findings upon "the questions of fact and upon the amount of "damages, if any, sustained, and the principles upon "which such amount had been computed."

The same difference in respect of references to the Official Arbitrators for award and for report only is preserved in 44 Vic. c. 25 s. 27 (1) and (3).

By chapter 40 of *The Revised Statutes* we find that the authority of the Minister to refer for report only is continued (s. 11), and that he is also given power to refer to the Arbitrators, for hearing and award, claims arising out of the wrongs mentioned (s. 6); and the latter, with certain limitations, is the jurisdiction vested in the court by section 16 (*c.*) of 50-51 Vic. c. 16.

Now for the Crown it was said that at the time of the passing of the Act 50-51 Vic. c. 16 there were cases in which the Crown was by statute liable for the negligence of its officers and servants, as, for instance, the liability under certain circumstances to damages

for cattle killed on Government railways, or for damages sustained by reason of the neglect of the engineer or driver on a Government railway to ring the bell of the locomotive in the cases in which it was his duty so to do (1), and that clause (*c.*) of section 16, under discussion, should be limited to such cases. The argument would not be without weight if it did not happen that such cases are covered by clause (*d.*) of section 16, which gives the court jurisdiction in respect of "every claim against the "Crown arising under any law of Canada.," and that, in the view for which counsel for the Crown contended, clause (*c.*) would be wholly unnecessary and superfluous.

By section 37 of the *Crown Suits Act*, 1881, (New Zealand) it was, among other things, in effect enacted that no claim or demand should be made against Her Majesty, under that part of the Act, unless the same were founded upon a breach of contract or a wrong or damage independent of contract done or suffered in connection with a public work, as therein defined, and for which an action would lie against a subject. In an action by petition of right under this statute for damages to a vessel caused by striking upon a snag near a Government wharf, of which the Executive Government of New Zealand had notice but of which they gave no warning, it was held that the Crown was liable (2).

After the conquest of Ceylon a practice of suing the Crown sprang up, there having been no authority for any such practice by the Roman-Dutch law of Holland in force there before the conquest. This practice was recognized by section 117 of Ordinance No. 11, 1868, in terms wide enough to include actions *ex delicto*, which,

(1) R.S.C. c. 38, ss. 16; 17, 22, 23 and 36.

(2) *The Queen* v. *Williams*, 9 App. Cas. 418.

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it was admitted, could not be brought against the Crown. The words used in the Ordinance were: "All suits instituted by any private party against the "Queen's Advocate shall," in the cases mentioned, "be "instituted and prosecuted in the District Court, * * * "and the said District Court shall have cognizance of "and power to hear and determine such suits as if the "cause of action had arisen within the district." This Ordinance was held to make the practice referred to part of the law of Ceylon. In *Hettihewage Siman Appu* v. *The Queen's Advocate* (1), Sir Arthur Hobhouse, delivering the judgment of their lordships, says:(p.586.)

> But it does not follow that, because the words are wide enough to include actions *ex delicto*, they must do so. They are not words adapted to confer a new right or to establish a new kind of suit. They are only regulative of rights and proceedings already known, and they must be construed according to the state of things to which they clearly refer. They can, therefore, receive a full and sufficient meaning without extending them to actions *ex delicto*, but they cannot receive a full and sufficient meaning, indeed, it is difficult to assign them any substantial operation at all unless they embrace actions *ex contractu*.

At the time of the passing of the Act of the Legislature of New South Wales, 39 Vic. No. 38, there were in existence in that colony two methods of proceeding against the Crown,—one by petition of right under 24 Vic. No. 27, by the 7th section of which it was provided that nothing in the Act should give to the subject any remedy against the Crown in any case in which he would not have had a remedy before the passing of the Act, and the other under 20 Vic. No.15 whereby it was provided that any case of dispute or difference touching any claim between a subject and the Colonial Government might, by the Governor with the advice of his council, be referred to the Supreme Court of the Colony for trial by jury or otherwise as such court should, after such reference, direct. Both

(1) 9 App. Cas. 571.

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statutes were repealed by 39 Vic. c. 38, by which it was in effect enacted that any just claim or demand whatever against the Government of the Colony might be tried out in an action against a nominal defendant (for whose appointment provision was made), in which action the proceedings and the rights of the parties should, as nearly as possible, be the same as in an ordinary case between subject and subject. The proper construction of the statute having been brought in question on an appeal to the Lords of the Judicial Committee of the Privy Council, it was held that the words were amply sufficient to include a claim for damages for a tort committed by the local Government by their servants (1).

By the *Crown Suits Ordinance* of 1876, of the Straits Settlement, section 18, sub-section 2, after expressly mentioning claims arising out of contract, and other classes of claims, it was provided that "any claim against the Crown for damages or compensation arising in the Colony shall be a claim cognizable under this Ordinance."

This, it was held, included claims resulting from torts (2).

With reference to the cases before the Judicial Committee of the Privy Council to which I have referred, it may not be uninstructive to notice the standpoint from which their lordships regard the relation of a Colonial Government to the public works of the Colony; for it must, I think, be admitted that conclusions are often affected, if not determined, by the point of view from which a question is regarded.

In *Farnell* v. *Bowman* (1), Sir Barnes Peacock, delivering their lordships' judgment, said (p. 649):—

(1) *Farnell* v. *Bowman*, 12 App. Cas. 648.

(2) *The Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas. 192.

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It must be borne in mind that the local Governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that "the King can do no wrong" were applied to Colonial Governments in the way now contended for by the appellants, it would work much greater hardship than it does in England. **** Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them.

And in the judgment in the *Attorney-General of the Straits Settlement* v. *Wemyss* (1), delivered by Lord Hobhouse, the following passage occurs (p. 197):

In the case of *Farnell* v. *Bowman* attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which, in England, are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a Colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses.

The majority of the Supreme Court of Canada in *The Queen* v. *McFarlane* (2) and *The Queen* v. *McLeod* (3), took a different view of the relation of the Government of Canada to the public works of the Dominion. Their judgment is founded upon a recognition of the fact that the Government of Canada does not build or operate railways or canals, or construct river or harbor improvements, for purposes of profit as individuals do, but in the public interest and on grounds of public policy similar to those that call for and justify the maintenance of the postal service The following extracts are taken from the judgments of the Chief Justice:

(1) 13 App. Cas. 192. (2) 7 Can. S.C.R. 216.
(3) 8 Can. S.C.R. 1.

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In *The Queen* v. *McFarlane* he said (p. 234) :

There is, in my opinion, no analogy whatever between this case and that of private individuals or corporations owning slides and undertaking by themselves or their agents to take charge of, and to pass, for a consideration, timber through such their private property. In such a case no one can doubt that if such timber was lost or damaged by reason of the unskillful, negligent and improper conduct of the proprietors or their servants in passing such timber through their slides, they would be responsible to the owners thereof for such loss.

But this, in my opinion, is an entirely different case, governed by principles wholly inapplicable to that just suggested. The Queen, not being a private individual, is not subject to the liabilities of private individuals.

The slides, booms and property in question are not private property but public property, created by the expenditure of public money for public purposes and for the public benefit, and vested in Her Majesty, as the learned judge who heard this case justly remarks, not as personal to Her, but in trust for Her Dominion.

The management and control of this public property is through the instrumentality of orders of the Governor-General-in-Council, and the operations in connection therewith are conducted by persons appointed by a high officer of state, the Minister of Public Works, under whose general management the public works of the Dominion are placed. The river in its natural state was evidently unfitted for the transport of the timber in the great lumbering district through which it passed, and "to advance the public good," and to make the river fit for the transportation of timber, so that by its improvement it might be made a great highway for the development of a great Dominion industry, public property and public works, such as these, were required ; and the liability of Her Majesty in reference thereto cannot for a moment be placed on the same footing or governed by the same principles as private property in which private individuals invest their capital for their private gain.

And in *The Queen* v. *McLeod*, (pp. 23, 25 and 26.):

The establishment of the Government railways in the Dominion is, as has been said of the Post Office establishments, and as we thought of the slides in the case of *McFarlane* v. *The Queen*, a branch of the public police, created by statute for purposes of public convenience, and not entered upon or to be treated as private mercantile speculations.

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As to the Intercolonial Railway, it was in no sense in the nature of a private undertaking, constructed for reasons influencing private promoters of similar works, or in the nature of a mercantile speculation—it was constructed as a great public undertaking essential to the consolidation of the union of British North America, and in fulfilment of a duty imposed on the Government and Parliament of Canada by *The British North America Act.*

**** In this respect the law places the Crown in reference to the Post Office, railways, canals, and other public works, and undertakings, and those availing themselves of the convenience and benefit of such institutions, in no better or no worse position than if they were owned by private individuals, who made it an express stipulation that they should not be liable to parties dealing with them for the consequences of the negligence or misconduct, wilful or otherwise, of their agents and servants. This, of course, does not touch or affect the question of the liability, or the personal responsibility to third persons of officers or subordinates for acts and omissions in their official conduct when injuries and losses have been sustained, still less, where they are guilty of direct misfeasances to third persons in the discharge of their official functions.

There is, therefore, nothing unreasonable in limiting the liability of the Crown and freeing it from liability for negligences and laches of its servants ; none of the great public works having been undertaken with a view to mercantile gain, but for the general public good.

The public who use these Government railways must understand what the law is, to what extent the law, on principles of public policy, prevents actions being brought against the Crown for injuries resulting from the nonfeasance or misfeasance of its servants—in other words, parties dealing with the Crown, in reference to these great public undertakings, deal subject to those prerogatival rights of the Crown, and those rules and principles, well known to the law, which, on considerations of public policy, are applicable to transactions between the Crown and a subject, but not between subject and subject.

To say that these great public works are to be treated as the property of private individuals or corporations, and the Queen, as the head of the Government of the country, as a trader or common carrier, and as such chargeable with negligence, and liable therefor, and for all acts of negligence or improper conduct in the employees of the Crown, from the stoker to the Minister of Railways, is simply to ignore all constitutional principles. These prerogatives of the Crown must not be treated as personal to the Sovereign ; they are great constitutional rights, conferred on the Sovereign, upon principles of public policy, for the bene-

fit of the people, and not, as it is said, "for the private gratification of the Sovereign"—they form part of and are generally speaking "as ancient as the law itself."

I take it, however, that whatever opinion may be entertained of the point of view from which this question is to be regarded, it is necessary to give to the words used in clause (*c.*) of 50-51 Vic. c. 16 s. 16 the meaning that expressly or by necessary implication attaches to them; and I do not doubt that they recognize the Crown's liability for certain torts committed by its officers and servants for which a remedy had theretofore been provided by a proceeding on a reference to the Official Arbitrators, and for the redress of which it was for the first time by such Act provided that proceedings might be instituted in this court.

It appears to me, too, that I would fail to give effect to the language of clause (*c.*) if I limited its application to the special cases where a liability for torts is created by statute, to which reference has been made. Such cases of statutory liability, as we have seen, fall within and are provided for by clause (*d.*) of the section under discussion. There is nothing, I think, in the conclusion to which I have come in any way in conflict with the judgments in *McFarlane* v. *The Queen* or *McLeod* v. *The Queen*, which were decided under statutes differing very materially from that now under consideration. On the other hand, it is supported by the judgments of the Judicial Committee of the Privy Council that have been cited.

It will be observed, however, that the liability of the Crown for damages for any death or injury to the person or to property is qualified and limited. The death or injury must happen on or in connection with a public work, and must result from the negligence of an officer or servant of the Crown while acting with-

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in the scope of his duties or employment. While on the one hand there should be no hesitation in giving the words used in clause (*c.*) the meaning which they are adapted to express, that meaning ought not to be extended. The Crown's liability cannot be enlarged except by express words or necessary implication. It therefore appeared to me doubtful as to whether the clause covered a case in which the injury resulted from nonfeasance. That, however, I conclude with some hesitation is the result. See *The Queen* v. *Williams* (1) in which *Jolliffe* v. *Wallasey Local Board* (2) is approved.

Now, with reference to the petition of right in this case, it will be observed that Her Majesty is charged with carelessness, want of precautions and gross negligence in doing, in respect of a property owned by Her in the city of Quebec, works which ought not to have been done, and in not doing in respect thereof what was necessary to be done to prevent the same from becoming dangerous. That literally is a charge of personal negligence that cannot be imputed to the Crown, and for which, if it occurred, the law affords no remedy, for the doctrine of the Crown's immunity from liability for personal negligence is in no way altered by the Act 50–51 Vic. c. 16.

Then as to the allegation that the daily firing of guns from the Citadel over the cliff has contributed to the splitting of the rocky surface, it is not alleged, and it does not appear, that such firing was unlawful or negligently done.

Eliminating from the petition the allegations relative to the Crown's personal negligence, and the firing of the daily gun from the Citadel, the petition shows that Her Majesty was the owner of a property in Champlain ward in the city of Quebec, forming a high, steep and rocky cliff extending from the place commonly called

(1) 9 App. Cas. 433. (2) L. R. 9 C. P. 62.

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"Dufferin Terrace" southward to opposite the Citadel, with a short slope at the foot thereof along Champlain street, which has been opened there and used by the public for over a century, and that owing to the carelessness, want of precautions and gross negligence of Her Majesty's officers in doing to, or at, this property works which ought not to have been done, and in not doing what was necessary to be done to prevent the same from becoming dangerous, a very large portion of rock, on the 19th of September, 1889, fell from the flank side of the said cliff or cape, and breaking into pieces formed an enormous heap which totally blockaded Champlain street for a considerable length and rendered almost impossible the communication between the southerly and northerly portions of the said street.

Now does such a complaint show a case in respect of which the court has jurisdiction under 50–51 Vic. c. 16 s. 16 (*c.*)? I think that it does not. In the first place there is no allegation that the property mentioned was a public work or part of a public work. No doubt "fortifications and other works of defence" are public works within the meaning of the statute (*R.S.C.* c. 39, s. 2 (*d.*), and 53 Vic. c 13 s. 2 (*d.*)), and the inference might perhaps be drawn that the Citadel at Quebec is a fortification or work of defence, but there is no allegation that the property in question formed part thereof, or of any works of defence at Quebec.

Then again, it is not alleged, and it does not appear, that any officer of Her Majesty had any duty or employment in connection with the property mentioned, or that the acts of omission and commission complained of were committed by such officers while acting within the scope of their duties or employment.

There was another contention to which it is necessary very briefly to refer. It was said by counsel for the suppliants that by the falling of a portion of the cliff the

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Crown had taken possession of the street, and that a petition would lie to recover the possession thereof. By the fall of the rock the city has no doubt been deprived of the beneficial use of a part of the street, but the Crown cannot be said to have dispossessed the city. The real fact is that the city is in possession of too much. That is the substantial complaint, and the gist of the action is to secure the removal of the fallen rock, or damages for the injury thereby occasioned.

There will be judgment for the respondent with costs. Leave to amend upon payment of costs of the demurrer is given to suppliants.

Judgment for respondent with costs.

Solicitors for suppliants : *Baillairgé & Pelletier.*

Solicitors for respondent : *O'Connor, Hogg & Balderson.*

FREDERICK J. BRADY.....SUPPLIANT ; 1891

AND Jan. 19.

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of right—Demurrer—Personal injuries received on public work —Negligence of Crown's servant—Liability of Crown therefor.

The suppliant alleged in his petition that on a certain date he was driving slowly along a road in the Rocky Mountain Park, N.W.T., when his buggy came in contact with a wire stretched across the road, whereby the suppliant was thrown from the buggy to the ground and sustained severe bodily injury. He further alleged that the Rocky Mountain Park was a public road of Canada under the control of the Minister of the Interior and the Governor-in-Council, who had appointed one S. superintendent thereof ; that S. had notice of the obstruction to travel caused by the wire and had negligently failed to remove it, contrary to his duty in that behalf ; and that the Crown was liable in damages for the injuries so received by him.

The Crown demurred to the petition on the ground that the claim and cause of action were founded in tort, and could not be maintained or enforced.

Held, that the petition disclosed a claim against the Crown arising out of an injury to the person on a public work resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment, and therefore came within the meaning of 50-51 Vic. c. 16 s. 16 (*c*), which provides a remedy in such cases.

DEMURRER to a petition of right for personal injury sustained by the suppliant through the alleged negligence of one or more servants of the Crown.

The demurrer to the petition admits the following among other allegations therein contained :—

That the Rocky Mountain Park of Canada, and the road thereof on which the suppliant sustained the injuries complained of, is a public work under the control and management of the Minister of the Interior and the Governor-in-Council, who, in or about the month of

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December, 1886, appointed one George A. Stewart Superintendent thereof as an officer or servant of the Crown.

That the said Stewart on or about the 1st day of January, 1887, entered upon his duties as such Superintendent, since which date he has continued to act in that capacity, and that under him were employed subordinate officers and servants of the Crown.

That the construction, maintenance, care, repairs and control of the road mentioned, and other Park roads, and the removal of any obstruction to traffic thereon, were each within the scope of the duties or employment of the said Stewart, as such Superintendent, or of his said subordinate officers, or Crown servants, or some of them.

That on or about the 8th of September the road mentioned was obstructed by a wire which was stretched or lying across the same, and that before that date the said Park Superintendent Stewart, or his said subordinates, or some of them, had, or had received, due notice of such obstruction, which constituted a danger and menace to persons travelling upon said road, but that the said Stewart, his subordinates or some of them whose duty it was to thereupon remove the said wire, neglected to remove, and negligently refrained from removing, the same, and that in the evening of the said 8th of September, 1888, the suppliant was driving slowly in a buggy in and along said road when the buggy or its wheels came suddenly in contact with the said wire, of which the suppliant was unaware, whereby the buggy was lifted off the ground and the suppliant thrown violently out upon the said road, and sustained severe bodily injury.

November 4th, 1890.

Hogg, Q.C. in support of demurrer :

The Rocky Mountain Park was set apart under the

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authority of the Act 50-51 Vic. c. 32. It contains some 260 square miles, and is reserved as a public park and pleasure-ground for the benefit, advantage and enjoyment of the people of Canada. In section 4 of the Act the purposes for which the park was to be maintained are set forth.

I submit that no action will lie against Her Majesty upon the grounds alleged in the petition of right. In the first place, there is no duty imposed on the Minister of the Interior or the Crown by the statute creating the park, to either build or maintain roads. The duties of the Minister of the Interior, and of the Crown, must be derived entirely and exclusively from the words of the statute, and if no obligation such as the one set up by the suppliant is to be found there, it is not to be called into existence outside of the statute. Any duties imposed upon them are duties arising under the specific words of the Act. The position of the Crown with reference to the maintenance of this park is the same as that mentioned by the learned Chief Justice with respect to Government railways in the *Queen* v. *McLeod* (1). The duties of the Crown as owner of the park are simply those of an ordinary owner not holding himself out as liable for accident or injury to persons frequenting the same.

(Cites *Cracknell* v. *The Mayor of Thetford* (2); *Metropolitan Railway Company* v. *Jackson* (3); *Holliday* v. *St. Leonard's* (4); *Smith on Negligence*) (5).

Again, this is really an action against the Crown for the negligence of its servants in placing on, or allowing to be placed on, one of the roads of the Park certain wire which was a menace and danger to persons using

(1) 8 Can. S. C. R. p. 25.
(2) L. R. 4 C.P. 629.
(3) 3 App. Cas. 208.
(4) 11 C.B.N.S. 192,
(5) P. 70.

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such road. On this point my contention is based on the well known principle that there is no remedy against the Crown in tort. The maxim that the "King can do no wrong," with all its significance in actions of tort, need not be discussed at great length here. The servants of the Crown may be personally liable, but there is no action against the Crown. (Cites *Viscount Canterbury* v. *The Queen* (1); *Tobin* v. *The Queen* (2); *Langford* v. *The United States*) (3). The latter is an American case very much in point showing what the law is in the United States in regard to similar actions against the Government of that country. (Cites *MacFarlane* v. *The Queen* (4); *The Queen* v. *McLeod* (5); *Clode on Petition of Right* (6); *Dicey on Parties to Actions*) (7).

There can be no serious argument put forward that this action will lie under *The Petition of Right Act* of 1876. There is no liability on the part of the Crown in this case unless it is created by *The Exchequer Court Act*, 50-51 Vic. c. 16. Now, my contention is that section 16 of that Act does not create any liabilities that were not in existence at the time of the passing of the Act. The jurisdiction of the court is enlarged but no new obligations or liabilities are created. Any defence to a petition of right that could have been set up prior to the Act of 1887 coming into force is still available to the Crown. *The Petition of Right Act* is still in force. There are no express words in the new Act to take away any rights accruing to the Crown under *The Petition of Right Act.*

Under the Act 33-34 Vic. c. 23 s. 2. the Official Arbitrators or some one of them might have had referred to them for investigation and report, and

(1) 12 L.J. Ch. 281.
(2) 16 C.B.N.S. 310.
(3) 101 U.S.R. 341.
(4) 7 Can. S.C.R. 216.
(5) 8 Can. S.C.R. 1.
(6) P. 53, *et seq.*
(7) Pp. 23, 24.

also for award, claims for injury to the person or property occurring on a public work. Now there is nothing to show that, while the Arbitrators had the jurisdiction to report or award damages, the Minister or the Crown was bound to pay them. That was entirely left to the good-will of the Crown. There was no liability created against the Crown for the payment of such damages, and the same contention holds good as against section 16 (*c*.) of 50-51 Vic. c. 16. The reasonable view to take of the whole of sec. 16 is that the legislature merely intended to give the court jurisdiction to hear and determine any claims of the species indicated in such section, if such claims existed in law and were triable before the Act came into force. There is no case reported that will show any extension of liability on the part of the Crown under 33-34 Vic. c. 23. Take clause (*a*) of the 16th section of 50–51 Vic. c. 16, and all other clauses except (*c*), and we find they deal with questions of liability that were decided and established before the passing of the Act. I would also refer in this connection to *The Interpretation Act*, R. S. C. c. 1 s. 17 sub-sec. 46, and to some cases at common law upon the question of the Crown's rights being invaded or affected without express words to that effect. (Cites *Maxwell on Statutes* (1), *Endlich on Statutes* (2), and *Chitty's Prerogatives*) (3). Section 16 is simply a jurisdiction conferring section, and nothing more. It was not intended to affect the rights of the Crown, and if it were, it must be shown in that section, or else it must be shown that the liability was existing at the time the statute was passed. (Cites the *Henrich Björn case*) (4).

This is a statute which provides for procedure only.

(1) Sec. 161.
(2) Sec. 161.
(3) Pp. 382, 383.
(4) 11 App. Cas. 270,—Lord Watson at page 278 and Lord Bramwell at page 281.

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The statutes upon which the cases in Australia and the Straits Settlement were founded were statutes of entirely different character. (Cites and comments upon the decisions in *Cookney* v. *Anderson* (1), and *Drummond* v. *Drummond*) (2). Now it may be argued that in the case of *Farnell* v. *Bowman* (3), the Privy Council laid down the general principle that actions *ex delicto* can be brought against any Colonial Government. But it must be borne in mind that this case was decided upon a statute entirely different from ours. It not only provides a remedy against the Crown in such a case as the present, but also creates a liability. It is not a statute which merely confers jurisdiction, but goes further and actually describes the nature of the liability.

Chrysler, Q. C. *contra* :—It must be admitted at the outset that prior to the passing of 50–51 Vic. c. 16 such a case as this could not have been maintained by petition of right, and, therefore, the whole question necessarily depends upon the construction of that statute. It is necessary for us to look at the old rules of construction of statutes in order to understand the real meaning of the statute in question. (Quotes the rules of construction in *Maxwell on Statutes*) (4).

To ascertain what was the law before the Act was passed we need not go back further than the case of *Viscount Canterbury* v. *The Attorney-General* (5), wherein the argument of counsel was directed largely to a consideration of the meaning of the legal maxim: "The King can do no wrong." It was argued in support of the petition of right, which was founded on damages arising from the negligence of the Crown's servants, that the only reason existing prior to that case why such an action could not be maintained against the Sovereign depended upon the technical

(1) 1 DeG. J. & S., p. 365.
(2) L. R. 2 Ch. App. 32.
(3) 12 App. Cas. 643.
(4) P. 27.
(5) 1 Phil. 306; 12 L. J. Ch. 281.

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ground that the King could not issue process against himself. In other words that the liability of the Crown for the torts of its servants always existed, but such liability could not be enforced because there were no means provided by the law for such enforcement. The judgment of Lord Lyndhurst is a compendium of modern learning upon the subject. Now I submit that neither in this case nor in any previous one, neither in case law nor statute law, do we find it expressly stated that the Crown shall be liable to the suit of a subject founded either in contract or tort. All the cases down to the present time show that the sole foundation of the Crown's immunity from actions of tort is the absence of remedy,—the reason being that the Sovereign, by fiction at common law, was always present in the courts of justice and could not be asked to adjudicate upon his own case. There have been many statutory infringements upon the operation of that doctrine from time to time, and, coming down to the case before us, by *The Exchequer Court Act*, s. 16 (*c*) a remedy is expressly provided for it, and as long as we have the remedy I submit, upon the grounds I have before stated, that there is no doubt about the Crown's liability in the premises. Then, again, it has been advanced in support of the demurrer that the King can do no wrong, and that any action founded on the facts set up in this petition should have been brought against the Crown's servants whose negligence caused the accident. The explanation of the maxim given in *Broom's Legal Maxims* (1) shows that the Crown's liability always existed, but by means of a legal fiction the agents or officers of the Sovereign were made liable instead of the Sovereign himself. The Crown is always supposed to do justice, but heretofore there were no means of obtaining redress against the Crown available to the subject in such a case

(1) P. 51, *et seq.*

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as this. By *The Exchequer Court Act* s. 16 (*c*) that remedy is provided, and our petition of right is well founded. (Cites *Tobin* v. *The Queen* (1) . *Thomas* v. *The Queen* (2) ; *The Queen* v. *McLeod* (3) ; *Farnell* v. *Bowman*) (4). I submit that the case of *Farnell* v. *Bowman* is on all fours with this case. The legislative re-enactment upon which the decision is founded provided that "Any person having or deeming himself to have any "just claim or demand whatever against the Govern- "ment of this Colony may set forth the same in a peti- "tion to the Governor praying him to appoint a nominal "defendant in the matter of such petition, &c," and upon such appointment the case shall be proceeded with as therein provided. There is no serious distinction to be drawn between the legal effect of the words "any just claim or demand whatever against the "Government of this Colony," used in that enactment, and the words "every claim against the Crown," employed in *The Exchequer Court Act*, s. 16 (*c*). Indeed if anything is to be said on that point, our statute is to be read more strongly against the Crown than the New South Wales Act, and, further than this, there was an express provision in that Act safe-guarding the Crown's prerogative. In our statute there is no such saving clause, and while there are no express words saying that the Crown shall be liable, I submit that the recognition of such liability is implied by the creation of the remedy. As the case of *Farnell* v. *Bowman* appears in the reports it meets all the requirements of our case. It supports my contention that the immunity of the Crown from actions in tort depends altogether upon a question of practice, and that practice is altered, so far, at least, as this case is concerned, by *The Exchequer Court Act*, 1887.

(1) 16 C. B. N. S. 310.
(2) L.R. 10 Q.B. 31.
(3) 8 Can. S. C. R., Judgment of Fournier J., at p. 29.
(4) 12 App. Cas. 643.

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In the *Queen* v. *Williams* (1) the clause of the 37th section of the New Zealand Crown Suits Act, upon which that case was decided against the Crown, is given at length. It reads as follows: " A wrong or damage independent of contract, done or suffered [by or under authority of the Crown] in, upon, or in connection with a public work, &c." I submit that this language is almost the same as section 16 (*c*) of *The Exchequer Court Act*, 1887.

From the very title of the Act 50–51 Vic. c. 16 we must assume that Parliament intended to enact a change in the old law. That title is worded:

> An Act to amend " The Supreme and Exchequer Courts Act," and to make better provision for the trial of claims against the Crown.

The title is part of the Act, and should be looked at to determine its meaning in case of doubt. (Cites *Coomber* v. *The Justices of Berks*) (2).

The question may be asked is there a fund in Canada to respond a judgment obtained in a case like this ? I submit that the payment of any amount that may be awarded against the Crown in this suit is provided for by section 15 of *The Petition of Right Act* (3) which is in force to-day.

Then, with regard to section 21 of *The Petition of Right Act*, which was a provision for safe-guarding the Crown's prerogative in Canada, this section has been expressly repealed by the last clause of schedule B. of *The Exchequer Court Act*, and there is no substituted provision in such behalf to be found in the repealing Act. In view of this fact, the court cannot read into the repealing Act any general provisions respecting the Crown's rights to be found in the *The Interpretation Act*. The court should only look at the repealing clause, when its meaning is plain

(1) 9 App. Cas. at p. 433.
(2) 9 Q. B. D. 17., Grove, J. at p. 26, and Huddleston, B. at p. 32.
(3) R.S.C. c. 136.

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and unambiguous, to ascertain the intention of the legislature. (Cites *Attorney-General* v. *Lamplough* (1), Bramwell L.J. (2) and Brett, L.J. (3)). I submit that the plain wording of section 16 (*c*) of *The Exchequer Court Act* covers this case. It is true that there is no declaration to be found in the statute that the Crown should be liable in such a case as this, but I rely on the premises I have already advanced to have that question determined by the court in favor of the subject. (Cites *Maxwell on Statutes*) (4). In fact, in no one of our statutes which give the subject a remedy against the Crown is there any mention made of the Crown's liability. Nothing to this effect can be found in *The Official Arbitrators Act* (5), *The Government Railways Act* (6), or in the Expropriation Acts. In such matter the legislature uniformly proceeds upon the theory that the Crown will do justice and right.

Finally, the grounds upon which the suppliant's action is based are properly the subject of a petition of right. Section 21 of *The Exchequer Court Act* provides that any claim against the Crown may be prosecuted by petition of right.

It is contended on behalf of the Crown that unless the Crown is specially mentioned in the statute it is not bound thereby. My answer to that is that the Crown is expressly mentioned in the statute. What can be more explicit than the words "every claim against the Crown" to be found in section 16? (Cites *Attorney-General of the Straits Settlement* v. *Wemyss* (7); *Mersey Docks Trustees* v. *Gibb* (8); *Gilbert* v. *Corporation of Trinity House* (9); *White* v.

(1) 3 Ex. Div. 214.
(2) At p. 227.
(3) At p. 231.
(4) Pp. 286-303.
(5) R.S.C. c. 40.
(6) R.S.C. c. 38.
(7) 13 App. Cas. 192.
(8) L.R. 1 H.L. 93.
(9) 17 Q.B.D. 795.

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Hindley Local Board (1) ; *Bathurst* v. *McPherson* (2) *Hammersmith Railway Company* v. *Brand*) (3).

Lewis, following on the same side, contended that the provisions of *The Interpretation Act* respecting the Crown's rights should not be imported into *The Exchequer Court Act* because the latter Act expressly repealed the provisions safe-guarding the prerogatives contained in *The Petition of Right Act* (4). Furthermore, as *The Exchequer Court Act* is a remedial one, it should receive such fair and liberal construction as will best attain the object of the legislature in passing it,—that object being simply, as declared in the title, "to make better provision for the trial of claims against the Crown."

Hogg, Q.C. in reply :

There is nothing in this Act to take away the right of the Crown to set up any defence which might have been set up under *The Petition of Right Act*. The effect of section 16 is simply to give the court a right to hear and determine such claims as are mentioned therein whenever there is a liability on the part of the Crown therefor. It may be very properly said that it is legislation looking forward to possible modifications of the Crown's rights by Parliament in the future ; but it cannot be said that such modifications are to be found in the section itself or in any part of the Act. The whole point in the case is simply this : Does the statute in question in any way extend the doctrine of *respondeat superior* against the Crown ? I submit that it does not. (Cites *Re Nathan* (5) ; *The Sanitary Commissioners of Gibraltar* v. *Orfila, et al.*) (6).

(1) L.R. 10 Q. B. 219.
(2) 4 App. Cas. 256.
(3) L.R. 4 H.L. 171.
(4) R.S.C. c. 136 p. 21.
(5) 12 Q.B.D. 461.
(6) 15 App. Cas. 400.

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BURBIDGE, J. now (January 19th, 1891) delivered judgment.

For the reasons that I have given in the case of *The City of Quebec* v. *The Queen* (1), I am of opinion that the petition discloses, within the meaning of the Act 50-51 Vic. c. 16, s. 16 (*c.*), a claim against the Crown arising out of an injury to the person on a public work resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment, and that there should be judgment for the suppliant on the demurrer to the petition, and with costs.

Demurrer overruled with costs.

Solicitors for suppliant: *Stewart, Chrysler & Lewis.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

(1) 2 Ex. C. R. 252.

LOUIS ACHILLE BERTRAND... .....SUPPLIANT ; 1891

AND Jan. 19.

HER MAJESTY THE QUEEN.....RESPONDENT.

Damages to property from Government railway—The Government Railways Act, 1881, *s.* 27—*Claimant's acquiescence in construction of culverts, effect of—Negligence of Crown's servants—Estoppel.*

The suppliant sought to recover damages for the flooding of a portion of his farm at Isle Verté, P.Q., resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under the hand of the suppliant, given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the Intercolonial Railway, whereby he accepted a certain sum "in full compensation and final settlement for deprivation of water, fence-rails taken, damage by water and all damages past, present and prospective arising out of the construction of the Intercolonial Railway," and released the Crown "from all claims and demands whatever in connection therewith." It was also proved that, although the works were executed subsequent to the date of this release, they were undertaken at the request of the suppliant and for his benefit, and not for the benefit of the railway, and that, with respect to part of them, he was present when it was being constructed and actively interfered in such construction.

Held:—That he was not entitled to compensation.

2. The Crown is not under an obligation to maintain drains or back-ditches constructed under 52 Vic. c. 13, s. 4.

PETITION OF RIGHT to recover a sum of $7,937 as compensation for injury done to a farm belonging to the suppliant at Isle Verte, County of Temiscouata, P. Q.,—such injury having been occasioned by the construction and maintenance of the Intercolonial Railway.

The facts of the case are sufficiently stated in the judgment.

August 19th, 1890.

Pouliot for suppliant :

There should be damages in respect of the land on the

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south side of the railway notwithstanding the receipt given by the suppliant.

As to the north side, Bertrand's land carries a great deal more water than before the railway was put there. This has resulted from the construction of the second culvert. I admit that this was done at Bertrand's request, but having undertaken the work the Government should have made it sufficient to carry away all the water.

The suppliant is entitled to at least $1,000.

Taché, Q.C. for the respondent :

The claim is $7,937, while claimant's brother says the whole property is worth only $5,000. The culvert last constructed has benefited the property south of the railway, and such enhancement of value is a complete compensation for the inconvenience caused to the northern part. Again, suppliant accepted $20 in full when he had no culvert. The second culvert was made at Bertrand's wish and we built all that he asked, and he should not now complain.

Pouliot, in reply :

The railway authorities saw that the suppliant's land was flooded, and upon his complaint they built the culvert. He wanted his land drained and they consented to do it. They should have done the work efficiently when they set about to do it.

BURBIDGE, J. now (January 19th, 1891) delivered judgment.

This petition is brought to recover compensation for injury to a farm belonging to the suppliant, situated in the Parish of Isle Verte, County of Temiscouata and Province of Quebec, occasioned by the construction and maintenance of the Intercolonial Railway. The suppliant's house and other buildings are situated at the north end of the farm, in the Village of Isle

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Verte, and not far from the River St. Lawrence. At the east side of the farm and near to the barn and out-buildings is a deep gully or water-course through which the water coming from the south is discharged, the natural drainage of the land being from south to north. By the construction of the railway the natural flow of the water from the south of the railway was interfered with, and the railway ditches collected a considerable quantity of water which was discharged upon the suppliant's farm, as its level was lower than that of the farms adjoining.

The exact date of the construction of the railway is not disclosed by the evidence, but I take it that it was constructed in or about the year 1871, for in July of that year the suppliant was paid eighty-nine dollars and ten cents as compensation for the right of way of the railway through his farm.

The question of the compensation to which he was entitled because the railway injuriously affected his property was not determined until 1877. On the 22nd of January of that year an award was made by three of the Official Arbitrators, by which they determined that the Government of Canada should pay to the suppliant the sum of twenty dollars in full payment and settlement of his claim, the payment being for all damages past, present, and future, which the construction of the said railway might theretofore have occasioned or might thereafter occasion to the said farm.

The claims which the Arbitrators considered had been put forward by the suppliant in the years 1874 and 1875, by which he, in addition to the value of some fence rails, sought compensation for damage to his property because the construction of the railway had caused one portion of it to be flooded and another portion to be deprived of water by the diversion of a stream. I understand the injury by the flooding to

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have related principally, if not entirely to the portion south of the railway, and that if any portion of the farm was at the time deprived of water it was the portion to the north of the railway.

In June following such award, the suppliant, by a release under his hand, and in consideration of twenty dollars theretofore awarded to him by the Official Arbitrators "in full compensation and final settlement for deprivation of water, fence rails taken, damage by water, and all damages past, present and prospective arising out of the construction of the Intercolonial Railway," to the property in question, released Her Majesty "from all claims and demands whatsoever in connection therewith."

In his evidence taken before Mr. Cowan, which by consent has been used in this case, the suppliant, the facts having for the time, it is probable, gone from his memory, denied knowledge of this award, or that he signed the release or receipt mentioned. The original papers have since been produced and are in evidence, and there is no doubt the facts are as stated.

Since such award and release the Minister of Railways and Canals has caused two additional culverts to be constructed, and ditches to be opened and repaired for the purpose of carrying off the water that, as we have seen, collected upon and drowned a portion of the farm south of the railway. It does not appear that he was under any obligation to execute these works, or that they were constructed for any purpose except to drain the land of the suppliant. Why they were undertaken is, so far as can be gathered from anything before the court, a mere matter of conjecture. It may have been because the officers of the railway, like the suppliant himself, lost sight of the fact that the matter had been concluded by the award and release, or they may have thought the compensation awarded was

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incommensurate with the damage done, and that there was some moral, if not legal, obligation to attempt to remove or mitigate it, or it may be that the suppliant succeeded in securing the execution of the works by reason of his much asking. That they were undertaken at his request is admitted, and it appears that when, in 1885, the second and deeper of the two culverts was constructed and a ditch leading therefrom through the suppliant's land was repaired, he was present while the work was going on, and, so far at least as respects the ditch, actively interfered in the execution of the works. When completed he appears to have expressed his satisfaction with the works executed, and for the purposes they have no doubt proved sufficient. But it happens that during the winter the culverts fill up with snow and ice, forming, with the railway embankment, a dam that in the spring holds the water which collects south of the railway. Then when the culverts are opened by the section-men, or by a sudden thaw, the water so held back is discharged with great force and in such quantities that it overflows the lands adjacent to the gully or natural water-course, of which mention has been made, and occasions damage by flooding the portion of the farm where the suppliant's buildings and gardens are.

The suppliant by his particulars claims compensation to the extent of $7,937, while according to the testimony of his brother, which there is no occasion to question, the farm with the buildings thereon is worth about $5,000. Part of this claim is for damage caused by the flooding of the land south of the railway which we have seen has already been disposed of.

The injury occasioned by the flooding of the lands on which are his buildings and gardens, is, however, substantial and considerable, and in respect of this he is, I think, entitled to compensation unless—1st. such

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injury is part of the damage of which he acquitted the Crown in 1877; or—2ndly. his request for the construction of the works that cause the injury, and his acquiescence and interference in their execution, constitute a good defence to his petition.

It seems to be clear that if the injury complained of results wholly from the original construction of the railway the suppliant cannot succeed (1). That certainly is the case in respect of everything that might in 1876 or 1877 have been foreseen, and it is, it appears to me, conclusive in respect of the flooding of the land south of the railway, and of the collection of water by the railway ditches, and of its discharge upon the suppliant's land. These causes of damage must have been well known and observed at the time of the arbitration. What probably was not foreseen was that if means were taken to drain the flooded land, the injury in question might occur. The absence, for so many years, of any such injury shows, I think, that it was occasioned by the subsequent opening of the culverts and ditches to which reference has been made. At the time when such subsequent works were executed *The Government Railways Act*, 1881, (44 Vic. c. 25) was in force, by the twenty-seventh section of which was recognized the Crown's liability to make compensation for any properly established claim for property taken, or for direct or consequent damage to property arising from or

(1) *The King* v. *Leeds and Selby Ry. Co.*, 3 A. & E. 683; *Lee* v. *Milner*, 2 M. & W. 824; *Lawrence* v. *G. N. Railway Company*, 16 Q. B., 643; *In re Ware*, 9 Ex. 395.; *Broadbent* v. *The Imperial Gas Company*, 7 DeG. M. & G., 436, 7 H. L. C., 600; *The Caledonian Railway Company* v. *Lockhart*, 6 Jur. N. S., 1311; *Bagnall* v. *L. & N. W. Railway Company*, 7 H. & N., 423, 1 H. & C. 544; *Reg.* v. *Aire & Calder Navigation Company*, 30 L. J.Q.B. 337; *Croft* v. *L. & N. W. Railway Company*, 3 B. & S. 436; *Whitehouse* v. *The Wolverhampton & Walsall Railway Company*, L.R. 5 Ex. 6; *Stone* v. *Corporation of Yeovil*, L. R. 2 C. P. D. 111, 113; *Reg.* v. *Hubert*, 14 Can. S.C.R. 737.

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connected with the construction, repair, maintenance or working of any Government railway. The Minister had, it is clear, the right, under the statute to which I have referred, to construct the works mentioned; and if he had done so of his own motion, or for the protection or in the interest of the railway, or because he was under some obligation to do so, it would, I think, be tolerably clear that the suppliant would have been entitled under the Act to compensation. If the suppliant had simply stood by and not objected to the Minister undertaking such works he would not, I think, have deprived himself of his remedy, for he would have had the right to assume that, as the Minister was acting under the statute, the compensation thereby provided for would be given for any injury done, and his acquiescence would not be such as could be invoked against him. In *The Conservators of the River Thames* v. *The Victoria Station and Pimlico Railway Company* (1) it was held that the consent given by the plaintiffs under the defendant's Special Act to the latter's plans for a bridge, the foundations of which rested upon land belonging to the plaintiffs, did not constitute a license to build the bridge upon such land without compensation (2).

Here, however, there is more than mere acquiescence or consent. The suppliant for his own benefit asks the Minister to execute works, which the latter is under no obligation to undertake, and which are constructed to the satisfaction of the former. It happens, however, that while by reason of what has been done, the suppliant has secured the benefit of having one portion of his farm drained, it has become necessary for him to incur very considerable expense to prevent another portion thereof from being flooded for a short time in the spring. If similar acts had been done by a neighboring pro-

(1) L. R. 4 C. P., 59.

(2) See also *The Metropolitan Board of Works* v. *The Metropolitan Ry. Co.*, L. R. 3 C. P. at p. 629.

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prietor, under like circumstances, I do not see how the suppliant could have maintained an action therefor against the former; and that, it is well established, is one test by which the right of the matter is to be tried. It was not suggested that there is any difference, and I take it on this point there is no difference, between the law of Quebec, by which the case is to be determined, and the law in force in the other Provinces. (1). I am of opinion, therefore, that the suppliant is not entitled to compensation under the statute.

It is contended, however, that part of the inconvenience and damage results from the failure of the Minister of Railways to keep open a cross-ditch on a neighbor's land, which, if properly maintained, would carry a portion of the water to another gully or water-course on the farm of one Napoléon Côté. It was also suggested that the injuries complained of have in part resulted from the negligence of the Minister's servants in opening the culverts in the spring. But as to the first contention, I know of no obligation resting upon the Minister to keep this ditch open, and counsel did not point me to any law under which such a duty might arise. Speaking generally, that duty seems to be thrown on the proprietor through whose lands the ditches are constructed by the Crown (2).

As to the second contention, there is, I think, no evidence which would justify me in concluding that the officers or servants of the Crown have been guilty of negligence in opening the culverts in question.

There will be judgment for the respondent with costs.

Judgment for respondent with costs.

Solicitors for suppliant: *Pouliot, D'Amour & Pouliot.*

Solicitors for respondent: *O'Connor & Hogg.*

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(1) *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

(2) See 52 Vic. c. 13 s. 4; and the repealed statutes 31 Vic. c. 12, s. 30; 44 Vic. c. 25 s. 5 (9); and R. S. C. c. 39 s. 4.

JOHN HENRY ROSS BURROUGHS, ELZÉAR ANTOINE DÉRY AND JOHN JACKSON FOOTE..... } CLAIMANTS ; 1891 Mar. 24.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

The Liquor License Act, 1883, *s.* 6—*Salaries of License Inspectors—Approval thereof by Governor-in-Council—Negligence of officer of the Crown—Damages.*

By the 6th section of *The Liquor License Act*, 1883, the Boards of License Commissioners for the various license districts in the Dominion were empowered to fix the salaries of license inspectors, subject to the approval of the Governor-in-Council.

Held, that such approval could not be given by a Minister of the Crown.

2. Laches cannot be imputed to the Crown, and, except where a liability has been created by statute, it is not answerable for the negligence of its officers employed in the public service.

THIS was a claim against the Crown for money paid by the Board of License Commissioners appointed under *The Liquor License Act*, 1883, for the License District of the City of Quebec, in excess of the salaries determined to be paid to the License Inspectors for such district by the Governor-in-Council.

The facts of the case are fully stated in the judgment.

November 18th, 1890.

Burroughs for the claimants :

Casgrain, Q.C. and *Hogg*, Q. C. for the respondent.

BURBIDGE, J. now (March 24th, 1891) delivered judgment.

The claimants were the License Commissioners, under *The Liquor License Act*, 1883, for the License District of the City of Quebec. By the 6th section of the Act it was provided that the Board of License

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Commissioners for each License District should appoint a Chief Inspector of licenses, and one or more Inspectors, and fix their salaries, subject to the approval of the Governor-in-Council; and by the 56th section that all sums received by the Commissioners on applications for licenses, or on the issue thereof, or for fines or penalties, should form the License Fund of the District, and be applied under regulations of the Governor-in-Council for the payment of the salaries and expenses of the Commissioners and Inspectors and for the expenses of the office of the Board, and the administration of the Act. The License Fund for the District of the City of Quebec amounted, during the claimants' term of office, to $4,480. In the adjustment of their accounts, the Minister of Inland Revenue, who was charged with the duty of administering the Act, allowed the claimants $832.24 for general expenses, $1,852.66 for the salaries of Inspectors, and $2,521.33 for their own services as Commissioners, the difference ($726.23) between the sum of the amounts so allowed and the $4,480. received on account of the License Fund, being paid by the Minister to the claimants out of an appropriation made by Parliament. The Commissioners had, however, under circumstances to which it will be necessary to refer, paid to the Inspectors for salaries the sum of $3,431.42, and instead of receiving for their own services $2,521.33 as was intended and with reference to which there is no question, they have in the result received therefor only $942.57. For the difference, $1,578.76, they now prosecute their claim, which has been referred by the Minister to the court.

The claimants were appointed Commissioners on or about the 8th February, 1884. On the 19th of that month they appointed a Chief License Inspector at a salary of $1,200. per annum, payable monthly, and on the day following two Inspectors at yearly salaries

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of $400 each, payable weekly. By circular letter of the 10th of March, 1884, the Commissioner of Inland Revenue (as the deputy of the Minister of Inland Revenue is designated) asked the several License Boards to notify the Department of Inland Revenue of the appointment of Inspectors under *The Liquor License Act*, 1883, and the rate of salary which such Boards proposed to pay for such services, in order that a complete schedule of the same might be laid before the Governor-in-Council for confirmation. In reply to this circular the claimants, by letter of the 14th of the same month, communicated to the Minister of Inland Revenue the names of the persons that they had appointed Chief Inspector and Inspectors, respectively, and the salaries that they had fixed. Their letter concluded as follows:—

In regard to the payment of salaries we beg to state that our Chief Inspector will be paid by the month, and the other two by the week, out of the license fund in our hands, unless instructions are given us to act otherwise.

The above subject to approval under the provisions of the said Act.

No instructions to the contrary were given and the claimants paid the salaries mentioned at the rate and in the manner proposed by them. On the 6th August, 1884, the Commissioner of Inland Revenue addressed the following circular letter to the chairman of each Board of License Commissioners. I cite from the circular printed in English, that printed in French, a copy of which the claimants received, being to the same effect:

(Copy).

L. L. Act. [G. 88.]

Department of Inland Revenue,
Ottawa, August 6th, 1884.

To the Chairman of
The Board of License Commissioners,
District of.....

Sir,—

Repeated enquiries having been made as to the remuneration of Com-

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missioners under *The Liquor License Act* of 1883, and the payment of their expenses, and the expenses and salaries of the Inspectors appointed by them, I beg to state that it is hardly likely that the Governor-in-Council will consider any proposed regulations under authority of the 56th section of the Act until the question of the validity of the Act itself has been determined by the Supreme Court. Owing to the Provinces not having been ready to argue the case in June, when the matter was first submitted to the Supreme Court, an extension to September had to be acceded to, so that definite regulations can hardly be established before October next.

The Department recognizes the difficult position that the License Boards will, in many cases, be placed in by this delay, but is unable in the meantime to give any authoritative advice upon the matter.

In Districts where the revenue accrued upon applications for licenses and license fees is sufficient to meet all anticipated expenditure, the chairman of such Boards will probably feel little hesitation in accepting the responsibility of authorizing disbursements on account of the expenses of the Board, and of the salaries and expenses of the Inspectors, always bearing in mind that the Inspectors' salary is subject ultimately to the approval of the Governor-in-Council, and therefore that any advance on account of it must leave a reasonable margin for any possible divergence of view between the Board and His Excellency-in-Council as to the value of the services rendered.

The question as to the remuneration of the Commissioners must necessarily be left open for the decision of the Governor-in-Council, and it will be patent to every one that that determination must be affected very materially by the decision of the court, which will, in effect, determine whether the position is merely a temporary one or one of a more permanent character—a consideration which must be taken into account in determining the rate of remuneration to be paid.

Your attention is also drawn to the 26th section of the amending Act in view of which the Department is not in a position to authorize or become responsible for any prosecutions for the infringement or violation of the Act. Personally, I have no doubt that, should the validity of the Act be affirmed by the Supreme Court, as is anticipated, the Government will ask Parliament for a sum sufficient to ensure the proper administration of its provisions, whether those provisions relate to Districts within which a revenue shall accrue, or for Districts within which, owing to prohibitory legislation, no such revenue can be expected. At present, however, that provision has not been made, and until the whole question in all its bearings has been considered by the Governor-in-Council, the hands of the Department in relation thereto are tied.

I have the honor to be, Sir,

Your obdt. servant,

(Signed), E. MIALL,

Commissioner.

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The claimants continued to pay the salaries of Inspectors at the rate at which they had fixed them, and from time to time as occasion required, or the same were demanded on behalf of the Minister of Inland Revenue, they rendered to him statements of account showing such payments. On the 7th of August, 1885, after the decision of the Supreme Court as to the validity of the Act, and pending the appeal therefrom to the Judicial Committee of the Privy Council, the claimants wrote to the Commissioner of Inland Revenue that unless they were instructed to the contrary they would maintain their staff of officers, composed of an Inspector and two deputy Inspectors, as theretofore, having funds in hand which would cover expenses for four or five months more; and on the 14th of that month the Secretary of the Department of Inland Revenue replied that he was directed to state that the course proposed by them was approved.

On the 5th of September, 1885, on the recommendation of the Minister of Inland Revenue, an order of the Governor-in-Council was passed prescribing regulations for determining the salaries of the Commissioners and Inspectors of the several License Districts, to which the claimants, in paying the salaries of their Inspectors, thereafter conformed. The sum of $1578.76 which they now seek to recover represents, as I have already intimated, the difference between the sum that up to this date they had disbursed for such salaries and that allowed to them in respect thereof under the order-in-council referred to.

If this case depended upon the proper determination of the questions of fact, to which I am about to refer, and it were necessary to decide the same, I should have little hesitation in coming to the conclusion that the evidence, on the whole, supports the claimants' contention that the salaries paid by them to the In-

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spectors were fair salaries; that the Minister of Inland Revenue acquiesced in such payments; and that the claimants had reasonable grounds to expect that their action in that respect would be ratified and confirmed. But these facts are not really in issue here. The Minister had, it is clear, no authority to approve of the salaries fixed by the Commissioners; and it is obvious that what he could not do directly, he cannot be held to have done indirectly. No doubt in the administration of the Act he had occasion to form an opinion as to what the amount of such salaries should be, and to make a recommendation on the subject; and we find, as we should expect to find, that the order-in-council prescribing the regulations by which such salaries were ultimately determined was passed upon his recommendation. The power to approve was, however, vested in the Governor-in-Council, and could not be exercised by any other authority. Then it is urged that there was unreasonable delay in the determination of the matter, by which the claimants have been prejudiced. But here again the enquiry suggested is irrelevant. Whatever pertinency or force the facts on which the claimants rely might, if determined in their behalf, have in an appeal to the favor of the Crown, they do not disclose sufficient grounds for a judgment against the respondent in this court. The law is well settled that laches cannot be imputed to the Queen, and that She is not answerable for the negligence of Her officers employed in the public service. To the first proposition there is no exception, and to the second none except such as have been created by statute (1).

(1) Chitty's Prerogatives of the Crown, 379, 381. Per Ritchie, C.J., in *The Queen* v. *The Bank of Nova Scotia*, 11 Can. S. C. R. 10; *The Queen* v. *McFarlane*, 7 Can. S.C.R. 216; *The Queen* v. *McLeod*, 8 Can. S. C. R. 1; and other cases cited in the judgment in the *City of Quebec* v. *The Queen*, 2 Ex. C. R. 252.

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There will be judgment for the respondent, and the costs will, if moved for, follow the event.

Judgment for respondent, costs reserved.

Solicitor for suppliants: *L. F. Burroughs.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

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Mar. 24.

JOHN GILCHRIST.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injury to property on a Government railway—Negligence of servant of the Crown—R.S.C. c. 38 s. 23—50-51 Vic. c. 16 s. 16 (c).

A filly, belonging to the suppliant, was run over and killed by a train upon the Intercolonial Railway. It was shown on the trial that at the time of the accident the train was being run faster than usual in order to make up time, that it had just passed a station without being slowed, and was approaching a crossing on the public highway at full speed. The engineer admitted that he saw something on the track, which he did not recognize as a horse. He, however, paid no attention to it, and made no attempt to stop his train until after it was struck.

Held, that the engineer, as a servant of the Crown, was guilty of negligence, for which the Crown was liable under R. S. C. c. 38 s. 23 and 50-51 Vic. c. 16 s. 16 (c).

(*The City of Quebec* v. *The Queen*, 2 Ex. C. R. 252, referred to).

PETITION OF RIGHT for the recovery of damages against the Crown in respect of the killing of a filly on the Intercolonial Railway, and for injury done to two other horses belonging to the suppliant.

The facts of the case are fully stated in the judgment.

November 25th and 26th, 1890.

Pugsley, Q.C. for suppliant;

Barker, Q.C., and *McLeod*, Q.C. for respondent.

BURBIDGE, J. now (March 24th, 1891) delivered judgment.

The suppliant brings his petition to recover 1st. the value of a two year old thorough-bred filly killed by an engine and train of cars on the Intercolonial Railway, and 2ndly. for injury alleged to have been occasioned to two other horses belonging to him by being "furi-

ously driven and chased by such engine and train of cars".

On the second branch of his claim the suppliant has, I think, failed to make out a case. The first he seeks to support on two grounds:—

(1.) That the filly gained access to the railway from adjoining land in which he had a right of pasturage and which the railway authorities had, contrary to their duty in that behalf, left unfenced; and that the filly being so upon the railway was killed by a passing engine and train.

(2.) That the filly was killed through the negligence of the respondent's servants in charge of such engine and train.

The lands for the right of way, at the place on the Intercolonial Railway where the accident occurred, were acquired under the Act of the Legislature of the Province of New Brunswick, 19 Victoria, chapter 17, by which, in certain cases, the commissioners were directed to erect and maintain sufficient fences along the line of railway. At or near the place mentioned the railway crossed a brook and a public highway, and a small triangular piece of land, adjoining the highway and bounded by it and by the railway and the brook, was left unfenced and open to the highway. From this piece of land the filly and other horses gained access to the railway.

Now after the lapse of so many years, it appears to me that there is much to be said for the view that the owners of the land in question acquiesced in the arrangement of the railway fences that left this piece of land unenclosed; and, however that may be, I think it is very doubtful that, in the arrangement which the suppliant made for pasturing his horses on another part of the property, of which such piece formed part, he had it in mind to acquire, or the owner

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to give, a right of pasturage in such piece of land. The small area comprised therein, and its known dangerous proximity and exposure to the railway, render this I think improbable.

Reasons for Judgment.

With reference to the second ground on which the case is rested, it appears that the accident happened about three o'clock on the morning of June 22nd, 1889, when, according to the engineer of the train, it was just coming on daylight. The train was behind time, and was being run at a speed of about twenty-five miles an hour to make up time. This was faster than was usual. The train had just passed a station without being slowed, and was approaching the crossing of the public highway mentioned at full speed, when the engineer noticed an object on the bridge, or beam-culvert, over the brook referred to. He says that it looked to him something like a large piece of brown paper lying on the track. When he saw it he was some ninety yards from the bridge, but he made no attempt to stop his train, and he did not even continue his observation of such object to ascertain what it was. To do so he would have had to cross his cab, and the fireman was at the time putting on coal, and he could not, he says, get over. By striking the filly one of the cylinder cocks of the engine was broken, and then he had to stop the train. Apparently the filly had attempted to cross the bridge and had fallen and become entangled in the beams and rails thereof. It seems altogether improbable that it would have remained lying thereon in the position described by the engineer if it could have got away. And if the fact that it was killed by the engine and train had not been admitted by the pleadings, I should have thought the matter open to a good deal of doubt. At the rate of speed at which the train was moving, the engineer could not, he says, after he saw the object on the bridge, have stopped

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the train in time to prevent the accident. But the fact that the speed was unusual called, it seems to me, for the greater care and caution in passing the crossing of the highway mentioned, especially as at this point, for a distance of two hundred and seventy feet, there were no fences to prevent animals getting on the track of the railway. There is, it appears to me, some evidence of negligence both in respect of the rate of speed at which this crossing was approached, and in not attempting to stop the train when the object lying on the bridge was noticed; and for the negligence of its servants in such a case the Crown is liable (1).

There will be judgment for the suppliant both on the issues of law and of fact, and for five hundred dollars and costs.

Judgment for suppliant with costs.

Solicitor for suppliant: *W. Pugsley.*

Solicitor for respondent: *E. McLeod.*

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(1) R. S. C., c. 38, s. 23., 50-51 Vic. c. 16 s. 16 (c); *The City of Quebec* v. *The Queen*, 2 Ex. C. R. 252.

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Mar. 24.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

VAN DULKEN, WIELAND & COMPANY ..... DEFENDANTS.

Trade-mark — Property in — Infringement of — R. S. C. c. 63 s. 12—53 Vic. c. 14.

The questions which the court has jurisdiction to determine under the Act 53 Vic. c. 14 are such as relate to rights of property in trade-marks, and not questions as to whether or not a trade-mark ought not to be registered, or continued on the registry, because it is calculated to deceive the public or for such other reasons as are mentioned in R.S.C. c. 63 s. 12.

DEMURRER to an information filed by the Attorney-General for the Dominion of Canada on behalf of the Crown.

The facts upon which the information was based, and the grounds of demurrer, are sufficiently stated in the judgment.

February 9th, 1891.

Ferguson, Q.C. (with whom was *Marceau*) in support of demurrer:

Prior to the passage of 53 Vic. c. 14 it will be admitted that there was no jurisdiction in this court to adjudicate upon the question now before it. If such jurisdiction is not conferred upon the court by that statute it does not exist. I submit that no jurisdiction to hear such a case as that presented by the information herein can be found in the statute. The Act of 1890 only confers jurisdiction upon the court to hear and determine cases where the true owner finds his identical trade-mark has been registered by some other person; it does not cover a case where a registered trade-mark is sought to be cancelled on the ground

that it is an imitation or infringement of a trade-mark which has been previously registered. The subject has a remedy in the ordinary courts of justice for such an injury, and does not need the intervention of the Attorney-General to enable him to obtain proper redress. The court should not assume a jurisdiction that is not clearly given by the Act. (Cites *Maxwell on Statutes* (1); *Hardcastle on Statutory Law* (2); *Wilberforce on Statutory Law* (3); *The Attorney-General* v. *Sillem* (4); *James* v. *South Western Ry. Co.* (5).

Again, there should be a relator in the case. The Crown has no interest or property involved in it, and will not be effected in any way by its result. The information, therefore, is bad in substance; the court could not give costs against the Crown in such a case.

Christie, Q.C. *contra*: A relator is not necessary. The absence of a relator cannot be successfully relied upon as a ground of demurrer to such an information as this. He is only introduced in Crown suits for the purpose of costs. (Cites *The Attorney-General* v. *The Niagara Falls Bridge Company* (6); *The Attorney-General* v. *Bradlaugh* (7); *The Attorney-General* v. *The Edison Telephone Company* (8); *Story's Equity Pleadings* (9); *Hardcastle on Statutory Law* (10); *Daniel's Chancery Practice* (11); *The Attorney-General* v. *Wright*) (12). Section 11 of *The Revised Statutes of Canada*, c. 63 is copied almost word for word in the new Act. Unless it is held that section 3 of the Act of 1890 has no meaning, this action is properly instituted. Where one person has registered a trade-mark which belongs to another then it is necessary to bring a relator into the suit.

(1) 2nd ed. 158.
(2) Pp. 52, 55.
(3) Pp. 55, 56 and 244.
(4) 10 H. L. Cas. 720.
(5) L. R. 7 Ex. 296.
(6) 20 Grant 34.
(7) 14 Q. B. D. 667.
(8) 6 Q. B. D. 244.
(9) C. 2 s. 8.
(10) Pp. 134, 135.
(11) Ed. 1879, Pp. 11, 16, 65.
(12) 3 Beav. 447.

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THE QUEEN v. VAN DULKEN WIELAND COMPANY.

Argument of Counsel.

because the Crown has no direct interest therein; but where two trade-marks are registered and one infringes the other, the Crown has an interest in the suit because people are liable to be deceived, and the public interest demands a rectification of the register by the Crown. Even if no jurisdiction is expressly given by the Act of 1890, the Court should assume it and proceed according to its ordinary procedure. (Cites *The Interpretation Act*, R.S.C., c. 1. s. 7, sub-secs. 49-52.)

Again, I submit if one trade-mark infringesa nother they are practically one and the same trade-mark. In such a case it becomes a question of property that the court has to decide, and it cannot be disputed that, under the Act of 1890, the court has the right to hear and determine questions of property in trade-marks.

Ferguson, Q. C. in reply:

The trade-marks are not the same, and the information does not allege that they are. Again, the information does not allege that the Crown has any interest in the suit.

BURBIDGE, J. now (March 24th, 1891) delivered judgment.

The information sets out that John DeKuyper & Son are the owners of certain trade-marks and devices therein described which were registered in the office of the Minister of Agriculture on the 21st April, 1875; that on the 2nd of April, 1884, the defendants obtained the registration in the said office of a trade mark that is an infringement on and an imitation of the registered trade-marks and devices of the said John DeKuyper & Son, and which so resembles the latter as to be likely or calculated to deceive, and the registration of which conflicts with the registration of DeKuyper & Son's said trade-marks and devices, and

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Reasons for Judgment.

was effected through error and oversight; that application was made on behalf of John DeKuyper & Son to the Minister of Agriculture for the cancellation of registration of the defendants' trade-mark, and that the Minister, having considered such application, decided that the matter thereof was a question for the decision of this Court, and so notified the parties according to law.

The information concludes with a claim for a decree that the registration of the defendants' trade mark be cancelled as an infringement of the rights of the said John De Kuyper & Son, and as having been registered by error and oversight. The defendants demur to the sufficiency of the information principally upon the ground that the court has no jurisdiction to hear the matter or grant the relief prayed for, and it is admitted that if such jurisdiction is not conferred upon the court by the Act of Parliament 53 Vic. c. 14, it does not exist.

Prior to the passing of that Act it was provided by the 11th section of *The Trade-Mark and Design Act* (1), that if any person made application to register as his own any trade-mark which had been already registered, and the Minister of Agriculture was not satisfied that such person was undoubtedly entitled to the exclusive use of such trade-mark, the Minister should cause all persons interested in the matter to be notified to appear in person, or by attorney, before him with their witnesses for the purpose of establishing who was the rightful owner of such trade-mark, and that after hearing such persons and their witnesses, the Minister should order such entry or cancellation or both to be made as he deemed just. By an amending Act, 53 Vic. c. 14 sec. 1, it is now provided that on such application the Minister shall cause all persons interested in the matter to be notified that the question is one for the

(1) R. S. C. c. 63.

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decision of the Exchequer Court of Canada, and that no further proceedings shall be had or taken concerning such application until the rights of the parties have been declared and adjudged by such court, or until the parties have agreed among themselves as to their respective rights; and by the second section of the Act last cited, the court is given authority upon information in the name of the Attorney-General of Canada, and at the relation of any party interested, to declare the rights of the contesting claimants with respect to such trade-mark. It will be observed that, so far as we have as yet seen, the jurisdiction vested formerly in the Minister and now in the court is to determine which of two or more persons claiming to own a trade-mark is entitled thereto.

By the 12th section of *The Trade-Mark and Design Act* (1) it is provided that the Minister may object to register any trade-mark in the following cases :—

(*a.*) If the trade-mark proposed for registration is identical with or resembles a trade-mark already registered ;

(*b.*) If it appears that the trade-mark is calculated to deceive or mislead the public ;

(*c.*) If the trade-mark contains any immoral or scandalous figure ;

(*d.*) If the so called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking.

By the second clause of the 11th section of the Act last mentioned, it was provided that errors in registering trade-marks and oversights in respect of conflicting registrations of trade-marks might be corrected in a manner similar to that provided in the first clause of the section already cited at length ; and by the 3rd section of the amending Act (2) it

(1) R. S. C. c. 63. (2) 53 Vic. c. 14.

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is provided that errors in registering trade-marks and oversights in respect to conflicting registrations of trade-marks may be corrected by the Exchequer Court of Canada upon proceedings instituted therein as provided in section one of the amending Act. Now, passing over the difficulty suggested that section one of the Act makes no provision for the manner in which such proceedings shall be instituted, unless, indeed, the notice from the Minister to the persons interested that the question is one for the decision of this court can be considered a proceeding therein, we come to the more important question as to what are the errors and oversights which the court may correct. By the first and second sections of the amending Act, the court is given authority to declare the respective rights of persons where one has obtained registration of a trade-mark of which the other claims to be the owner. It might, however, have happened that through error or oversight both parties had obtained registration, and then I think that the court would have jurisdiction under the third section to hear and determine the question of ownership. It may be that under the 11th and 12th sections of the amended Act (1) the Minister might have gone further and have tried out questions as to whether one mark resembled another, or was calculated to deceive or mislead the public, or for any other reason in such 12th section mentioned, ought not to be registered or continued on the registry. But the Minister's powers under the 12th sec. of the Act last referred to are not in any way affected by the amending Act; and Parliament has not, at least in express terms, given the court any jurisdiction in respect of such matters. The most that can be said, I think, is that the amending Act, taken as a whole, suggests that possibly Parliament intended to give

(1) R. S. C. c. 63.

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THE QUEEN v. VAN DULKEN WIELAND COMPANY.

Reasons for Judgment.

to the court all the jurisdiction formally exercisible by the Minister under section 11 of the amended Act. But having regard to the well established rules for the interpretation of statutes conferring a new jurisdiction on courts, I ought not, it seems to me, to act on that surmise when I can otherwise give a reasonable meaning and effect to all the provisions of the Act.

Now, in the case before the court, it is not alleged that the defendants have obtained registration of a trade-mark of which DeKuyper & Son are the owners, but of one which is an infringement on, and an imitation of, that owned by the latter, and so resembling it as to be calculated to deceive. The questions are no doubt closely related, but the information appears to have been framed on the 12th and not on the 11th section of the Act (1).

The plaintiff will have leave to amend, and it is possible that the issues which the persons who are, in reality though not in name, the relators, wish to have determined may, as suggested on the argument, be raised on an enquiry under the 11th section as to whether or not the two trade-marks are, in their essential particulars, the same, and if so, whether they are entitled to the exclusive use thereof. If the plaintiff amends, an opportunity will thereby be afforded to consider the objections taken to the form of the information, and which it has not become necessary for me to determine.

There will be judgment for the defendants on the demurrer with costs, and the plaintiff may amend upon the usual terms.

Demurrer allowed with costs.

Solicitors for plaintiff: *Abbotts, Campbell & Meredith.*

Solicitors for defendants: *Duhamel, Marceau & Merrill.*

(1) R. S. C. c. 63.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL..... } PLAINTIFF;

1891
June 22.

AND

WILLIAM F. McCURDY, MARY E. McCURDY AND MABEL G. BELL (AND BY ADDITION) HENRY K. BRINE, TRUSTEE..... } DEFENDANTS.

The Expropriation Act (R.S.C. c. 39)—Assignment of rights in land expropriated previously acquired by lease—Effect of new leases between same parties—Compensation—Assignment of chose in action against the Crown—Evidence.

An agreement by a proprietor to sell land to the Crown for a public work, followed by immediate possession and, within a year, by a deed of surrender, is sufficient under *The Expropriation Act*, s. 6 (R.S.C. c. 39) to vest the title to such land in the Crown, and to defeat a conveyance thereof made subsequent to such agreement and possession, but prior to such surrender.

2. Under section 11 of the said Act the compensation money for any land acquired or taken for a public work stands in the stead of such land, and any claim or incumbrance upon such land is converted into a claim to compensation, and such claim once created continues to exist as something distinct from the land and is not affected by any subsequent transfer or surrender of such land. *Partridge* v. *The Great Western Railway Company*, (8 U. C.C.P. 97), and *Dixon* v. *Baltimore and Potomac Railroad Company*, (1 Mackey, 78), referred to.

3. Where a chose in action was assigned, *inter alia*, for the general benefit of creditors, all the parties interested being before the court and the Crown making no objection, the court gave effect to such assignment.

Quære.—In the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown?

4. In a case of expropriation the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land. (*Brown* v. *The Commissioner for Railways*, 15 App. Cas. 240, referred to). Where, however, such tests or experiments have not been resorted to, the Court, or jury, must find the facts as best it can from the indications and probabilities disclosed by the evidence.

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THE QUEEN v. McCURDY.

Statement of Facts.

THIS was a claim for damages arising out of an expropriation of land at Jamesville, in the County of Victoria, N. S., for the purposes of the Cape Breton Railway.

The facts of the case are fully stated in the judgment.

September, 19th, 20th, 22nd and 30th 1890.

Borden, Q.C. and *Chisholm*, for plaintiff;

Fraser, *Drysdale* and *Murray*, for defendants.

BURBIDGE, J. now (June 22nd, 1891) delivered judgment.

The questions to be determined in this case arise out of the acquisition by the Minister of Railways and Canals of certain lands for the Cape Breton Railway. The lands so acquired are situated at Jamesville, in the County of Victoria, and Province of Nova Scotia, and are described in the pleadings as lots numbered 164, 165, 168, and 169. On the 7th July, 1887, such lots formed parts of certain farms owned respectively by Neil Gillis, James Campbell and Hugh Campbell, in and from which the defendant William F. McCurdy had a right, for the residue of a term of which he was assignee, to quarry and ship gypsum. On the day named, Gillis and the two Campbells and their respective wives, by agreement under their several hands and seals, agreed to surrender to Her Majesty all their right, title and interest in and to such portions of such farms as might be required for the right of way, stations, or other railway purposes of the Cape Breton Railway. The price was in one case to be four dollars and fifty cents, and in the others four dollars, per acre. The line of the railway had been located prior to the 7th of July, 1887, and a plan indicating such location and the lands to be taken was shown to the persons named when they entered into the agreements to which I have referred.

On the 5th of August following, a general plan of such location, corresponding with that shown to Gillis and the Campbells, was filed by the Minister with the Registrar of Deeds for the County of Victoria. The work of taking cross-sections for the railway and setting slope-stakes was commenced on lots 164 and 165 in July, 1887, and completed thereon and on lots 168 and 169 in October following. In September the brush along the line of railway was cleared from all the lots, and the actual construction of the road-bed of the railway was commenced at this point between the 18th and 25th of November of the same year.

On the 12th of November, 1887, James Campbell and Sarah Campbell, his wife, in pursuance of their agreements, surrendered lots 165 and 169 to the Crown, and in like manner, on the 25th of April, 1888, Neil Gillis and wife surrendered lot 164, and Hugh Campbell and wife lot 168.

Between the dates of the agreements mentioned and such surrenders the width of lots 168 and 169 had been increased by twenty-five feet as shown on two plans filed with the Registrar of Deeds on the 12th and 29th of October, 1887. The descriptions contained in the surrenders of such lots covered and included this additional area.

On the 7th October, 1887, Neil Gillis and Mary his wife, in consideration of fifty-five dollars, granted to the defendant McCurdy all the gypsum to be found on the Gillis farm, and on the eighth of the same month Hugh Campbell demised to McCurdy for a term of fifty-nine years, with a covenant for renewal at the lessee's option for a further term of fifty-nine years, all the gypsum quarries and gypsum on his farm, the lessee to pay him three cents a ton on all gypsum shipped therefrom. On the 14th of that month

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James Campbell made to McCurdy a like demise in respect of his two farms.

At this date the Crown was without doubt in possession of lots 164, 165, 168 and 169, and McCurdy admits that at the time he knew that there had been a survey for a railway through the properties in question and that the line would pass in their neighborhood, but he adds that he did not know that the proprietors had made any agreements with the Crown.

On the 7th of November, 1887, McCurdy made an assignment of all his estate and effects to one Duncan C. McDougall in trust for the benefit of his creditors, under which, and by virtue of an order made by Mr. Justice Townshend on the 12th of February, 1890, the defendant Henry K. Brine is now the trustee.

On the 10th of April, 1888, McDougall as such trustee in consideration of two hundred dollars conveyed to the defendant Mary Elizabeth McCurdy, the wife of the defendant Wm. F. McCurdy, with other properties, the rights that the latter had acquired in the properties of Gillis and the two Campbells by the grant and leases of October, 1887, before mentioned; and on the 24th September, 1889, McCurdy and wife assigned the same by way of mortgage to the defendant Mabel G. Bell.

On the 18th of January, 1890, the Minister of Railways and Canals caused separate plans and descriptions of lots 164, 165, 168 and 169 to be deposited of record in the office of the Registrar of Deeds for the said County of Victoria. By this proceeding, which under the circumstances of this case was authorized by the tenth section of *The Expropriation Act*, 52 Vic. c. 13, any question that might otherwise have been raised as to the Crown's title to the lands affected thereby was set at rest. It appears tolerably clear, however, that the Crown had previously acquired a

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good title to the lots mentioned. By 49th Vic. c. 14, the Minister of Railways and Canals was authorized by Parliament to construct the Cape Breton Railway as a public work. By *The Expropriation Act* (1), in force in 1887, he had power by himself, his engineers, superintendents, agents, workmen and servants to enter upon and take possession of any land the expropriation of which was in his judgment necessary for the use of such public work (2), and to contract and agree for the purchase of such land (3). By the 5th section of the Act last mentioned it was provided that land taken for the use of Her Majesty should be laid off by metes and bounds, and when no proper deed or conveyance thereof to Her Majesty was made, or if for any other reason the Minister deemed it advisable so to do, a plan and description of such land, signed as therein provided, should be deposited of record in the office of the Registrar of Deeds for the county or registration division in which the land was situate, and such land by such deposit should thereupon become and remain vested in Her Majesty.

By the 6th section of the Act it was enacted that every contract or agreement made by any person before the deposit of the plan and description, and before the setting out and ascertaining of the land required for the public work, should be binding at the price agreed upon for the same land if it was set out and ascertained within one year from the date of the contract or agreement, and although such land had in the meantime become the property of a third person ; and by section 5, sub-section 9, it was provided, in accordance with what was otherwise the law, that no surrender, conveyance, agreement or award under the Act should require registration or enrolment to preserve the rights of Her Majesty.

(1) R. S. C. c. 39. (2) Sec. 3*b*.
(3) Sec. 3*e*.

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By section 11 it was provided, and the same provision is to be found in the amending Act 50–51 Vic. c. 17, that the compensation money for any land acquired or taken by the Minister should stand in the stead of such land, and any claim to or incumbrance upon such land should as respects Her Majesty be converted into a claim to such compensation money, or to a proportionate amount thereof, and should be void as respects such land, which should by the fact of taking possession thereof, or the filing of the plan and description, as the case might be, become and be absolutely vested in Her Majesty—subject always to the determination of the compensation to be paid, and the payment thereof. On the 2nd of May, 1889, *The Expropriation Act*, and the Act in amendment thereof from which I have cited, were repealed, and the Act 52 Vic. c. 13, to which I have already referred, was enacted in lieu thereof.

The agreements of July, 1887, followed as they were immediately by possession and, within the year, by duly executed deeds of surrender, were, it seems to me, sufficient, under *The Expropriation Act*, to vest the title in the Crown. But if that is the true view of the case, McCurdy took no interest in lots 164, 165, 168 and 169 under the grant from Gillis and the leases from the Campbells of October, 1887. The latter proposition may indeed be supported on lower ground. For whatever may have been the date at which Her Majesty acquired a good title to such lots, there is no doubt that She was in possession prior to October, 1887, and that when Gillis and wife made their grant to McCurdy in that month, and the Campbells their leases, Gillis and the Campbells were out of possession, and consequently as Mr. Borden for the Crown contended, not in a position to convey any interest in such lots to the defendant McCurdy.

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This brings me to a second question. For the Crown Mr. Borden argued that by taking the grant and leases of October, 1887, McCurdy surrendered the leases of 1870 (which were outstanding when the agreements between the proprietors and the Crown were made, and the Crown went into possession), or at least that the old leases were merged in the new, and that, therefore, McCurdy was not entitled to any compensation in respect of any interest that he otherwise might have had under the leases of 1870. That, however, does not appear to be the result. By the express terms of the Act, McCurdy's rights in the lands acquired for the railway, were, by the fact of the Minister's taking possession of such land, converted into a claim to compensation, and became void as respects the land itself. The leases of 1870 thereby ceased to be operative in respect of lots 164, 165, 168 and 169, and the right to compensation given in respect thereof by the statute once created continued to exist as something distinct from such leases, and any subsequent assignment or surrender of the latter could not affect the right to compensation so acquired. That, I think, is clear, whether we have regard to the terms of the statute, to principle or to authority (1).

It follows, however, from the same considerations that neither the defendant Mary Elizabeth McCurdy, nor Mabel G. Bell, her assignee, has any interest in the questions before the court, for it is not contended that there are any words in the assignment from McDougall to the former that could operate to transfer to her any claim to compensation arising from the injurious affection of the rights vested in her husband by virtue of the leases of 1870. The right to such com-

(1) *Partridge* v. *The Great Western Railway Company*, 8 U. C. C. P. 78.

mac Railroad Company. 1 Mackey 97 ; *Dixon* v. *Baltimore and Poto-*

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pensation is either in the defendant McCurdy or in the trustee under the deed of assignment made by him for the benefit of his creditors, to which reference has been made. If a claim against the Crown for compensation for land taken or injuriously affected will not, without the concurrence of the Crown, pass to the assignee under such a deed, or if the terms of the deed in question are not sufficient to transfer the claim, McCurdy is still entitled to the compensation money.

The question involved in this enquiry is one which, in the United States, has been definitely determined by legislation and judicial decision. By section 3477 of the Revised Statutes of the United States, re-enacting the provision of earlier statutes, it is provided that all transfers and assignments made of any claim upon the United States shall be absolutely null and void unless executed in the presence of at least two witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. The mischiefs against which this statute was directed have been said by the highest authority to be two—1st. the danger that the rights of the Government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction; and 2ndly. that by a transfer of such a claim against the Government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the department, the courts or Congress, as desperate cases, when the reward is contingent on success, so often suggest. The terms of the statute, it will be observed, are very wide, but they have been held not to include transfers by operation of law, by will, or by voluntary assignment for the benefit of creditors,—

these not being within the evil for which it was intended to provide a remedy (1).

In Canada the practice of the Crown is, so far as I know, against the recognition of the assignment by one person to another of a claim against it. By the third rule of the rules prescribed by the Treasury Board (February 1st, 1870), under sanction of His Excellency-in-Council, it is provided in reference to the mode of acquittal of warrants for the payment of money that no power of attorney which partakes of the character of an assignment of the moneys to another party, or purports to be irrevocable or in any respect qualified, will be received by the Government for the payment of money. At the same time the practice has always been, I think, to give effect to transfers by operation of law, or by will, of claims against the Crown, and, although I do not recall any case in point, I have no doubt that the same course would be followed in respect of a voluntary assignment for the general benefit of creditors. It is, I think, free from objection and eminently fair and just that effect should be given to such assignments, but that perhaps is not conclusive. In *Flarty* v. *Odlum* (2), Buller, J., while concurring with the other members of the court that, on grounds of public policy, the half-pay of an officer is not saleable and cannot be assigned, expresses the view that salary accrued due might be assigned; and in the *Queen* v. *Smith et al.* (3), Mr. Justice Strong says, that had it appeared from the proof in that case that there had been an equitable assignment to the suppliants of the payments to arise from the performance of the work by the original contractors, the former would

(1) *United States* v. *Gillis*, 95 U. S. 407; *Spofford* v. *Kirk*, 97 U. S. 484; *Erwin* v. *United States*, 97 U.S. 392; *Goodman* v. *Niblack*, 102 U. S. 556; *Stanford* v. *Lockwood*, 31 Hun. 291.

(2) 3 T. R. 681.

(3) 10 Can. S. C. R. 66.

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have been undoubtedly entitled to recover in respect of work actually performed by the latter; for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts. In the case of *The Queen* v. *Dunn* (1), the suppliant's case rested upon a transfer to him of moneys alleged to be due from the Crown to one Tibbitts, but the petition in that case (2) contained an allegation that the transfer had been communicated to the Government and accepted by them.

There are, in several of the Provinces, statutes authorizing the assignment of certain choses in action, but I do not see that they are of much assistance in the determination of this case; for even if the terms of any such statute were in any case large enough to include such a claim as that in question, the Crown, not being named therein, would not be bound by the statute.

As between the parties to such equitable assignments they are undoubtedly good, and if in any such case the money so assigned were paid to the assignor, his assignee would have an action against him for the same; and when, as in the present case, the assignment is for the general benefit of creditors and all the parties are before the court, and the Crown makes no objection, I see no reason for refusing to give effect to such assignment.

Referring then for a moment to the trust deed, it will be seen, I think, that by its terms the claim to compensation in question passed to the trustee. After assigning a number of properties by description, and, among others, the rights to quarry gypsum acquired from Gillis and the Campbells in October, 1887, McCurdy

(1) 11 Can. S. C. R. 385. (2) P. 392.

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assigned to McDougall, in trust, all his real and personal estate, book-debts, accounts, credits, mortgages, judgments, bonds, bills, notes and securities for money, goods, chattels, choses in action, assets and effects, and all his right, title and interest, trust, possession, property, claim and demand whatsoever, at law or in equity, in the same. There can, I think, be no doubt that the claim to compensation for the injurious affection of the rights which, in July, 1887, McCurdy had in the lots in question, formed at the date of his assignment to McDougall a part of his estate and effects, and passed to the latter as trustee. The amount of such compensation to which the defendant Brine, McDougall's successor in the trusts, is entitled, is the only question remaining to be determined.

The Gillis farm contained two hundred acres, and of this there was acquired for railway purposes four acres and nine-tenths of an acre, described as lot 164, as stated. Lot 165 containing two acres and six one-hundredths of an acre was severed from a larger lot of twenty acres in the possession of James Campbell, while the farm on which the latter resided, and from which lot 159 containing three acres and one-hundredth of an acre was taken, contained something less than one hundred acres. Hugh Campell's farm contained between eighty and one hundred acres. From this farm was taken lot 168 which contained three and twenty-four one-hundredths of an acre. In these four farms McCurdy had in July, 1887, the right for the residue of a term of 39 years from April, 1870, to quarry and ship gypsum, paying to the proprietors three cents a ton on every ton shipped. That right had in the first instance been granted by the predecessors in title of such proprietors to one Norman McMillan, together with other rights and interests necessary to its bene-

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ficial enjoyment. McMillan quarried and shipped from the Campbell properties about half a cargo of gypsum, which he sent to Montreal for the purpose of ascertaining its value. Beyond this he made no attempt to open or develop the quarries at Jamesville. By assignments dated, respectively, the 27th of October, 1870, and the 25th of September, 1873, in consideration of the sum of four thousand five hundred dollars, he assigned his right to quarry gypsum under the leases which I have mentioned, and in some eight other properties therein described, to Duncan McDonald, of Montreal, who was, McMillan thinks, acting for the parties to whom the latter was shipping plaster. Speaking of these other properties, McMillan says that they were leases of the right to quarry plaster on farms, some of which contained one hundred or two hundred acres and some less, he could not tell the exact area. McDonald does not appear to have made any use of the rights of which he so became assignee; and in April, 1886, they were sold at Sheriff's sale, and the defendant McCurdy became the purchaser thereof for the sum of one hundred dollars. So far as the Gillis lease is concerned, we have seen that fifty-five dollars was the value which, in 1887, Gillis put upon his right to be paid three cents a ton on all the gypsum to be shipped from his farm during the residue of the term mentioned in the lease, and on all the gypsum that might remain after the determination thereof. It will also be observed by reference to the assignment from the trustee of McCurdy's estate of the 10th of April, 1888, to McCurdy's wife, that the consideration expressed therein is only two hundred dollars, and that the transfer includes not only all the rights to quarry plaster and interests in the Jamesville and other properties that I have mentioned, but also rights in other properties as well.

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It is beyond question that there exist in the farms mentioned large deposits of gypsum, a fact which, from the outcrop to be seen at the shore of the Bras d'Or Lake and elsewhere, must have been well known for many years. These quarries have, however, never been developed and no borings or tunnellings have ever been made. The excavations for the road-bed of the railway have, perhaps, disclosed more accurately than anything else the quantity and quality of the deposits of gypsum there situated.

The case of *Brown* v. *The Commissioner for Railways* (1), on which Mr. Fraser relied, shows that there is no rule of law imposing upon a claimant in a case such as this, in order to sustain a verdict, the burden of proving by costly experiments the mineral contents of his land. But where such tests and experiments have not been resorted to, the jury must, I take it, find the facts as best they can from the indications and probabilities disclosed by the evidence. In the case before me, there is, I think, satisfactory evidence not only that there are in the properties mentioned large deposits of gypsum, but that a considerable proportion thereof is soft gypsum which has a commercial value; but what proportion is soft and what hard, it is impossible with the materials before the court to determine with even approximate accuracy. The defendant McCurdy estimated the quantity of soft gypsum actually expropriated at 186,318 tons; but after all this was only an estimate, and I cannot say that it rested on any satisfactory basis.

Apart from its use as a fertilizer, soft plaster has an additional value if it is of a quality suitable for the manufacture of plaster of Paris. From the weight of evidence in this case, I am inclined to the conclusion that the soft gypsum in question is valuable only for

(1) 15 App. Cas. 240.

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agricultural purposes. That it has any other value, has not, I think, been established. With reference to what was said of the quantity of clay and earth overlaying the deposit, it appears to me that they were not shown to be sufficient to interfere with a fairly profitable working of the quarries, if all other conditions were favorable.

For such soft gypsum as that to be found at Jamesville, the price, free on board at the quarries, appears to have been ninety cents a ton, and the cost of quarrying and loading from fifty to sixty or seventy cents per ton. That, as one of the witnesses, Mr. DeWolfe, who is himself engaged in the business in the County of Richmond, said, would pay handsomely if they could ship enough. For himself he had never been able to find a market in which he could compete with the Windsor plaster.

Mr. McCurdy says that so long as they had to depend on sailing vessels, by which the business had theretofore been carried on, it was precarious. He was hopeful of better things if shipments were made by steamships which he stated were at the time of the trial carrying freight from Cape Breton to Montreal. I did not, however, understand him to mean that gypsum at that time formed part of such freight. The fact is that the available supply of gypsum greatly exceeds the demand, and the competition is correspondingly keen. For which reason gypsum properties, or, as one of the witnesses called them, "plaster chances," have never, I take it, commanded any considerable price in the market. I have referred to the small consideration paid in the actual cases and transactions of which there is evidence before the court, and I assume that if the defendants had known of other sales which would have disclosed higher market values they would have tendered evidence of such transactions. There

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are other considerations which, to me, appear to confirm the view to which I have given expression. Part of the deposits in the Campbell properties formed a cliff at the shore of the Bras D'Or Lake, and for that reason offered exceptional facilities for opening, quarrying and shipping, yet they had never been worked. In making the leases in 1870, and again in 1887, the proprietors of the lands in which these deposits occur did not bind the lessees to work or develop them, but left them free at their option to allow the properties to lie idle, in the case of the 1870 leases for 39 years, and of those of October, 1887, for 118 years. Of course there is this to be said on the other side that if the business should at any time become profitable it would be in the interest of the lessee to ship as much gypsum as possible; and if it were never profitable no harm would be done. But that, I take it, is only another way of saying that these rights to quarry gypsum had not at the time acquired any considerable market value. At the same time it is clear that in assessing the damages I should not exclude from consideration the prospective capabilities of these properties. In *Brown* v. *The Commissioner for Railways* (1), Lord Macnaghten, delivering the judgment of their lordships, says it must be borne in mind that it does not follow because a seam of coal is not presently workable at a profit that no compenstation is to be given for it, if it is likely to prove profitable in the future. So far as the Gillis property is concerned the facilities for quarrying have not been greatly interfered with by the construction of the railway. The injury in respect thereof arises principally from the expropriation of the gypsum lying within the limits of the right of way. In the other cases, however, the shore front of the properties have been taken, and here it was that quarries could have been most advantageously opened and worked. That is not now

(1) 15 App. Cas. 240.

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possible, and the gypsum cannot be shipped by water without the construction of a tramway through a gulch under a railway bridge and across the railway property to the properties to the north thereof. Not only does the lessee lose the right to quarry the gypsum under the right of way, but his facilities for exercising his rights in the remainder of the properties are rendered less valuable. Undoubtedly the injury in relation to the value of the rights affected is serious and substantial. But it does not appear to me that the value of such rights, from whatever standpoint they are regarded and making all fair allowances for the possibilities of the future, represented in 1887 a very considerable sum of money.

By their statement in defence the defendants claim the sum of $74,774 as compensation for injuries sustained. But it is only fair to add that Mr. Fraser in the course of his argument said that when the statement in defence was drawn he was not in possession of McKenzie's measurements, and that if he had been the claim would have been presented in a different form. What he did contend for was that the compensation should be determined by allowing a fair royalty on the estimated number of tons of soft plaster in the portions of the farm expropriated, and by adding thereto a sum for the injurious affection of the right to quarry in other parts of the farms mentioned. The application of such a rule presents, however, some difficulties at least in the case now under consideration. For instance, to take the difference between the cost of quarrying and loading a ton of gypsum and the price thereof, free on board, as the measure of royalty to be allowed, would be to overlook the facts that for such a business capital and skill are necessary, and that in the prosecution of such enterprises man incidents arise to reduce or dissipate apparent profits. The rate per ton agreed upon by the proprietors and

lessees by the leases of 1870 and 1887 would, I think, afford a better basis for fixing the royalty if that were deemed the better mode of proceeding to assess the compensation. But even the three cents per ton so bargained for would have to be reduced in view of the facts that the lessees were not bound to quarry, and that in any case the payments to the proprietor would not be made in one sum, but would be paid from year to year as operations proceeded. In such a case it would be necessary to form some conclusion as to the number of years it would take to develop the quarries and exhaust the deposits, and the probable output each year, and then to ascertain a sum that would be the equivalent of such a royalty paid from year to year on the amount of gypsum so gotten out. For such a calculation the case does not, I think, present data in every way satisfactory. On the other hand the actual transactions affecting the properties in question afford, I think, a better way of determining the value of the rights that the defendant McCurdy, in July, 1887, had therein. There is nothing in the case to lead me to doubt that the sum of one thousand five hundred dollars would be a large estimate of the value of such rights as a whole, and that half that amount would constitute a liberal compensation for the damages which he sustained by reason of the expropriation complained of and the construction and operation of the railway.

There will be a declaration that the lands and premises mentioned in the information are vested in Her Majesty, and that the defendant Henry K. Brine, as trustee, is entitled to be paid the sum of seven hundred and fifty dollars with interest from the 7th of July, 1887.

The question of costs is reserved

Judgment accordingly.

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

Solicitors for defendants: *Fraser & Jennison.*

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June 25.

JOSEPH ADHÉMAR MARTIN, ES QUALITÉ .. .. } SUPPLIANT ;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injury to person on a public work—Negligence of servant of the crown—Brakesman's duty in putting children off car when trespassers—Damages.

The crown is liable for an injury to the person received on a public work resulting from negligence of which its officer or servant, while acting within the scope of his duty or employment, is guilty.

City of Quebec v. *The Queen* (2 Ex. C. R. 252) referred to.

2. One who forces a child to jump off a railway carriage while it is in motion is guilty of negligence.

The fact that the child had no right to be upon such carriage is no defence to an action for an injury resulting from such negligence.

PETITION OF RIGHT for damages for injury to the person received on a public work.

The facts of the case appear in the judgment.

June 23rd, 24th and 25th, 1891.

Taché for the suppliant :

Under the regulations of the railway in force at the time of the accident (1) it was the duty of the brakesman in charge of a train to put trespassers off when the train was not in motion. Bélanger, the offending brakesman in this case, put the suppliant's son off a car which was in motion, and in consequence of being put off at such a time the boy fell on the track and his leg was crushed by the wheels of the car. It was gross negligence on the brakesman's part. He caused an injury to the person on a public work while acting within the scope of his duty, and the crown is liable therefor under 50-51 Vic. c. 16, sec. 16 (*c*).

(1) Rule 48 of the Rules and Regulations of the Government Railways of Canada, 1876.

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Argument of Counsel.

Hogg, Q.C. for the respondent :

The brakesman was not acting within the scope of his duty in causing the boy to get off the train at the time and in the manner charged. It was his duty to put trespassers off the train when it was not in motion, and if he put the boy off while the train was in motion he was acting contrary to his instructions and without the scope of his duty as clearly defined in the regulations.

(Cites *McKenzie* v. *McLeod* (1); *Clerk and Lindsell on Torts* (2); *Wright* v. *Wilcox* (3); *Wilson* v. *Rankin* (4)).

Casgrain, Q.C. following on the same side :

The boys, among whom was suppliant's son, took their lives into their own hands in getting on board the train in the manner they did. They were trespassers. The fact of suppliant's son being improperly on the train was the direct and proximate cause of the accident.

(Cites 20 *Laurent*, *No.* 585 ; 31 *Demolombe*, *Nos.* 613, 614, 615 ; *Dalloz*, *Repertoire de Jurisprudence*, *verbo Responsabilité*, *No.* 624 ; 2 *Sourdat*, *De la Responsabilité No.* 919 ; *Seymour* v. *Greenwood* (5)).

BURBIDGE, J. now (June 25th, 1891) delivered judgment.

On the question of the liability of the crown for an injury to the person received on a public work, resulting from negligence of which its officer or servant is guilty while acting within the scope of his duties or employment, I have nothing to add to what I said in the cases of the *City of Quebec* v. *The Queen* (6) ; and *Brady* v. *The Queen* (7).

With reference to the facts of this case, it appears that the suppliant's son, then a boy of eleven or twelve years of age, was, with a number of other boys on the day of the accident (in July 1884), upon the rear platform of

(1) 10 Bing. 385
(2) pp. 360—377.
(3) 19 Wend. 343.
(4) 34 L. J. Q. B. 62.
(5) 6 H. & N. 359.
(6) 2 Ex. C.R. 252.
(7) 2 Ex. C.R. 273.

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the rear carriage of an accommodation train at Rimouski, which was about to take the siding to allow an express train to pass. On this accommodation train one Bélanger was brakesman. The evidence as to whether or not the boys were invited to get on the carriage is conflicting. I think it probable, however, and in accordance with Bélanger's testimony I find that he did not invite the boys to get upon the carriage. I think that the boys had no right to be where they were, and that they knew it. They were in fact trespassers.

The evidence as to whether or not Bélanger attempted to get the boys off the carriage is also conflicting. That he threw some water upon them is not denied. He says that he did not attempt to put them off, that he did not tell them to get off, that he did not throw water upon them to get them off, and that at that time he had no intention of getting them off. Afterwards, he thought the throwing of the water might have had the effect of making them get off. The boy Poulin says that no one on that day told them to get off the train, and St. Laurent says that they jumped off because the water was thrown upon them. Both Poulin and St. Laurent were on the platform of the carriage, but Alfred Martin, another boy called by the suppliant, who was, at the time the water was thrown, inside the carriage, says that Bélanger when he threw the water cried out "get off, get off"! In this he is corroborated, it appears to me, by the evidence of Guay, a passenger on board the train, who was called by the respondent. Guay says, in substance, that Bélanger took the trouble to get the children off the train, that he went from one door of the carriage to the other to get them off, but that he did not persist. He says that he heard Bélanger telling them to get off, but he cannot say if this took place when the train was in motion.

In this connection, however, Bélanger's evidence is important. He says that upon the arrival of the accom-

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modation train at Rimouski he went to help unload the freight, and when he returned to the rear carriage the train was in motion ; and from his account of what he did it seems that a very short interval must have elapsed between the time when he got upon the train and the time when he threw the water upon the boys. The result is, I think, and I find, that Bélanger was attempting to get the boys off the train while it was in motion and at the time when he threw the water upon them. Poulin goes farther and says that Bélanger pushed the suppliant's son off the train, but I am not inclined to accept his unsupported statement in the face of Bélanger's distinct denial. When the water was thrown upon the boys they jumped off. The suppliant's son had the misfortune to fall, and a wheel of one of the carriages crushed his leg, necessitating immediate amputation between the knee and the ankle. He was dangerously ill for two months, and did not recover for a year. His health has not since the accident been as good as it was before.

Now, it appears to me to be clear that this boy was injured on a public work through the negligence of a servant of the Crown. To force a child to jump off a moving train is, I think, negligence. To do this by throwing water upon the child, or to throw water upon the child when directing him to jump off, would be an aggravation of such negligence.

But it is argued that there was contributory negligence. I agree, as I have already intimated, with counsel for the Crown, that the injured boy had no right to be where he was ; and, of course, if he had not been there the accident would not have happened. But that does not, it appears to me, excuse the brakesman whose negligence was the direct and proximate cause of the accident, without which it would not have happened.

On the question as to whether or not Bélanger was

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acting within the scope of his duty or employment, I entertain more doubt. For the respondent, it is said that his duty was to put the boys off the train when not in motion, and that in what he did he went beyond the scope of his duty or employment. But to make the master liable it is not necessary tha he authorize the wrongful or negligent act. If the servant is acting within the general scope of his duty or employment to further his master's interest, and not from motives or for ends of his own, the master is liable. In this case, I think, it was within the general scope of Bélanger's duty to put the boys off the train, and that the crown is liable for the consequence of his negligence in doing this at an improper time and in an improper manner.

I would be disposed, however, in directing judgment to be entered for the suppliant to reserve leave for the respondent (if counsel desired me to do so) to move to set aside the judgment on the ground that Bélanger was not acting within the scope of his duty or employment. But as, no doubt, there will be an appeal to the Supreme Court on the more important and fundamental question of the crown's liability for the negligence of its servant, to which I have briefly alluded, it is probable that it will be found more convenient to make the judgment final at the present time (1).

I assess the damages at three thousand dollars, for which amount there will be judgment for the suppliant with costs.

Judgment for suppliant with costs.

Solicitor for suppliant : *L. Taché.*

Solicitors for respondent : *O'Connor, Hogg & Balderson.*

(1) REPORTER'S NOTE.—Counsel for the crown concurred in the latter view.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

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AND

SARAH BARRY, THOMAS BARRY, WILLIAM J. VEITH, SARAH ANN TAYLOR, WILLIAM O. TAYLOR, JOHN F. VEITH, SUSAN A. VEITH, ANN E. VEITH, HENRY G. WOODS, ELLA VOSE, JESSIE VOSE, GEORGE A. VEITH, JANE LETSON, ROBERT A. LETSON, HENRY W. VEITH AND WILLIAM H. KEATING. DEFENDANTS.

Injurious affection of land—Construction of a railway siding on a sidewalk contiguous to such land—Measure of damages.

Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under *The Government Railways Act*, 1881, unless the injury (1) is occasioned by an act made lawful by the statutory powers exercised, (2) is such an injury as would have sustained an action but for such statutory powers, and (3) is an injury to lands or some right or interest therein, and not a personal injury or an injury to trade.

2. The construction of a railway siding along the sidewalk contiguous to lands whereby access to such lands is interfered with, and the frontage of the property destroyed for the uses for which it is held (in this case for sale in building lots), is such an injury thereto as will entitle the owner to compensation.

Quære: Whether the rule that compensation in cases of injurious affection only must be confined to such damages as arise from the construction of the authorized works, and must not be extended to those resulting from the user of such works, is applicable to cases arising under *The Government Railways Act*, 1881?

THIS was an information filed by Her Majesty's Attorney-General for the Dominion of Canada in a matter of expropriation of land for the purposes of a siding on the Intercolonial Railway.

On the 30th September, 1881, certain lands belonging to the defendants at Halifax, N.S., were taken by the Gov-

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ernment of Canada for the purposes of the Cotton Factory siding in that city. This siding was located along a public highway called Kempt Road, the frontage of certain property of the defendants, other than that taken for the railway siding, being contiguous thereto. It was claimed by the defendants that by the construction of the siding, access to their property last mentioned was interfered with, and that, inasmuch as the property was held for sale as building lots, it was injuriously affected by the operation of engines and trains over and upon such siding. By the information filed herein, the sum of fifty dollars was declared to be sufficient compensation both for land taken and damages; but the defendants in their answer demanded a sum of six thousand eight hundred and fifty dollars as such compensation. By consent of parties, the case was referred by the court to one of the official referees for enquiry and report as to the value of the land taken and the amount of damages, if any, sustained by the defendants by reason of the construction and operation of the siding. On the 7th of August, 1890, the official referee reported in favor of the defendants for the sum of $2,900.75, being divided as follows: For land taken and damages to lot 5*a*, $79.25; for land taken and damages to lot 7, $126.50; for the injurious affection of lands situate on Kempt Road, $2,695.

The defendants moved for judgment on this report and to increase the amount thereof; and the crown moved against it by way of appeal and asked for a reduction of the compensation money on the ground that the defendants were not entitled to anything in respect of the alleged injurious affection of the property on Kempt Road. The court, being of opinion that the evidence was not altogether clear as to the manner in which the construction of the siding affected the property on Kempt Road,

sent the case back to the official referee for further enquiry and report, 1st, "As to the amount of depre- "ciation in the value of the property in question occa- "sioned by the construction of the siding considered as "a physical obstruction only, and apart from any ques- "tion as to the use to be made of it;" and, 2ndly, "as "to the amount of such depreciation occasioned by "the construction of such siding, having regard to the "use for which it was constructed."

Further evidence having been taken by the official referee, he reported as follows: "As to the amount of "depreciation in the value of the defendants' property "occasioned by the construction of the siding con- "sidered as a physical obstruction only, and apart "from any question as to the use to be made of it, I "estimate this at the sum given in my first report. * * * * "To make myself more clearly understoood, "in estimating the damages sustained by the defen- "dants I have been mainly guided by the evidences "given at the original hearing of the case, at which "hearing all the witnesses admitted that the property "for house-building purposes was destroyed, or rather "that portion of it fronting on the Kempt Road. With "the witnesses I fully concur. In order then to place "the defendants in as good a position as they were "before the construction of the siding, and to enable "them to make sale of their front lots, I consider that "the only feasible thing for them to do is to construct "a new road, beginning at a point about seventy-five "feet from where the railway siding crosses the bend "of the Kempt Road, thence in a southerly direction "to the southern boundary of the property. This "would entail upon the defendants the loss of land "seventy-five feet in width through their property, "and the expense of construction of this road. Allow- "ing for these I arrive at the damage, $2,695."

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"As to the amount of depreciation occasioned by "the construction of the railway siding, having regard "to the use for which it was constructed, I believe "there would be no depreciation in view of what I "have stated above. By the defendants substituting "a highway or street to take the place of that portion "of Kempt Road running along the front of their pro- "perty and interfered with by the siding, they would "be in a position to realize as much for their lots fac- "ing on such new street as they would were said lots "immediately fronting the Kempt Road *minus* the "railway siding. With an approach other than from "the Kempt Road, occupants of houses would not be "subjected to the same danger or inconvenience as "they might be with the siding in front of them, and "locomotives and cars running over the same."

August 20th and 21st, 1891.

The case then came before the court on motion for judgment by defendants on the official referee's reports.

Sedgewick, for defendants;

Ritchie, for plaintiff.

BURBIDGE, J. now (September 17th, 1891) delivered judgment.

The information in this case is filed by the Attorney-General for a declaration that certain lands therein described, and situate in the city of Halifax, are vested in the crown; and that a sum of fifty dollars tendered to the defendants is a just and sufficient compensation to them for such lands, and for any damages suffered by them, by reason of the expropriation thereof and the construction thereon of a siding from the Intercolonial Railway, known as the Halifax Cotton Factory siding.

The crown's title to the lands, and its right to a

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declaration that they are vested in it, is admitted. With reference to the question of compensation it is not denied that the defendants ought to be paid the two sums of $79.25 and $126.50 for lots 5*a* and 7 mentioned in the first report of the official referee; and it is equally clear, I think, that they are not entitled to any compensation in respect of the item of $500 claimed as the value of a portion of the Kempt Road upon which the siding is constructed, and which under the evidence I find to be a public highway (1).

The main question at issue between the parties is as to whether or not the defendants are entitled to compensation for the injurious affection of a lot of land owned by them and adjoining the Kempt Road.

The Halifax Cotton Factory siding was built in the year 1881, in pursuance of the provisions of *The Government Railways Act*, 1881; and with the leave of the city council of Halifax, subsequently confirmed by an Act of the Legislature of Nova Scotia, it was constructed along a certain public road or street in that city, known as the Kempt Road (2). Opposite the defendants' property, and for a distance, in round numbers, of eleven hundred feet, the track of the siding is laid upon the sidewalk of the street, contiguous to their property. To give access thereto, three crossings have been made, which are sufficient for any use to which the property has hitherto been put. But it appears from the report of the official referee, and from the evidence, that the chief value of the property consisted in its availibility for division into, and sale as, building lots; and that in respect of any such use, its value has been greatly depreciated by the construction of the siding.

(1) *Stebbing* v. *The Metropolitan Board of Works* L. R. 6 Q. B. 37; *Paint* v. *The Queen*, 2 Ex. C. R. 149. As to the crown's title to highways in Nova Scotia, see *Koch* v. *Dauphinee*, James 159.

(2) 44 Vic. c. 25, ss. 5, (7), 49; 47 Vic. (N.S.) c. 30.

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This property, it is to be observed, was not in any way held with lots 5*a* and 7 which were taken for the siding, and no question of unity of possession arises (1). We have seen that the damage results from acts made lawful by the statute, and, so far as that requisite of a well grounded claim is concerned (2), there is nothing in the defendants' way. But they are not entitled to succeed, it is clear, unless the acts complained of would, in the absence of the statutory powers exercised, be actionable, nor unless they cause damage to the property itself. To sustain a claim for compensation under the compensation clauses of the Imperial Lands Clauses Consolidation Act, or other like Acts, there must be a special or peculiar damage to lands, or to some right or interest therein, occasioned by the construction of the authorized works, which, but for the statute might have been the subject of an action, and which diminishes the value of the lands. These two elements must concur. It is not enough that what is complained of would sustain an action on the part of the complainant if the injury or inconvenience is personal to him and does not affect any land of which he is the owner. And, on the other hand, he is not entitled to compensation, although his land may be depreciated in value by the construction of the authorized works, unless what is done under the statute would otherwise have been actionable.

I shall illustrate these propositions by reference, in the first place, to cases in which it has been held that no claim to compensation exists :

In *Rex* v. *The Bristol Dock Company* (3) the owners of a brewery were held not to be entitled to compensation for a loss arising to them in their business from the

(1) *Cowper Essex* v. *Acton*, L. R. 14 App. Cas 153.

(2) *The Imperial Gas Co.* v. *Broadbent*, 7 H. L.C. 600 ; *The Caledonian Railway Co.* v. *Colt*, 3 Macq. H.L. Cas. 833.

(3) 12 East 428.

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deterioration of the water of the public river Avon, from which the brewery had been supplied by means of pipes laid under low-water mark, the use of the water having been common to the King's subjects, and not claimed as an easement to the particular tenement. The only remedy for such an injury is by indictment, which in this case was taken away by the Act of Parliament. The Commissioners of the Nene Outfall, in execution of powers conferred upon them by the Act 7-8 Geo. IV. c. 85, acquired for the purposes of navigation certain titheable land, and covered it with water. The tithe-owner claimed compensation but it was held that he was not entitled, as he had a mere right to a portion of the produce of the land when that produce arose and was severed from it, and could not have maintained an action if the Act of Parliament had not been passed (1). The London Dock Company by the construction of its works, which were authorized by the statute 9 Geo. IV. c. 116, occasioned the destruction of the neighborhood of a public house, known as The Wheat Sheaf, by the formation of a basin and a cut on ground before covered by houses, and stopped up several thoroughfares that had previously given a direct passage to, from, and by such houses, whereby the direct and casual custom of the premises was diminished, and their pecuniary value to sell or let as a public house or shop, but not as a private house, was lessened. William Hartree and Ann Lammiman were at the time the surviving trustees under certain indentures of lease and release of the fee simple of this public house, and Ann Lammiman was the occupier and tenant for life thereof and carried on therein the trade of a victualler. Hartree and Lammiman took proceedings to compel the London Dock Company to issue a precept to the sheriff to summon a jury to

(1) *The King* v. *The Commissioners of the Nene Outfall*, 9 B. & C. 875.

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assess compensation to them under the provisions of the statute referred to, but failed, it being held that the statute contemplated compensation only in cases where there was direct injury occasioned by the act of the company to lands, houses or hereditaments, and that the inconvenience arising from public traffic being diverted and the loss of custom in trade thereby occasioned to the owners was too remote and indefinite and would not have given them a right of action if there had been no statutory powers. The inconvenience complained of was common, it was said, in a greater or lesser degree, to every inhabitant in the neighborhood (1). It will be observed, no doubt, that in this case the claimants' premises were diminished in value as a public house by an act done by the company under its statutory powers, which, without the statute, would probably have given them a right of action; but such depreciation appears to have been thought to have been occasioned by the diversion of public travel and traffic, and the consequent loss of custom, and not by reason of any interference with any right of access belonging to the claimants as incident to such premises. The case must be read in the light of later cases, such as *Chamberlain's*, *Beckett's*, *McCarthy's* and that of *Walker's Trustees*, to which I shall have occasion presently to refer, (2) and cannot be relied upon for any larger proposition than this, that the obstruction of a public highway which diverts public travel and traffic and causes loss of custom in trade to the proprietor of premises in the neighborhood of such obstruction, but which does not interfere with any right of access that such proprietor has as incident to such premises, will not support a claim for compensation.

(1) *The King* v. *The London Dock Company*, 5 Ad. & El. 163.

(2) See *post* pp. 349, 350, 351.

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The facts in *Ogilvy's Case* (1) were, that the railway company under the Railways Clauses and Lands Clauses Acts of 1845 took part of the premises on which the plaintiff resided with his family. The line of railway divided the property and crossed at rail-level, and within a few yards of the lodge, a public road that formed the chief access to the residence. By reason of the level crossing Ogilvy was, in going to and from his residence, liable to inconvenience, interruption and delay by the closing of the railway gates, and subjected to the risk of his horses being startled by the passing and noise of engines. For the land taken the jury assessed the damage at £360, and this sum was not in dispute. For the injuries arising from the severance and the level crossing, they allowed him £560 without distinguishing how much was for "severance" and how much for the "level crossing." It was not denied that he was entitled to compensation for the injury to his premises occasioned by the severance, but it was contended that he was not entitled to compensation for the personal inconvenience arising from the level crossing, and that contention the House of Lords (reversing the decision of the Court of Session) upheld. This case has been much discussed. It has been questioned, perhaps qualified, but never over-ruled. It is probable, however, that to-day an owner of an estate would, under later decisions and a like state of facts differently presented, succeed where Ogilvy failed. It cannot, I think, be doubted that the existence of the level crossing of which he complained would have been an inconvenience to any owner of the estate, and would have had the effect of diminishing its value either for occupation or for sale. For such a diminution in value, a portion of the premises having been taken,

(1) *The Caledonian Railway Company* v. *Ogilvy*, 2 Macq. H. L. C. 229.

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he would be entitled to compensation (1). But that is not the state of facts on which the case was decided; and interpreted and limited by subsequent decisions it is an illustration of the principle that where there is no injury to land or any right or interest therein or incident thereto, a personal inconvenience or annoyance to the owner, which, though it may be greater in degree, does not differ in kind from that to which all Her Majesty's subjects are exposed, does not entitle him to compensation, although, but for the statute, he might have had an action for such inconvenience or annoyance. The Court of Common Pleas of Upper Canada followed *Ogilvy's Case* in that of *Day* v. *The Grand Trunk Railway Company* (2), and held that Day was not entitled to compensation. In the latter case the company had, under its statutory powers and with the leave of the municipality of Guelph, constructed its line of railway along the centre of a street in Guelph, in front of a lot of land owned by the plaintiff. The railway occupied, it appears from the report, thirty-four feet of the centre of the street and was elevated from three to six feet above the surface of the street, leaving a space about thirty-two feet wide on each side, and rendering it necessary to use part of the lot in addition to such space to get into the yard of the lot, whereby Day sustained damage. The court treated the case as one of personal inconvenience only, to which Day was exposed in the same way as any other person having occasion to use the street. The interference with the access to the premises does not appear to have been taken into consideration. The case does not, it appears to me, d ffer materially from *Beckett* v. *The Midland Railway Com-*

(1) In *re Stockport, &c., Rail Co.*, 33 L. J. Q. B. 251; *Buccleuch* v. *The Metropolitan Board of Works*, L. R. 3 Ex. 306, 5 Ex. 221, 5 H.L. 418; *Cowper Essex* v. *Acton*, 14 App. Cas. 153.

(2) 5 U.C.C.P. 420.

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pany (1), in which it was held that the plaintiff was entitled to recover. Interference with the privacy of lands by reason of their being overlooked by persons on the railway will not, it is clear, sustain a claim to compensation, although the value of such lands is thereby diminished. There is in such a case, no damage to any right which but for the statute would be actionable (2). The case of *Herring* v. *The Metropolitan Board of Works* (3) illustrates the proposition that the injury which gives a right to compensation must diminish the value of the claimant's lands (4), although it should be added that that is not the principle upon which all the members of the court rested their opinions. In that case the respondents under statutory authority erected a hoarding in Northumberland Street, London, for the purpose of enabling them to reconstruct a sewer running under that street. The hoarding occupied the whole width of the street between the kerb stones on each side, and the upper end of it stood five or six inches higher up the street than the lower side of the appellant's gateway, that is, it overlapped the entrance to his premises five or six inches. It stood three feet six inches from the nearest part of his premises, the access to which was thereby rendered less convenient than it had been before. The obstruction, it was maintained, interfered with the carrying on of the appellant's business, and thereby occasioned him loss, but his premises were not damaged or diminished in value. Held, that he was not entitled to compensation. *Ricket's Case* (5) was also a case in which the plaintiff's business was injured by the obstruction, during the construction

(1) L. R. 3 C. P. 82.

(2) *Penny* v. *The South Eastern Railway Company*, 7 El. & B. 660.

(3) 19 C. B. N. S. 510.

(4) *Ibid.* See opinion of Montague Smith, J., p. 526.

(5) *Ricket* v. *The Metropolitan Railway Company*, L. R. 2 H. L. 175.

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of the defendant's works, of certain public thoroughfares near the plaintiff's premises. This obstruction was continued for twenty months. The question for determination was "Whether the loss of customers by "the plaintiff in his trade," under such circumstances, "was such damage as to entitle him to recover from the "company?" The Court of Queen's Bench consisting of four judges (1) answered the question in the affirmative. Their decision was reversed in the Exchequer Chamber by four judges (2) against two (3) and the latter judgment was affirmed by the House of Lords (4). By *Ricket's Case, Senior v. The Metropolitan Railway Company* (5), in which a tailor recovered compensation for loss of business resulting from the obstruction of public streets adjacent to his premises, and *Cameron* v. *The Charing Cross Railway Company* (6), involving under similar circumstances a like question of the loss of trade suffered by the plaintiff, a baker, were over-ruled. *The Queen* v. *Vaughan and the Metropolitan District Railway* (7) affords another illustration of the proposition that the acts complained of must be actionable, and that loss of profits in business occasioned by the authorized destruction of the neighborhood is not a proper subject for compensation. The claimant in that case was tenant from year to year of a public house, for which the company gave him notice to treat. The proceedings thus commenced for the acquisition of his interest were delayed for some two or three years, and in the meantime he continued to carry on his business. In the end he claimed not only the value of his interest in

(1) Cockburn, C.J. and Blackburn, Mellor and Shee, JJ.

(2) Erle, C.J., Pollock, C.B. and Channell and Pigott, BB.

(3) Keating and Byles, JJ., 5 B. & S. 155, 157, 169.

(4) Lord Chelmsford, L.C. and Lord Cranworth, Lord Westbury dissenting. L. R. 2 H. L. 175.

(5) 2 H. & C. 258.

(6) 16 C. B. N. S. 430.

(7) L. R. 4 Q. B. 190.

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the premises, to which he was admittedly entitled, but the depreciation in value of such interest, the custom of the public house having in the interval been greatly reduced by the pulling down of neighboring houses taken under the company's statutory powers. Held, that he was not entitled to compensation for such depreciation, it being clear that no action would lie by a person whose business is injured by reason of some one having acquired and pulled down the neighboring houses. In the case of *Reg.* v. *The Metropolitan Board of Works* (1), it appeared that the occupier of premises near the Thames had been used to draw water from the river, and to bring barges to a draw-dock there, as public rights and not as rights attaching to the premises. The works of the embankment, then in course of construction by the defendants, caused an obstruction by which access to the river at the place at which such rights had been exercised was practically cut off, and it was suggested that the deprivation would continue until the embankment works were completed. There was no direct evidence as to whether the obstruction would be permanent or not. Held, not to be a case for compensation. The case of *The Metropolitan Board of Works* v. *The Metropolitan Railway Company* (2) turned upon the point that the plaintiffs had acquired no right to lateral support for the sewer that was injured by the construction of the defendants' railway, and affords another example of the application of the rule that where the act complained of is not actionable there is no right to compensation. *Brand's Case* (3) illustrates chiefly a different principle, but it will be convenient briefly to notice it here. In that case Cumberland House, the property of the respondent's wife, was not diminished in value by the construction

(1) L. R. 4 Q. B. 358.
(2) L.R. 4 C.P. 192.
(3) *The Hammersmith and City Railway Company* v. *Brand.* L.R. 4 H.L. 171.

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of the appellants' railway, but it was injuriously affected by the operation of the railway, such injury arising from vibration caused by the passing of trains over the railway. Now it will be observed that the premises were depreciated in value by an act of the company, which, but for the statute, would have been actionable. The Court of Queen's Bench (1) on a special case held that the claim to compensation was not sustainable (2). This decision was reversed in the Exchequer Chamber by Bramwell, B., Keating and Montague Smith, JJ. (Channell, B. dissenting) (3). In the House of Lords (4), of the judges summoned, Willes, J., Keating, J., Pigott, B., Lush, J. (the latter of whom on further consideration had changed his opinion) and Bramwell, B. thought the respondent was entitled to compensation, and Blackburn, J. that he was not, and the latter view prevailed, being supported by Lord Chelmsford and Lord Colonsay (Lord Cairns dissenting). It was agreed that the owner's right of action had been taken away, the operation of the railway having been legalized, and it was determined that the statute, in the case under consideration, made no provision for compensation. The principle is that a railway company is not bound to make compensation for damages necessarily caused by the use of its works for the purposes authorized by the legislature. It is necessary, in the discussion of this case, to bear in mind that no part of the owner's property nor any right or interest therein, was taken or acquired, for in that respect it is distinguishable from such cases as *Buccleuch* v. *The Metropolitan Board of Works* (5). At first sight, *The City of Glasgow Union Railway Company* v. *Hunter* (6) would appear to sustain the view that even

(1) Mellor and Lush, JJ.
(2) L. R. 1 Q. B. 130.
(3) L. R. 2 Q. B. 223
(4) L. R. 4 H. L. 171.
(5) L. R. 5 H. L. 418.
(6) L. R. 2 Sc. Ap. 78.

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where a part of the claimant's land is taken he cannot recover compensation for the depreciation in the value of that which is left resulting from the inconvenience occasioned by the noise and smoke of trains. That appears to have been Lord Hatherly's opinion, but Lord Chelmsford distinctly rests his opinion on the facts that the claim did not arise out of anything done on the land taken, nor in respect of any property of the respondent held therewith, but from the construction of a railway bridge over the land of another person, and that no part of the respondent's property had been injured by anything done on his land over which the railway ran; and Lord Westbury expresses the opinion that when part only of premises is taken, the residue being left to the owner, all the inconvenience sustained by the owner of the residue, in consequence of the user made by the railway company of that which is taken, is a legitimate subject of consideration in determining what is the damage resulting from the severance of the property. In *Devlin's Case* (1), the facts were that the railway was brought into Hamilton, by consent of the municipality along Cherry Street, a narrow street only thirty feet wide, on which the claimant had a brick cottage and a double frame house, and she complained of the great injury done to her by the railway and its user,—that passing trains caused the house to vibrate and the plaster to fall off the walls. Held, following *Brand's Case* (2), not to be a case for compensation. So, too, it has been decided that the owner of a ferry is not entitled to compensation for loss of traffic occasioned by the construction of a railway bridge (3). The diversion of the traffic under the circumstances of

(1) *In re Devlin and the Hamilton and Lake Erie Railway Company*, 40 U.C.Q.B. 160.

(2) L.R. 4 H.L. 171.

(3) *Hopkins* v. *The Great Northern Railway Company*, 2 Q.B.D. 224, over-ruling *Reg.* v. *The Cambrian Railway Company*, L.R. 6, Q. B. 422; *Jones* v. *The Stanstead, Shefford and Chambly Rail. Co.*, 16 L. C. J. 157, L. R. 4 P. C. 98.

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Hopkins' Case (1) would not, it was held, have been actionable if the bridge had been erected without the authority of the Act of Parliament, and, besides, such diversion was not occasioned by the construction of the railway bridge, but by its user. This case is of course very different from that of *Reg.* v. *The Great Northern Railway Company* (2), where the obstruction of access to an ancient ferry, appurtenant to the land injuriously affected by such obstruction, was held to give the owner of the land a right to compensation. In *Fleming* v. *The Newport Railway Company* (3) the facts were, to state them very briefly, that the railway company took none of the appellant's land but the line of railway cut off access to a way shewn on a plan by which his predecessor in title had purchased, and thereby diminished the value of such land. The way in question had not been opened, and the seller or superior was under no obligation to open it. Held, not a case for compensation. The appellant would have had no right of action if the statute under which such access was destroyed had not been passed.

If, on the other hand, the access from lands or premises to a public highway or navigable water on which they immediately abut is destroyed or rendered less convenient, and the value of such lands or premises is thereby depreciated, the owner is entitled to compensation, for without the statute he would have had a right of action incident to his ownership of such lands or premises (4).

(1) 2 Q. B. D. 224.

(2) 14 Q. B. 25.

(3) 8 App. Cas. 265.

(4) *Reg.* v. *The Eastern Counties Railway Company*, 2 Q. B. 347; *The East and West India Dock Company* v. *Gattke*, 3 M. & G. 155; *Moore* v. *The Great Southern and Western Railway Company*, 10 Ir. L. R. 46; *Reg.* v. *The Buffalo and Lake Huron Railway Company*, 23 U. C. Q. B. 208; *Buccleuch* v. *The Metropolitan Board of Works*, L. R. 5 H. L. 418; *Yeomans* v. *The Corporation of the County of Wellington*, 43 U. C. Q. B. 522, and 4 Ont. Ap. 301; *Bowen* v. *The Canada Southern Railway Company*, 14 Ont. App. 1; *Parkdale* v. *West* 12 App. Cas 602; *Pion* v. *The North Shore Railway Company*, 14 Can. S.C.R. 677, 14 App. Cas. 612.

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So, too, for a like reason, he is entitled to compensation where the subjacent or adjacent support to which as owner of buildings he is entitled is interfered with (1); or an easement or similar right is destroyed or interfered with (2), as, for instance, access to a ferry appurtenant to the owner's land (3); or the obstruction of a private road (4), or of ancient lights (5); or the diminishing of the flow of water to which the riparian owner has a right (6). The owner is also entitled to compensation where, by the obstruction of a public highway or navigable water, the right of access incident to the ownership of lands or premises is interfered with or made less convenient, and in consequence the value of such lands or premises is diminished, although they do not immediately abut upon the public highway or navigable water where the obstruction in question is made. In *Chamberlain's Case* (7), certain houses of the plaintiff, four of which fronted on a highway and eight others on a new road running at right angles to such highway, were rendered less convenient of access and less suitable for occupation, and were depreciated in value, by the defendants' works which crossed and obstructed such highway, and it was held that he was entitled to compensation for such depreciation. Chief Justice Erle distinguishes this case from *Ogilvy's* by stating that Ogilvy was claiming compensation for

(1) See *The Metropolitan Board of Works* v. *The Metropolitan Railway Company*, L.R. 4 C.P. 192, in which the plaintiff failed because the right did not exist.

(2) *Buccleuch* v. *The Metropolitan Board of Works*, L.R. 5 H.L. 418.

(3) *Reg.* v. *The Great Northern Railway Company*, 14 Q.B. 25.

(4) *Glover* v. *The North Staffordshire Railway Company*, 16 Q.B. 912.

(5) *Eagle* v. *The Charing Cross Railway Company*, L.R. 2 C.P. 638; *Clark* v. *The School Board for London*, L.R. 9 Ch. 120; *Duke of Bedford* v. *Dawson*, 20 L.R. Eq. 353.

(6) *Bush* v. *Trowbridge Water Works Company*, L.R. 19 Eq. 291; *Stone* v. *The Mayor of Yeovil*, 2 C.P.D. 99.

(7) *Chamberlain* v. *The West End of London and Crystal Palace Railway Company*, 2 B. & S. 605, 617.

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a personal inconvenience or annoyance and not for injury to his property. *Chamberlain's Case* is approved in *McCarthy's Case* and in that of *Walker's Trustees*. In *Beckett's Case* (1), which was held to be one for compensation, it appeared that the railway company had erected an embankment on a portion of the highway opposite to the plaintiff's house, thereby narrowing the road from fifty to thirty-three feet, impeding the access of light and air and the approach to the house, and diminishing its value. The facts in *McCarthy's Case* (2) were that McCarthy resided and carried on business as a carman and contractor for supplying builders with lime, bricks and other building materials, and as a dealer in sand and ballast, near a dock known as the Whitefriar's Dock, which was a draw-dock leading into the River Thames. This dock was a free and open public dock, and was largely used by the plaintiff in the way of his business. But he had no right or easement in the dock other than as one of the public, nor was there appurtenant, or otherwise belonging to his premises any other right or privilege in or to the dock. The plaintiff's premises were only twenty feet distant from the head of the dock, which was three hundred and fifty-two feet long, and thirty feet wide at its head and forty-six feet wide at its outlet into the Thames. By reason of their proximity to the dock, and the access thereby given to and from the Thames, the premises were more valuable to sell or occupy with reference to the uses to which any owner might put them. In the execution of the works authorized by the *Thames Embankment Acts*, a solid embankment was carried along the fore-shore of the Thames, thus permanently stopping up and destroying Whitefriar's Dock. By reason thereof access through the dock to

(1) *Beckett* v. *The Midland Railway Company*, L. R. 3 C. P. 82 ; (2) *The Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243.

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and from the Thames was destroyed, and the plaintiff's premises, either to sell or occupy with reference to the uses to which any owner or occupier might put them in their then state and condition, were permanently damaged and diminished in value. Held, to be a case for compensation; the test submitted by Mr. Thesiger, of counsel for the claimant, being generally accepted, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if, by reason of such interference, the property, as property, is lessened in value. *McCarthy's Case* (1) was followed in *The Caledonian Railway Company* v. *Walker's Trustees* (2) in which the facts were, to state them perhaps too briefly, that the respondents were possessed of a spinning mill ninety yards from an important main thoroughfare in Glasgow, having parallel means of access on the level from two sides of the mill to such thoroughfare. The railway company under their Special Act cut off entirely one access substituting therefor a deviated road over a bridge with steep gradients; and the other access they diverted and made less convenient. But none of the operations were carried on *ex adverso* the premises. Held, that the owners were entitled to compensation. In the case of *McPherson* v. *The Queen* (3), decided in this court in the same year but a few weeks earlier than the decision of the House of Lords in the case of *Walker's Trustees*, Mr. Justice Fournier held the suppliant was entitled to

(1) L.R. 7 H.L. 243. (2) 7 App. Cas. 259.
(3) 1 Ex. C. R. 53.

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compensation where his premises had been diminished in value by an authorized interference with his access thereto by a public street, the grade of which was raised several feet. There were other grounds on which the judgment in that case was rested, but I mention this only to add that in the case of *Paint* v. *The Queen* (1), in which the Supreme Court dismissed the cross-appeal of the crown as well as the appeal, I took into consideration as one element of damage the inconvenience arising from the steeper grades existing on a highway substituted for one theretofore used. But in *Paint's Case* part of his lands was taken, and it was not a case of injurious affection only, and the rules as to the measure of damages are not under the decisions the same in the two cases. It will be observed, however, that it was not decided in *Walker's Case* that a mere change of gradient in a highway would give a right to compensation (2). *Re Wadham and the North Eastern Railway Company* (3) is an authority, primarily, for the proposition that the measure of damages for the injurious affection of property is the depreciation in its value as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put, but it also illustrates the principle that premises are injuriously affected within the meaning of the *Lands Clauses Consolidation Act*, 1845, where the street upon which they are situated is stopped up by the works of the company.

But while an obstruction of access by a public road or navigable water to private property need not, to sustain a claim to compensation, be opposite to such property, it must be proximate and not remote (4). In *McCarthy's Case* (5) the point at which access to the

(1) 2 Ex. C. R. 157.
(2) 7 App. Cas. 260, 274.
(3) 14 Q. B. D. 747.
(4) Per Lord Selborne, L. C. in *The Caledonian Railway Company* v. *Walker's Trustees*, 7 App. Cas. 285, and Lord Blackburn at p. 299.
(5) L.R. 7 H.L. 243.

river Thames was obstructed, was distant three hundred and seventy-two feet from the premises affected, and in *Walker's Trustees* (1) the interference took place at a point distant two hundred and seventy feet from the mill.

There are of course a large number of cases, which have not arisen under statutes making provision for compensation for lands taken or injuriously affected by railways or other works, that illustrate the principles by which the right to compensation under such statutes is determined. I shall refer to a few of such cases only. The obstruction of a common highway, by which customers are prevented from going to a colliery, whereby the benefit of the colliery is lost and the coal dug up depreciated in value is such a special damage as will enable the owner to maintain an action for a public nuisance (2); and for a like reason the owner of houses who, through an obstruction of a highway, loses his tenants and the profits of his houses, may have his action (3). Lord Chelmsford in *Ricket* v. *Metropolitan Railway Company* (4) questions the decision in *Baker's Case*, but in *Beckett* v. *The Midland Railway Company* (5), decided later in the same year, Willes, J., commenting upon the observations of Lord Chelmsford, expresses the opinion that it is well decided. In *Greasley* v. *Codling* (6) it was decided that one who was delayed four hours by an obstruction in a highway, and thereby prevented from performing the same journey as many times in a day as if the obstruction had not existed, might maintain an action against the obstructor. But in a later case it was decided that in order to maintain an action for obstructing a public way

(1) 7 App. Cas. 259.

(2) *Iveson* v. *Moore*, 1 Ld. Raymond 486.

(3) *Baker* v. *Moore*. 1 Ld. Raymond 491.

(4) L.R. 2 H.L. 188.

(5) L.R. 3 C.P. 100-101.

(6) 2 Bing. 263.

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the plaintiff must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way; and where, in an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road or else to remove the obstruction, it was held that he was not entitled to maintain his action (1). The facts in the case of *Wilkes* v. *The Hungerford Market Company* (2) were that the plaintiff, a book-seller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by defendants continuing an authorized obstruction across it for an unreasonable time, and it was held that this was a damage sufficiently of a private nature to form the subject of an action; but the authority of the case is questioned by Chief Justice Erle in *Ricket's Case* (3), and by Lord Chelmsford, L.C. in the same case in the House of Lords (4), and in *Beckett's Case* (5) Willes, J. expresses the opinion that it was over-ruled by *Ricket's Case*.

The right of navigating a tidal river is common to the subjects of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of a river, and the latter is a private right incident to the enjoyment of the land,—the invasion of which may form the ground for an action for damages. The right of the riparian owner to the use of the stream does not depend upon the ownership of the soil of the stream (6).

(1) *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316, 1867; *Baird* v. *Wilson*, 22 U. C. C. P. 491, 1872.
(2) 2 Bing. N. C. 281.
(3) 5 B. & S. 161.
(4) L. R. 2 H. L. 188.
(5) L. R. 3 C. P. 85-100.
(6) *Lyon* v. *The Fishmongers' Company*, 1 App. Cas. 662.

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Now, with reference to the case under consideration, it has been seen that the defendants are the owners of lands situate on Kempt Road, in the City of Halifax, which they hold for sale as building lots. The value of such lands to be used for that purpose depends largely, no doubt, upon the frontage on the street mentioned. By the construction of the railway siding in question upon the sidewalk contiguous to such lands, access thereto and such frontage have been interfered with. It is clear, I think, that the owners have suffered damages not only greater in extent but different in kind from those to which others of Her Majesty's subjects having occasion to use the Kempt Road are exposed. Their right of access to the property has been interfered with, and for such an interference they might, but for the statute, have maintained an action; and the official referee has found, and I think rightly, that by reason of such interference the property has been lessened in value. Under these circumstances, I entertain no doubt that the defendants are entitled to compensation.

With reference to the amount of compensation, it is established by the decisions under the Lands Clauses Consolidation Acts, though possibly there is still ground for some discussion, that in cases of injurious affection only, the owner is not entitled to compensation for injury arising from the operation of the authorized works, but only for loss arising from their construction. In the present case, however, the official referee has found that the lands have been diminished in value by reason of the construction of the work; and he has assessed compensation at an amount which, in his opinion, will be sufficient to enable the owners of the property to obtain convenient access thereto. That having been done, he thinks no further depreciation will arise by reason of the

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operation of the railway siding. This finding renders it unnecessary, therefore, to consider whether *The Government Railways Act*, 1881, under which the siding was constructed, is wider in terms than the Imperial Lands Clauses Consolidation Acts, or makes provision for compensation in a case of injurious affection where no title to compensation would arise under such Acts (1). The official referee in his first report found that 35 lots, 33 feet wide, are injuriously affected by the construction of the siding, and in his second report he intimates that further evidence taken shows that 36 lots are so affected; but it is clear, I think, and counsel for defendants admits, that the number of lots so affected is 33. Making allowance for this obvious error and adding interest to date upon what I understand to be the principal sums at which compensation was assessed by the official referee, I find that the defendants are entitled to compensation as follows :— In respect of lot 5*a* to $79.90, in respect of lot 7 to $127.84, and in respect of the injurious affection of the property upon Kempt Road to $2,636.70. There will be a declaration that the title to the lands expropriated is vested in the crown as claimed in the information. The question of the respective interests of the defendants in the compensation money has not been considered, and leave is reserved for any person interested to apply for further directions. The defendants are entitled to their costs.

Judgment for defendants with costs.

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

Solicitors for defendants: *Ross, Sedgewick & Mackay*

(1) 44 Vic. c. 25, s. 3, sub-sec. 6; s. 5, sub-sec. 15; ss. 15, 27, 30.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF ;

1891
Sep. 17.

AND

WILLIAM MALCOLM ..... DEFENDANT.

Injurious affection of property by construction of public work—Obstruction of access—Right to compensation—Waiver.

The defendant was the owner of a dwelling-house and property fronting on a public highway. In the construction of a Government railway, the crown erected a bridge or overhead crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had theretofore freely enjoyed.

Held, that the defendant was entitled to compensation under *The Government Railways Act* and *The Expropriation Act*. *Beckett* v. *The Midland Railway Company* (L.R. 3 C.P. 82) referred to.

2. The defendant, and a number of other persons interested in the manner in which the crossing was to be made, met the Chief Engineer of Government railways and talked over the matter with him. The defendant, who does not appear to have taken any active part in the discussion, and the other persons mentioned wished to have a crossing at rail level with gates ; but the Chief Engineer declining to authorize such gates, it was decided that there should be an overhead crossing with a grade of one in twenty. Subsequently the defendant signed a petition to have the grade increased to one in twelve, as the interference with the access to his property would in that way be lessened. The prayer of the petition was not granted.

Held, that by his presence at such meeting the defendant did not waive his right to compensation.

3. The right of way for the line of railway had been previously acquired by the Western Counties Railway Company, and the defendant's predecessor in title had been paid the damages awarded to him. But it was clearly shown that at the time when such damages were assessed there was no intention to construct an overhead bridge, and that they were assessed on the understanding that there was to be a crossing at rail level.

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Held, that the defendant was not, by reason of such payment, precluded from recovering compensation for injuries occasioned by the overhead bridge.

Statement of Facts.

THIS was an information filed by Her Majesty's Attorney-General for the Dominion of Canada under *The Expropriation Act* (1), in a matter of the injurious affection of lands arising from the construction of a bridge or overhead crossing on the Annapolis and Digby Railway at Annapolis, N. S.

By the information it was alleged, *inter alia*, that :— By the Act of the Parliament of Canada, 52 Victoria, chapter 8, the Minister of Railways and Canals was authorized to build and complete the railway between Annapolis and Digby, N.S., the construction of which had been previously provided for by 50 Victoria c. 25; and by the first mentioned Act, the Minister was authorized to take all such proceedings for the building and completing of the said railway as might be necessary under the provisions of *The Government Railways Act* or *The Expropriation Act* or any Acts amending the same.

Subsequently, in pursuance of the said Acts, the railway was duly constructed by Her Majesty the Queen represented in that behalf by the said Minister of Railways and Canals.

The said railway at or near the point where the same enters the town of Annapolis passes over and across a public highway known as St. George Street, and Her Majesty has constructed in the line of the said highway an overhead crossing or bridge of timber trestle-work with approaches having a grade of one foot in twenty and made of solid embankment to a point four feet above the street level.

The defendant claims to be the owner in fee simple of certain lands and premises situate in the neighbor-

(1) 52 Vic. c. 13, s. 25.

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hood of the said crossing and described as follows :— Bounded on the north by St. George Street aforesaid, on the south by the property of George Timothy Bohaker, on the east by the line of the said railway, and on the west by the Post road to Digby.

The defendant with certain other abutting and neighboring proprietors requested that the said crossing should be constructed in manner as aforesaid, and assented to and acquiesced in the details and particulars of such construction.

The defendant claims that the construction of the railway across the said highway and the construction thereupon of the said crossing has injuriously affected the lands and premises above described.

Her Majesty the Queen denies that the said lands and premises or that any part thereof has or have been so injuriously affected.

Under the provisions of chapter 81 of the Acts of the Legislature of the Province of Nova Scotia for the year 1870, entitled "*An Act to incorporate the Western Counties Railway Company*," and under the provisions of c. 70 of *The Revised Statutes of Nova Scotia*, third series, and the Acts in amendment thereof, and under the provisions of chapter 41 of the Acts of the said Legislature passed in the year 1877, entitled "*An Act to appoint Commissioners to re-appraise damages for Railway property in the County of Annapolis*," one Captain John Lingram, under whom the defendant claims, made a claim for and received compensation for damages sustained by the lands in question in this action by reason of the construction of said railway, and such compensation (to wit, the sums of $40 and $40) was awarded to the said Captain John Lingram, and operates as full satisfaction of the claim of the defendant in this action.

Her Majesty the Queen does not admit that the de-

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Statement of Facts.

fendant had or has any estate, right, title or interest in said lands and premises or any part thereof.

Her Majesty The Queen is ready and willing to pay to the defendant, or to any person or persons who may prove to be entitled thereto, such sum, if any, as he or they may respectively prove to be entitled to, in full satisfaction and discharge of all claims of the defendant or any of such persons in respect of damage, or loss, if any, that may have been sustained by the defendant or any of such persons by reason of the construction of the said railway across the said highway, and the construction thereupon of the said crossing or by reason of the said lands and premises being injuriously affected thereby.

Her Majesty The Queen is not aware of any other facts material to the consideration and determination of the questions involved in the matters aforesaid.

By his answer to the information the defendant pleaded, *inter alia*, as follows:—

The defendant denies that he with certain other abutting and neighboring proprietors, or at all, ever requested that the said crossing should be constructed in manner as set out in the information, and defendant denies that he ever in anyway assented to or acquiesced in the details and particulars of such construction.

The defendant says that he is the owner in fee simple of the lands and premises described in the said information, that the same are unencumbered, and that the said lands have a frontage of sixty-seven feet on Saint George Street in the town of Annapolis. The buildings on said lands consist of a valuable dwelling house, barn and outbuildings.

The defendant charges and claims that the said lands and premises are injuriously affected and their value destroyed by the construction of the said crossing for the following, among other reasons:

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(*a.*) The said crossing having an elevation of fifteen feet or thereabouts above the natural level of Saint George Street in front of the said lands, all access thereto with horses and carriages is cut off and destroyed and access by foot is hindered.

(*b.*) The said Saint George Street was, until the erection of the said crossing, the principal street and business thoroughfare in the town of Annapolis, and the said lands were of great value in that they had a frontage on the said street; but the said crossing has destroyed the said street as a thoroughfare, at least in front of said lands.

(*c.*) The said lands and premises have been greatly injured by reason of the obstruction of said crossing in front of said lands and the impossibility of access thereto.

(*d.*) For the reasons aforesaid the said lands and premises are rendered valueless as a residence, or for any use to which otherwise they might reasonably be put.

No sum whatever has been tendered the defendant by or on behalf of Her Majesty as compensation for the damages herein complained of.

The defendant claims that it may be adjudged and decreed that he is entitled to payment by Her Majesty of the sum of $2,000 damages, and interest thereon, as compensation for the injuries to the said lands and premises by reason of the construction and operation of the said crossing, and his costs of suit.

Such of the facts in evidence as are pertinent to the issues raised are stated in the judgment.

June 2nd, 1891.

Parker and Ruggles for plaintiff;

Ritchie, Q.C. *and Robertson* for defendant.

BURBIDGE, J. now (September 17th, 1891) delivered judgment.

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It is not denied that the defendant's property is injuriously affected by the construction of the overhead bridge or crossing mentioned in the pleadings, and that if such construction had not been authorized by statute, the defendant would have had a right of action against the persons who constructed such bridge or crossing. The case is not, I think, distinguishable in principle from *Beckett* v. *Midland Railway Company* (1). This was practically admitted on the argument, but it was said, first, that the defendant acquiesced in the execution of the works complained of, and secondly, that his predecessor in title received compensation which must be taken to have included the damages that the defendant now claims.

As to the first point, it appears that the defendant was one of a number of persons residing at Annapolis, who, being interested in the manner in which the crossing in question was to be made, met the Chief Engineer of Government railways at the Resident Engineer's office and talked over the matter with him. The defendant, who does not appear to have taken an active part in the discussion, and the other persons mentioned wished to have a crossing at rail level with gates. But the Chief Engineer declining to authorize such gates, it was decided that there should be an overhead crossing with a grade of one in twenty. Subsequently, the defendant signed a petition to have the grade increased to one in twelve, as the interference with access to his property would in that way be lessened. The prayer of the petition was not granted. Now, it appears to me that there is nothing in what took place in reference to this matter that could justly be held to have deprived the defendant of any right to compensation that he may have had.

The Minister of Railways was acting under statutory

(1) L.R. 3 C.P. 82.

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powers that provided for compensation where lands were taken or injuriously affected. The defendant could not have prevented his exercise of such powers, and had no alternative but to acquiesce. In so far as his presence at the meeting at the Resident Engineer's office may be taken as an approval of the construction of the works that have occasioned the injury, it must, I think, be taken to have been given subject to the provisions of the statute with reference to compensation. I do not think that such acquiescence as would deprive one of a legal right has been established (1).

On the second point, if it had been shown that the plans used by the Western Counties Railway Company disclosed an overhead bridge or crossing at the intersection of the railway with St. George Street, or perhaps if nothing had appeared, I should have been inclined to have adopted Mr. Parker's view, and have concluded that it must be taken that the damages paid to the defendant's predecessor in title included the depreciation of his property resulting from the construction of such bridge or crossing. But from the evidence of Richard Clark, one of the commissioners who assessed such damages, it appears that at the time of such assessment an overhead crossing was not contemplated, and that such damages were assessed on the understanding that the crossing was to be at rail level.

It is clear, therefore, that the injuries now complained of could not have been foreseen, and were not included in the commissioners' award. The case would not have been materially different, it seems to me, if the railway had been built with a crossing at rail level at the point in question, and if subsequently the over-

(1) *The Conservators of the River Thames* v. *The Victoria Station and Pimlico Railway Company*, L. R. 4 C. P. 59 ; *Willmott* v. *Barber*, 15 Ch. Div. 96 ; *Bertrand v. The Queen*, 2 Ex. C.R. 285 ; *Wood* v. *The Carleton Branch Railway Company*, 1 Pugsley 244.

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head bridge or crossing had been constructed as a new and independent work.

There will be a declaration that the lands and premises mentioned in the information have been injuriously affected by reason of the construction of such overhead bridge or crossing, and that the defendant is entitled to sixteen hundred dollars as compensation, and to his costs.

Judgment for defendant with costs.

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

Solicitor for defendant: *J. J. Ritchie.*

HER MAJESTY THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA, PLAINTIFF;

1891
Sept. 21.

AND

HENRY K. FISHER..... .....DEFENDANT.

Interference with public right of navigation—Injunction to restrain—Jurisdiction of Exchequer Court—Right to authorize such interference since the union of the Provinces—Position of Provincial legislatures with respect thereto—Right of Federal authorities to exercise powers created prior to the Union.

An information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbor is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50-51 Vic. c. 16, s. 17 (*d.*)

2. A grant from the crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament.

3. The Provincial legislatures, since the union of the Provinces, cannot authorize such an interference.

4. Wherever by an Act of a Provincial legislature passed before the Union authority is given to the crown to permit an interference with the public right of navigation, such authority is exercisible by the Governor-General and not by the Lieutenant-Governor of the Province.

THIS was an information filed by the Attorney-General for the Dominion of Canada, for an injunction to restrain the defendant from obstructing the navigation of a portion of Isaac's Harbor, in the County of Guysborough, N.S.

The allegations contained in the information were as follows :—

1. " That the public harbors in the Province of Nova Scotia are now, and have been since the 1st day of July, A. D. 1867, the property of Her Majesty The Queen, represented in that behalf by the Govern

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ment of the Dominion of Canada, and Isaac's Harbor in the County of Guysborough, and Province of Nova Scotia, aforesaid, is now and has been since the first day of July, A. D. 1867, a public and navigable harbor and common highway, the property of Her Majesty the Queen, represented as aforesaid, and ought to be preserved for the use of the ships and vessels, boats and other crafts of all Her Majesty's subjects and others to pass, repass and navigate at their free will and pleasure ; and Her Majesty The Queen, represented as aforesaid, hath the right of superintendence and prerogative over the same for the benefit of commerce and for the common use and enjoyment of all persons resorting thereto, and to protect and preserve the same from all nuisances and obstructions whatsoever.

2. " That the placing, depositing, casting, and throwing in and upon the bed and soil of the said public and navigable harbor and common highway of large quantities of gravel, sand, tailings and other materials and rubbish is, and will be, a great prejudice to the said public and navigable harbor and common highway, and greatly obstruct, impede, and render less safe and commodious, and in process of time may entirely destroy, the said navigable harbor and common highway, and so far prejudice and annoy the same that the ships and vessels, boats, and other crafts of Her Majesty's subjects and others will not be able to come into or go out of the same.

3. " That on the 18th day of July, in the year of our Lord one thousand eight hundred and eighty eight, and divers other days from the said date until the day of taking inquisition in a certain part of the said public and navigable harbor and common

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highway called Webb's Cove, in and upon the bed and soil of the same, the defendant did place, deposit, cast, and throw, and cause and procure to be placed, deposited, cast and thrown divers large quantities of gravel, sand, tailings and other material and rubbish, from a crusher owned or operated by him at said Isaac's Harbor, whereby and by means whereof the said public and navigable harbor and common highway was and still is greatly obstructed, impeded, and rendered less safe and commodious to the subjects of Her Majesty The Queen, and others, there passing, repassing and navigating with their ships and vessels, boats and other craft, than the same would have been and of right ought to have been and to be.

4. "The Attorney-General on behalf of Her Majesty The Queen claims as follows:—

(*a.*) "An injunction to restrain the defendant, his servants and agents, from the continuance or repetition of the said injury to the said public and navigable harbor and common highway, or the committal of any injury of a like kind in respect of the same.

(*b.*) "Such further and other relief as to this Honourable Court shall seem meet."

By his answer to the information the defendant pleaded as follows:—

"The defendant admits the allegations contained in the first and second paragraphs of plaintiff's information.

2. "As to the third paragraph of the plaintiff's information the defendant says he denies that on the 18th day of July, A.D. 1888, or on divers other days from said date, in the part of the harbor called Webb's Cove, or in any part of said harbor, that he, in and upon the bed and soil thereof, did place, de-

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posit, cast and throw, or did cause or procure to be placed, deposited, cast or thrown, large quantities or any quantity, of gravel, sand, tailings and other material and rubbish from a certain or any crusher operated by the defendant at said Isaac's Harbor.

3. "The defendant repeats paragraph two of his defence and denies that he committed the alleged trespasses or any of them, or that any act committed by him has caused the said public harbor to be obstructed, impeded or rendered less safe and commodious to the subjects of Her Majesty the Queen, or others, navigating, or intending to navigate, the said harbor."

Issue joined.

The court, under the evidence, found for the plaintiff on the issues of fact raised by the third paragraph of the information and the second and third paragraphs of the answer.

August 18th and 19th, 1891.

Harrington, Q.C. for the defendant :

1st. The court has no jurisdiction in this case. The court is the creature of the statute 50–51 Vic. c. 16, and by sections 15, 16 and 17 of that statute we find that the jurisdiction is confined to cases of a strictly civil nature. The subject matter of this suit, as indicated in the information, is essentially a criminal one. The acts complained of here constitute an offence which would sustain an indictment. This is not a case wherein any question arises as to a matter of private right, but it is rather a matter affecting the proprietary rights of the crown considered as a trustee for the public interest.

2ndly. The evidence does not show that the acts complained of constitute an obstruction to navigation. It is merely established that the accumulation of sand from the crusher has made an enlargement or extension

of the shore. The harbor may be narrowed, but it does not follow that navigation has been obstructed.

3rdly. The acts complained of were done under the authority of a lease from the crown, represented by the Commissioner of Public Works and Mines for the Province of Nova Scotia. This lease was issued under the provisions of *The Revised Statutes of Nova Scotia*, 5th series, chapter 7, which is merely a re-enactment of a statute passed by the Legislature of Nova Scotia prior to Confederation.

4thly. There are no sufficient grounds shown in the information upon which the court might grant an injunction. It is not alleged that the acts complained of are being continued by the defendant, nor that the injury is irreparable or insusceptible of being compensated for by damages in an action of trespass.

5thly. The place where the sand has accumulated is not a public highway. The cove beyond it is only used for the purpose of mooring vessels. Only so much of a river can be called a highway as is used for the purpose of communication between one place and another. Cites *Bourke* v. *Davis* (1).

Ritchie for plaintiff:

This is undoubtedly a civil proceeding. In England such actions have always been brought on the Equity side of the Exchequer Court.

Any obstruction, however slight, is sufficient to found the remedy sought in the information. (Cites *Moore on the Foreshore* (2); *Attorney-General* v. *Burridge* (3); *Attorney-General* v. *Palmeter* (4); *Attorney-General* v. *Earl Lonsdale* (5); *Attorney-General* v. *Terry* (6); *Wood's Law of Nuisances* (7); *Attorney-General* v. *Harris* (8); *Attorney-General* v. *International Bridge*

(1) 44 Ch. D. 110.
(2) P. 614, et seq.
(3) 10 Price 350.
(4) 10 Price 378.
(5) L.R. 7 Eq. 377.
(6) 9 Ch. Ap. 423.
(7) P. 574.
(8) 33 U.C. Q. B. 94.

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Co. (1); *Holman* v. *Green* (2); *British North America Act*, sec. 108).

The lease relied on by the defendant is void in so far as it seeks to empower him to interfere with the public right of navigation. It was made since Confederation in virtue of an Act of the Legislature of Nova Scotia which is *ultra vires*.

BURBIDGE, J. now (September 21st, 1891) delivered judgment.

The information in this case is exhibited to obtain an injunction to restrain the defendant, his servants and agents, from permitting the sand and tailings from a mill for crushing quartz-rock, alleged to be operated by him, to be carried into and deposited upon the bed and soil of Webb's Cove, which is a part of the public and navigable harbor known as Isaac's Harbor in the County of Guysborough and Province of Nova Scotia. The mill in question is situated a short distance from the shore of the harbor upon a small stream, the water of which is used to wash the crushed quartz and is then returned to the stream,—carrying with it the tailings from the mill. This has been going on for a number of years, and a bank of such sand or tailings has been formed in the harbor, at and near the mouth of the stream. There has been, and so long as the mill is operated as it has been operated there will be, a gradual encroachment upon the waters of the harbor. There is no direct evidence altogether satisfactory that the defendant is the person who is operating the mill, but that is the only inference to be drawn from his letters which are in evidence; and being present in court he did not go upon the stand to rebut that inference. On the issues taken upon the third paragraph of the information and the second and

(1) 6 Ont. App. 537. (2) 6 Can. S. C. R. 707.

third paragraphs of the statement in defence, I find, therefore, for the plaintiff.

The finding upon the issues of fact would dispose of the case but for an exception to the jurisdiction of the court, and a matter of defence, which, though not raised by the pleadings, was discussed at the hearing.

By *The Exchequer Court Act* (1), the court is given concurrent original jurisdiction in Canada in certain specified cases, and

> In all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

It is said that the information in this case is not of a civil nature. It is to be admitted that the facts shewn would have supported proceedings by way of indictment in the Supreme Court of Nova Scotia; but there can, I think, be as little doubt that the Attorney-General of Canada might have proceeded in that court as he has in this by way of an information for an injunction, and that such a proceeding would have been of a civil nature. The fact that the acts complained of constitute an offence, and would have sustained an indictment, is not conclusive of the question. For many such acts the law affords a civil remedy as well. The question is as to whether the action or suit, the proceeding, is or is not of a civil nature. In the *Attorney-General* v. *Bradlaugh* (2), the Court of Appeal (Brett, M. R. and Lindley, L. J., Cotton, L. J. doubting) held that an information exhibited by the Attorney-General to recover penalties under *The Parliamentary Oaths Act*, 1866, was not a criminal cause or matter. In that case it will be observed the majority of the court followed the opinion of Platt and Martin, BB. in the *Attorney-General* v. *Radloff* (3), in which Pollock, C.B. and Parke, B. took a different view. But, however that may be, I enter-

(1) 50-51 Vict. c. 16, s. 17 (*d*). (2) 14 Q.B. D. 667.
(3) 10 Ex. 84.

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tain no doubt that an information wherein the remedy sought is an injunction to restrain a defendant from doing certain acts that interfere with, and tend to the destruction of, the navigation of a public harbor, is a civil and not a criminal proceeding (1).

The defendant also contends that he has a right to commit the acts complained of under and by virtue of a certain indenture of lease from Her Majesty, represented in that behalf by the Commissioner of Public Works and Mines of Nova Scotia, bearing date the 26th day of February, 1880, whereby there was demised to his predecessor in title certain mining areas, with the right to erect thereon works, mills and machinery for crushing quartz, and to draw off from the stream or brook to which reference has been made so much of the water thereof as might be necessary or expedient to drive such works, mills and machinery, or to carry on such operations as are necessary in the business of quartz crushing mills. This lease was, it was said, issued under the authority of chapter 9 of *The Revised Statutes of Nova Scotia* (1873) (2), which was a re-enactment of a statute passed prior to the union of the Provinces. Assuming for the moment that this grant or lease is to be construed as giving the defendant a right to allow the tailings from his mill to be carried into Isaac's Harbor to the injury of the public right of navigation, it is clear, I think, that to that extent it is void, unless the interference with navigation is authorized by an Act of Parliament. It was not contended that the Legislature of Nova Scotia could, since the Union, legalize such an interference. That of course is very clear, as the Parliament of Canada has exclusive legislative authority over the subject of

(1) See *Attorney-General* v. *Burridge*, 10 Price 350, on which the information in this case was drawn.

(2) For the Act now in force see R. S. N. S. 5th S. c. 7, s. 46.

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navigation (1). It was argued, however, that chapter 9 of the Revised Statutes of 1873 should be read as having all the force and validity of the pre-Confederation Act, of which it was a re-enactment. I am not prepared to concede that point, but at present I express no opinion in respect to it; for I have no doubt that if by any Act of the Legislature of Nova Scotia passed before the Union authority has been given to the crown by its grant to derogate from, or interfere with, the public right of navigation, that authority is, since the Union, exercisible by the Governor-General in Council and not by the Lieutenant-Governor in Council of the Province of Nova Scotia (2).

I am of opinion that judgment should be entered for the plaintiff with costs, and that the injunction claimed should be granted.

Judgment accordingly.

Solicitor for Plaintiff: *W. F. Parker.*

Solicitor for Defendant: *J. A. Jennison.*

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(1) See *The British North America Act*, 1867, s. 91 (10.)

(2) *Ibid.* s. 12.

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Sept. 21.

HENRY A. ARCHIBALD.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Contract—Construction—Implied promise—Breach thereof.

The suppliant had a contract to carry Her Majesty's mails along a certain route. In the construction of a Government railway the crown obstructed a highway used by the suppliant in the carriage of such mails, and rendered it more difficult and expensive for him to execute his contract. After the contract had been fully performed by both parties, the suppliant sought to maintain an action by petition of right for breach thereof on the ground that there was an implied undertaking on the part of the crown in making such contract that the Minister of Railways would not so exercise the powers vested in him by statute as to render the execution of the contract by the suppliant more onerous than it would otherwise have been.

Held, that such an undertaking could not be read into the contract by implication.

DEMURRER to a petition of right for damages for an alleged breach of contract for the carriage of Her Majesty's mails between North Sydney and Port Hastings, in the Province of Nova Scotia.

By his petition the suppliant alleged as follows:—

"1. That on the first day of June, 1885, your petitioner entered into a contract under seal with Her Majesty, represented in that behalf by the Postmaster-General for Canada, to convey for the sum of $2507.52, per annum, Her Majesty's mails from North Sydney to Port Hastings aforesaid three times per week each way, serving on each and every trip or journey all the post offices then established, or which might be established, on the route during the continuance of the said contract; and it was stipulated in and by the said contract

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that the route to be pursued in the conveyance of the said mails was the highway *vid* Jacksonville, Leitche's Creek, Boisdale, Barrachois, Boisdale Chapel, Beaver Cove, Shunacadie, Christmas Island, Grand Narrows, South Grand Narrows, McKinnon's Harbor, Broom, Orangedale, Munro's Bridge, River Dennis, Big Brook and Askellton; that the computed distance between North Sydney and Port Hastings aforesaid was eighty-seven miles, and that the said mails were to be conveyed by horse and vehicle.

"2. It was further provided by the said contract that the rate of travelling should be at an average speed of six miles per hour including stoppages, and that the whole distance from North Sydney to Port Hastings aforesaid, going and coming, should be travelled in fifteen hours.

"3. By the said contract it was further covenanted that any default or failure on the part of your petitioner in performing the stipulations in the said contract provided and herein set out should subject your petitioner to a forfeiture of $50 for each such default or failure, and your petitioner was required to enter into a bond by himself and two sureties in the sum of $5,000, conditioned that your petitioner should well, faithfully and truly perform, fulfil and keep all and every of the articles, conditions, provisions and stipulations in the said contract expressed and contained on his part to be done, performed, fulfilled and kept.

"4. The said contract was expressed to remain and continue in force for a period of three years six months and twenty-two days, but on the 13th day of February, 1887, the said contract was varied by the contractor, your petitioner undertaking to convey the said mails six days per week, each way

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between North Sydney and Port Hastings aforesaid, receiving therefor at the rate of $5,000.04 per annum, and it was on the said date agreed to be continued in force beyond the time limited thereby, subject to the said variances, and your petitioner to be bound to all its terms, stipulations and conditions, until such time as your petitioner should receive notice of the termination thereof.

"5. That in the years 1888, 1889 and 1890, Her Majesty, by Her agents, servants and workmen, for the purposes and in the construction of a line of railway, the property of the Government of Canada, from Point Tupper, in the Island of Cape Breton, to North Sydney aforesaid, entered upon the highway over which your petitioner was required by the said contract to convey the said mails and in many places took possession thereof and for long distances expropriated the same, and laid rails and ties thereon, and in at least fifteen other places placed rails and ties across the said highway, and at an elevation, and in other places, diverted water-courses so that the said highway was torn away and destroyed; and in divers other ways and by divers other acts and in divers other places in the construction of the said line of railway blocked up and destroyed the said highway, and your petitioner was compelled to leave the said highway at many points in the carriage of the said mails, and to adopt other more difficult, lengthy and dangerous routes, and was compelled to provide additional teams and conveyances to carry the said mails, and lost horses and carriages and was otherwise greatly damnified by reason of the said acts of Her Majesty, Her agents, servants and workmen, and by reason

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of the breach on Her part of the said contract in expropriating and destroying the said highway.

"6. Your petitioner by petition dated on or about the 30th day of April, 1890, addressed the Honourable the Postmaster-General of Canada on the subject of the grievances herein complained of, and by his said petition claimed compensation for the loss and damages hereinbefore referred to, but was refused relief.

"Your suppliant, therefore, humbly prays that his claim for relief in the premises may be referred to this Honourable Court, and that it may be determined that he is entitled to $9,000 as damages."

The respondent demurred to this petition as follows:

"The Honourable Sir John Thompson, Her Majesty's Attorney-General for Canada, on behalf of Her Majesty the Queen, demurs to the whole of the suppliant's petition, and says that the same is bad in law on the following grounds:

"1. Because the suppliant's petition does not show any cause of action against Her Majesty the Queen, and does not disclose any facts which can give rise to any liability on the part of Her Majesty the Queen.

"2. Because no facts are set out in the suppliant's petition upon which Her Majesty the Queen can be made liable on a petition of right.

"3. Because the suppliant's claim is not in respect of any matter which may be the subject of a suit or action against Her Majesty the Queen.

"4. Because the suppliant's petition does not disclose that any lands or goods of the suppliant have come into the possession of Her Majesty the Queen, and does not disclose any breach of contract on the part of Her Majesty the Queen, or any right or cause of action arising out of a contract.

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"5. Because the suppliant's petition is not brought against Her Majesty the Queen for breach of contract, but seeks to make Her Majesty the Queen liable *ex delicto* for the acts of Her agents, servants and workmen.

"6. Because the suppliant's petition does not show that the acts complained of in the 5th paragraph thereof were done unlawfully, and the lawful acts of Her Majesty the Queen by Her agents, servants and workmen upon the public highway cannot render Her Majesty the Queen liable in damages to the suppliant.

"7. Because the fact that a person having a contract with Her Majesty the Queen to carry mails over a certain highway is damnified by reason of the said highway being obstructed, torn away, blocked up, or destroyed by Her Majesty the Queen by her agents, servants and workmen for the purposes and in the construction of a line of railway, does not give rise to any cause of action or right by such contractor against Her Majesty the Queen, and does not constitute any ground for a petition of right against Her Majesty the Queen; and does not render Her Majesty the Queen liable on a petition of right or otherwise to indemnify such contractor for such damage, or to pay the amount of such damage or any part thereof.

"8. Because Her Majesty the Queen cannot be made liable on a petition of right for the torts or acts *delicto* of Her agents, servants or workmen.

"9. Because Her Majesty the Queen is not liable for the torts or acts *delicto* of Her agents, servants or workmen.

"10. Because no negligence can be imputed to Her Majesty the Queen, and Her Majesty the Queen is

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not answerable by petition of right or otherwise for the negligence of Her servants or agents.

"11. Because there was no liability on the part of Her Majesty the Queen to maintain the said highway in a suitable or convenient manner for the use of the suppliant in the carrying out of his said contract, or in the same or a like condition in which the same was when the said contract was made, or to keep the same in a suitable or convenient condition for travel.

"12. Because all the acts and things set forth in the suppliant's petition are immaterial and irrelevant, and do not set forth or show or allege any violation or breach by Her Majesty the Queen, Her ministers, officers, agents or servants, of any contract of the suppliant, or any cause of action or right by the suppliant against Her Majesty the Queen.

"13. Because the suppliant's petition does not disclose any breach of contract on the part of Her Majesty the Queen."

August 20th, 1891.

Ritchie, in support of demurrer, cites *Leake on Contracts* (1), *Planché* v. *Colburn* (2).

Sedgewick, contra:

It was within the contemplation of both parties in making the contract that the mails were to be carried along the highway in question, and there must be read into the written contract a stipulation or undertaking on the part of the crown that nothing would be done on behalf of Her Majesty to make it harder for the suppliant to carry out his contract. The suppliant took the risk of the highway being diverted by the ordinary authorities, but he did not contemplate the expropriation of the road by the promisee. Such a

(1) 2nd ed. 708. (2) 8 Bing. 14.

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state of facts would give rise to an action for breach of contract between subject and subject.

Cites *Ford* v. *Beech* (1); *The Queen* v. *McLean* (2); *Isbester* v. *The Queen* (3).

Reasons for Judgment.

BURBIDGE, J. now (September 21st, 1891) delivered judgment.

It is not contended by the suppliant that he is entitled to compensation under the Expropriation Acts for damages occasioned by the obstruction of the highway by the Minister of Railways and Canals in the construction of the Cape Breton Railway, but he contends that there was implied in the contract set out in the petition of right an undertaking on the part of Her Majesty that the Minister would not exercise the statutory powers vested in him for the construction of the said railway in such a manner as to make it more difficult for the suppliant to carry out his contract, and that in this respect there has been a breach of the contract as set out in the petition. For this contention no authority was cited, and I know of none.

There must, I think, be judgment for the respondent upon demurrer, and with costs.

Demurrer allowed with costs.

Solicitors for Suppliant: *Ross, Sedgewick & Mackay.*

Solicitor for Respondent: *W. F. Parker.*

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(1) 11 Q.B. at p. 866. (2) 8 Can. S.C.R. 210.
(3) 7 Can. S.C.R. 696.

TANCRÈDE DUBÉ.....SUPPLIANT; 1891

Oct. 14.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of Right—Injury received on Government railway—Negligence—Order for particulars—Practice.

Where in his petition the suppliant alleged in general terms that the injuries he received in an accident on a Government railway in the Province of Quebec resulted from the negligence of the servants of the crown in charge of the train, and from defects in the construction of the railway, an order was made for the delivery to the respondent of particulars of such negligence and defects.

MOTION for particulars of *demande* in a petition of right.

The facts upon which the motion was based are stated in the judgment.

October 10th, 1891.

Hogg, Q.C. in support of motion:

This is a motion for particulars of *demande* under rule 30 of the Rules of Practice of the Superior Court for the Province of Quebec (1). The petition contains only a bare declaration that the accident happened by reason of the negligence of the crown's servants and defects in the construction of the railway. There is no allegation of the specific acts of negligence, or the particular defects of construction, relied upon by the suppliant. The defendant is not called upon to answer such a declaration as this, and without particulars the court will be unable to determine the issues to be tried.

(Cites *Lemieux* v. *Phelps* (2) *Lapierre* v. *Granger* (3);

(1) *Wotherspoon's Manual of Procedure*, p. 237.

(2) M.L.R. 1 S. C. 305.

(3) M.L.R. 5. S. C. 154.

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Seligmann v. *Young* (1); *O'Meara* v. *Stone* (2); *The Rory* (3); *Spedding* v. *Fitzpatrick*.) (4)

Belcourt, contra:

The petition is well framed under article 50 *C.C.P.* for Lower Canada. Under that article all that has to be stated is the cause of action, and the time when and how it arose. Rule 30 of the Superior Court Rules of Practice simply applies to particulars of account, and not to an action for damages. The petition is also well framed under the Ontario practice. (Cites *Smith* v. *Greey* (5); *Niagara Falls Park Commissioners* v. *Howard* (6); *Mason* v. *VanCamp*.) (7)

Hogg, Q C. in reply: Rule 30 does not distinguish between one kind of *demande* and another. (Cites *McDonald* v. *Dunn*.) (8)

BURBIDGE, J. now (October 14th, 1891) delivered judgment.

This, so far as it is necessary to deal with it, is an application for an order for the delivery to the respondent of particulars of the specific acts of negligence and improvidence on the part of the servants and employees of the crown in charge of the Intercolonial Railway, and of the specific defects in the construction of such railway, which it is alleged in general terms in the petition of right caused the derailment of the train and the accident by which the suppliant received the injuries of which he complains.

The Petition of Right Act (9) gives a form of petition of right in which the suppliant is directed to state the facts with convenient certainty. Section 21 of *The Exchequer Court Act* (10) adopts the practice and pro-

(1) W.N., 1884, 93.
(2) W.N., 1884, 72.
(3) 7 Prob. D. 120.
(4) 38 Ch. D. 410.
(5) 11 P. R. Ont. 169.
(6) 13 P.R. Ont. 14.
(7) 14 P.R. Ont. 297.
(8) 12 L.C.R. 345.
(9) R.S.C. c. 136 Schedule, Form A.
(10) 50-51 Vic. c. 16

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cedure of the High Court of Justice in England, so far as the same are not provided for by that Act or rules made thereunder; and by the 22nd section of the Act the rules of practice and procedure in force in the court when the Act was passed, so far as the same were consistent with the provisions thereof, were continued in force. These rules contain no direction as to the delivery of the particulars of any claim. The 2nd of such rules provides in effect that (except as otherwise provided) the practice, pleadings, evidence, forms and modes of procedure shall, where the cause of action arises in the Province of Quebec, conform as near as may be to those in use in like causes in Her Majesty's Superior Court of that Province. This rule was made in 1876, and it was not until 1 83 that the Quebec Petition of Right Act was passed. Until the latter date it is doubtful if there could have been said to be any cause like a petition of right that could be prosecuted in the Superior Court of Quebec. Assuming, however, that the effect of the 22 d section of *The Exchequer Court Act*, and of the 2nd rule of the rules of procedure thereby continued in force, was to adopt in any case in which the cause of action arose in Quebec the procedure prescribed by the Quebec Petition of Right Act, w find that so far as the direction to state with convenient certainty the facts entitling the suppliant to relief is concerned the Quebec Act does not differ from the Dominion Petition of Right Act, except that in the latter the direction is contained in the form of petition given by the Act, while in the former it constitutes a part of the Act itself (1). The Quebec Act goes on to provide that the petition shall be supported by an affidavit of the facts (886*b*) and that the suppliant shall deposit with the prothonotary a sum of two hundred dollars to pay the costs of the crown if costs are awarded

(1) *Revised Statutes of Quebec*, s. 5976, 886*b*.

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to it (886*c*), and that the ordinary delays and rules of procedure, in so far as they are not incompatible, shall apply to suits by petition of right (886*k*). I have not been referred by counsel to any case in the Superior Court of Quebec in which, under circumstances similar to those existing in this case, an order for the delivery of a statement in writing of the particular acts of negligence complained of was granted or refused. I see no reason, however, to doubt that the considerations upon which the practice in respect to the delivery of particulars is founded are as applicable to the Superior Court of Quebec as they are to other courts. But, however that may be, it appears to me to be clear from the directions contained both in the Dominion and in the Quebec Petition of Right Acts, that the legislature intended that parties seeking relief under such Acts should conform to modern rules of pleading whereby, to prevent surprise or unnecessary expense, each party is, so far as is reasonable, informed of the case he has to meet at the trial. The suppliant is required to state with convenient certainty the facts that entitle him to relief; and, while as a mere matter of setting out a cause of action, the general allegations of negligence and defects contained in the petition in this case are sufficient, the crown is, I think, entitled to know the particular acts of negligence and the particular defects in the construction of the railway of which the suppliant complains. If it be that such negligence and defects are inferred from the fact of the accident the suppliant should say so, or if he relies upon specific acts of negligence, or upon specific defects of construction, the respondent is, I think, equally entitled to be put in possession of such information. Nor with the ample powers of amendment possessed by the court is it possible for the suppliant to be prejudiced. If at any time before or even

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during the trial he should become aware of acts of negligence or defects of construction of which he may not have given particulars he would be allowed to amend. The only question would be as to the terms upon which such amendment ought to be made. The order may be in the form No. 13, Appendix K, of the English Rules of the Supreme Court, 1883, omitting the part of the order that refers to particulars of the injuries received (which are not asked for), and to the time and place of the accident, which are sufficiently stated in the petition, and adding a direction for particulars of the defects in the construction of the railway of which complaint is made. The suppliant may have thirty days in which to deliver such particulars, and until they are delivered all further proceedings will be stayed. The costs of this application will be costs in the cause.

Motion allowed; *costs to be costs in the cause.*

Solicitor for suppliant : *P. A. Choquette.*

Solicitors for respondent : *O'Connor, Hogg & Balderson.*

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Jan. 21.

ROBERT B. HUMPHREY.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Contract to carry mails—Breach of—Estoppel.

The doctrine of estoppel cannot be invoked against the crown.

PETITION OF RIGHT for an alleged breach by the Crown of a contract for the conveyance of Her Majesty's mails between St. John, N. B., and Digby and Annapolis, N. S.

The contract relied upon by the suppliant was alleged to have been entered into, on the 30th October, 1888, between the suppliant and the Postmaster-General of Canada, under which the suppliant contended he was entitled to carry the said mails for a period of nine months on terms as to payment similar to those contained in the contract then about expiring for the same service, and subject to the usual right of cancellation of such contracts,—that is, on receiving from the Postmaster-General six months' notice of his intention to cancel.

The facts leading up to the alleged contract are as follows: On the 30th October, 1888, the regular contract for the conveyance of the said mails was about to expire on the following day, 31st October, 1888, and the Postmaster-General was anxious to continue the service temporarily until a new permanent contract could be entered into for such service. Tenders for permanent service had been advertised for and a number of tenders had been received by the Post Office Department, amongst which was the suppliant's tender, but none of them had been accepted. The suppliant, with a view to urging his claims to the contract for which he had tendered,

had an interview with the Postmaster-General when a conversation took place between them in which the Postmaster-General offered him the temporary conveyance of the said mails, which was to continue only until a permanent contract could be arranged therefor.

As the suppliant had been understood during the said conversation to be willing to accept the temporary performance of the duties, he was requested to put his proposition for such service in writing, and on the same day, the 30th October, 1888, he addressed the following letter to the Postmaster-General :—

" OTTAWA, Ont., 30th October, 1888.

" To the Honorable JOHN HAGGART,
" Postmaster-General.

" SIR,—I beg to state that I hereby accept your pro-
" position to carry Her Majesty's mails between St.
" John and Digby and Annapolis upon usual condi-
" tions and at and upon the same price as has been
" subsisting between your Department and the Nova
" Scotia S. S. Co , temporarily,—that is for a period of
" nine months—subject as usual to cancellation at an
" earlier period if deemed necessary by your Depart-
" ment.

" I have the honor, to be,
" Your obedient servant,
" (Sd.) ROBERT B. HUMPHREY,
" on behalf of N.B. & N.S.S. Co."

On the same day the Secretary of the Post Office Department wrote to the Post Office Inspector at St. John, N. B., as follows :—

" POST OFFICE DEPARTMENT, CANADA,
" OTTAWA, 30th October, 1888.

" SIR,—With reference to the arrangements now
" being made for the continuance of the mail service
" between St. John, Annapolis and Digby, I am desired

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" by the Postmaster-General to instruct you to enter " into an agreement with Mr. R. B. Humphrey, acting " on behalf of the New Brunswick and Nova Scotia " Steamship Company, for the temporary performance " of this service on the same terms and conditions as " those under which the service is at present performed.

" I am, Sir,

" Your obedient servant,

" (Sd.) W. D. LESUEUR,

" *Secretary*

" S. J. KING, Esq., P.O. Inspector, St. John, N. B."

As the old contract was on the eve of expiring, the suppliant, on the 1st November, 1888, commenced to carry the mails, but although notified by the Post Office Inspector to enter into and execute the temporary agreement referred to no such contract or agreement was ever made, and the suppliant continued until the 27th December, 1888, to carry the mails, when the Postmaster-General, finding that the service was not being properly performed, notified the suppliant that the temporary arrangement with him was at an end.

The suppliant then claimed that his contract was for a definite period of nine months, and that it had been broken by the Postmaster-General, and he demanded reimbursement for moneys alleged by him to have been expended in making preparations to carry out his undertaking, and for damages for the breach of contract. Upon being informed that there was no contract existing for any definite period, but that only a temporary arrangement had been made with him subject to being put an end to at any time, and that the Department could not recognize any claim for damages, he presented his petition of right.

November 26th, 1890.

Pugsley, Q.C. (Solicitor-General, N.B.,) for suppliant; *McLeod*, Q.C. for respondent.

The evidence and argument having been concluded,

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the learned judge stated that he was inclined to be of the opinion that, under the evidence, there had been a contract with the Postmaster-General of which there had been a breach; but that he would reserve that question for the meantime and refer the matter to a special referee to enquire and report as to the damages.

January 19th, 1891.

Hogg, Q.C. for the respondent applied to re-open the case and to adduce further evidence.

Pugsley, Q.C. *contra.*

Application allowed upon terms that the costs already incurred under the reference, of this application, and of the taking of further evidence should be costs to the suppliant in any event.

January 21st, 1891.

Pugsley, Q.C. for the suppliant;

Hogg, Q.C. for the respondent.

The Postmaster-General and Mr. White, the Deputy Postmaster-General, were examined for the crown, and the suppliant in reply.

At the conclusion of the argument, BURBIDGE, J. delivered judgment:

When this case was before me at St. John, no question of the Postmaster-General's authority to make the contract set out in the first paragraph of the petition of right was raised, and I assumed that the crown did not desire to raise that question, nor need I discuss it now.

I thought then that the evidence of the suppliant, in no way contradicted or questioned, showed that there was a contract for a nine months' service, the crown having the right sooner to terminate the same on giving the notice mentioned. But that view cannot be maintained in the face of the testimony of the Honorable Mr. Haggart and Mr. White, from which it appears that neither of them, so far as the details of the arrang-

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ment were concerned, came to terms with the suppliant. Certainly they never made any arrangement of which one condition was that it should continue for any definite time. It appears from the departmental letter of October 30th, 1888, that the duty of arranging the terms of the temporary agreement with the suppliant was delegated to Mr. King, the Inspector at St. John, and such terms were never settled. The giving of the mails to be carried was, it will be observed, equally consistent with the Honorable Mr. Haggart's and Mr. White's view of the understanding, and also with Mr. Humphrey's. I find that the respondent did not enter into the contract set out in the first paragraph of the petition.

I desire to add that I do not doubt that there has been a misunderstanding, which might easily have been avoided if Mr. White had read with any care the suppliant's letter of October 30th, 1888, and if the action were against him personally, or against the Honorable Mr. Haggart as his principal, it might be that they would not be heard to say that the contract was other than that indicated in such letter. But Her Majesty is the defendant, and the doctrine of estoppel cannot be invoked against Her.

I think, however, that the case is a hard one; but that is a matter for the consideration of the crown, to whose grace and bounty it may be that it would commend itself if the facts were properly presented to His Excellency.

I give judgment for respondent with costs to November 27th, 1890, and costs of reference and subsequent to that date to suppliant and to be set off.

Judgment for respondent, costs distributed.

Solicitor for suppliant : *W. Pugsley.*

Solicitor for respondent : *E. McLeod.*

PRUDENT SIMONEAU.....CLAIMANT ; 1890

AND Feb. 17.

HER MAJESTY THE QUEEN.....RESPONDENT.

Government railway—Damage to adjacent farm—Right to compensation—Prospective damages—Acquittance by predecessor in title—Maintenance of boundary ditches—43 Vic. c. 8, construction of.

Where, by the construction of a railway, the claimant is put to greater trouble and expense in carrying off surface water from his lands through the boundary ditches between his farm and the farms adjoining, he is entitled to compensation therefor.

2. The injury thereby occasioned to claimant is one that could have been foreseen at the time when part of his farm was taken for the purposes of the railway, and was discharged by an acquittance given to the company of all damages resulting from such expropriation.

3. The Act 43 Vic. c. 8 does not make the crown liable for the acts or omissions of the Grand Trunk Railway Company in respect of the construction or management by the company of such portion of its railway in the Province of Quebec as was purchased by the crown.

4. The crown is not bound to keep in repair the boundary ditches between farms crossed by the Intercolonial Railway in the Province of Quebec.

APPEAL from a report of the Registrar of the court sitting as a special referee.

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

October 7th, 1889.

Belcourt, in support of motion by way of appeal: The law applicable to this case is the law of the Province of Quebec,—the *lex loci*. (Cites *Redfield on Railways* (1); *Story on Conflict of Laws* (2); *Bell* v. *Grand Trunk Railway Company* (3); *Holt's Canadian Railway Law* (4).

(1) Pt. VIII. sec. 204 *b* (1).
(2) Secs. 76 & 272.
(3) 20 C. L. J. 346.
(4) P. 59.

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Argument of Counsel.

2. By the law of the Province of Quebec incidental damages are not covered by the compensation awarded or paid to persons whose lands are expropriated under the enactments in that behalf, unless such damages are expressly mentioned in the deed of conveyance to the railway company. (Cites *Cantin* v. *The North Shore Railway Company*) (1).

3. A railway is liable for the damages caused by its works although performed within the powers conferred on it by statute.

(Cites *La Corporation de Tingwick* v. *Grand Trunk Railway Company* (2); *Grand Trunk Railway Company* v. *Meegar* (3); *Grand Trunk Railway Company* v. *Miville* (4); *Grand Trunk Railway Company* v. *Landry* (5); *Canadian Pacific Railway* v. *Pichette* (6); *de Bellefeuille's Code Civil Annoté* (7); *Pouliot* v. *The Queen*) (8).

Hogg, Q.C. *contra*, relied on the conclusions as to law and evidence arrived at by the Registrar in his report.

BURBIDGE, J. now (February 17th, 1890) delivered judgment.

This is an appeal against the report of the Registrar of this court recommending that the claimant's action be dismissed.

It is alleged in substance in the statement of claim that the claimant is the owner of a piece of land known as lot No. 343, in the parish of St. Ignace, in the county of Montmagny and Province of Quebec, which is crossed by the Intercolonial Railway; that by virtue of a deed of sale dated the 13th of May, 1854, made between one François Simoneau, through whom the claimant

(1) Ramsay's App. Cas. 591.
(2) 3 Q. L. R. 111; 9 R. L. 346.
(3) 29 L.C.J. 214.
(4) 14 L.C.R. 469.
(5) 11 R.L. 590.
(6) 31 L.C.J. 36.
(7) Art. 1053, No. 104.
(8) 1 Ex. C. R. 313.

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derives title, and the Grand Trunk Railway Company of Canada, from whom the respondent purchased that portion of the Intercolonial Railway that crosses the claimant's property; that the said company was, and the respondent is, obliged to keep open and in good order the ditches and water-courses on each side of the railway track, and the culverts communicating from one side of the track to the other; and that such ditches, water-courses and culverts have not been kept open and in good order, by reason whereof a portion of the claimant's property has been, and is, flooded, and he has, in consequence thereof, suffered loss and damage.

It is not material, but perhaps it is as well to observe here that if the claimant intended to allege that the obligation referred to is founded upon the express terms of the deed his proof fails him, as the deed contains no such covenant.

It appears that the claimant's farm is at the bottom of a slope and that the railway ditches, which cross his boundary ditches and those of the neighboring proprietors, collect the water for about one mile and a half and discharge it upon his property, and that, in consequence, he is obliged either to suffer his land to be overflowed or to accept the burden of maintaining ditches sufficient to carry off the water so collected and discharged. The burden thus thrown upon the claimant is one, I think, that depreciates the value of his property and would, in a proper case, constitute a matter for compensation.

In the deed to which I have referred, mention is made of the Acts of the Province of Canada, 16 Vic. chaps. 37, 39 and 76, respecting the incorporation of the Grand Trunk Railway Company of Canada, and the powers given to it and other companies to amalgamate; and it is, therein, amongst other things, recited that the said company required certain described lands

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belonging to François Simoneau for "la construction, "entretien, commodité et usage" of the company; that the company "ayant suivi et rempli les formalités "prescrites par les statuts en force concernant les "chemins de fer, a droit de prendre possession de la "dite pièce ou portion de terre." And that the said parties had agreed upon the price to be paid for the said piece or portion of land, "et de la compensation "à être accordée à la dite partie de première part pour "dommages à elle résultant, par suite de l'expropria-"tion qu'elle subit."

And by the said deed the said François Simoneau, for the consideration therein expressed, conveyed the said piece of land to the said company for the purposes of the railway, and discharged the company from the damages mentioned.

It also appears that for five or six years after the construction of the railway there was no flooding of the lands in question; but that subsequently they were flooded, not in consequence of any defect or want of repair in the railway ditches or culverts, but because the boundary ditches referred to have not been kept open and in good order. Now it appears to me that it cannot fairly be said that what has happened could not have been foreseen, for it was obvious that the ditches on each side of the railway would collect water and discharge it in the manner mentioned. I am of the opinion, therefore, that the compensation to which the proprietor was entitled for having to maintain boundary ditches capable of discharging a larger volume of water than flowed through them before the construction of the railway was covered and discharged by the deed between the parties.

But apart from that, it is very clear that the mischief to which I have alluded had made itself manifest many years before the respondent purchased the railway

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from the said company; and that since such purchase nothing has been done or omitted on the crown's part to alter the position of the matter or to give rise to the claim put forward.

Reference is made in the report to the Act of the Parliament of Canada (43 Vic. c. 8) by which the agreement of July 17, 1879, between the crown and the said company for the purchase of the Rivière-du-Loup branch of the Grand Trunk Railway is confirmed. By the 9th clause of such agreement the crown undertook to indemnify the company against payments of all claims for taxes, land, land damages, and such like matters springing into existence for the first time after the date of the transfer of the road; and the company undertook to indemnify the crown against payment of all similar claims having an existence before the date of the transfer. The effect of this provision is not, however, to make the crown liable for the acts or omissions of the company.

For the reasons that I have mentioned, the recommendation in the report should, I think, be confirmed, and judgment be entered for the respondent with costs.

Appeal dismissed with costs.

Solicitor for claimant: *P. A. Choquette.*

Solicitors for respondent: *Casgrain, Angers & Lavery.*

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Nov. 28.

SÉRAPHIN MORIN.....CLAIMANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Government railway—Damage to farm from overflow of water—Obligation to maintain boundary ditches.

The crown is under no obligation to repair or keep open the boundary ditches between farms crossed by the Intercolonial Railway in the Province of Quebec.

THIS was a claim for damages for the flooding of certain farm land in the County of Montmagny, P.Q., alleged to have arisen from the improper maintenance of the ditches and water-courses of the Intercolonial Railway and the claimant's boundary ditches.

By consent of parties the case was determined upon the evidence taken in the case of *Simoneau* v. *The Queen* (1).

The facts of this case are substantially the same as in *Simoneau's Case*, with the exception of a certain clause in the deed of sale from the claimant's *auteur* to the Grand Trunk Railway Company, which is cited at length in the reasons for judgment (2).

October, 22nd, 1891.

Choquette, for the claimant, contended that the damage complained of was clearly one for which the crown was liable. In addition to the flooding of the claimant's farm, a crossing given him by the Grand Trunk Railway Company, the crown's grantors, has been made impassable at certain seasons by the quantity of water that covers it. (Cited Art. 1053, C.C.L.C.). He also

(1) *See* the facts of that case as stated by the learned judge in his reasons for judgment. *Ante p.* 392.

(2) *Post* p. 398.

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Argument of Counsel.

dealt with the question of prescription as set up by the defence, and cited Art. 2242 C.C.L.C.

Belcourt, following on the same side :

1st. The acquittance given to the Grand Trunk Railway Company did not cover the *gravamen* of this action. The general rule under which incidental, or prospective or contemplated, damages are presumed to have been taken into consideration in the compensation paid to the owner at the time of the expropriation is not applicable to cases arising in the Province of Quebec. (Cites *Cantin* v. *The North Shore Railway Co.* (1) ; *Corporation de Tingwick* v. *Grand Trunk Railway* (2) ; *Grand Trunk Railway* v. *Meegar* (3) ; *Grand Trunk Railway* v. *Miville* (4) ; *Grand Trunk Railway* v. *Landry* (5) ; *Canadian Pacific Railway* v. *Pichette* (6) ; *de Bellefeuille's Code Civil Annoté*) (7). It is the *lex loci* that governs in such cases as this. (Cites *Redfield on Railways* (8); *Story on Conflict of Laws*) (9). These damages could not have been contemplated, because for five or six years the railway ditches were sufficient to carry off the water. The mischief arose when the ditches were allowed to fill up.

2ndly. The crown is liable for the acts and omissions of its grantor. (Cites *de Bellefeuille's Code Civil Annoté* (10) ; *Leduc* v. *The City of Montreal*) (11).

3rdly. The crown had the right to go on claimant's lands and repair the ditches thereon or make new ones, and if this had been done the injury would have been removed.

4thly. As to respondent's contention that the claim is prescribed, it is submitted that the damage is con-

(1) Ram. App. Cas. 591.
(2) 3 Q. L. R. 111.
(3) 29 L.C. J. 214.
(4) 14 L. C. R. 469.
(5) 11 R. L. 590.
(6) 31 L. C. J. 36.
(7) Art. 1053, No. 104.
(8) Sec. 204, p. 303.
(9) Secs. 76 & 272.
(10) Art. 1053.
(11) 1 M. L. R. (S.C.) 300.

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tinuous, and, moreover, the crown has waived prescription by offering to make ditches some two years ago. (Cites *Grenier* v. *The City of Montreal* (1); *Renaud* v. *The City of Quebec* (2); *R.S.C. c.* 109, *s.* 27).

Argument of Counsel.

Hogg, Q. C. for the respondent: The consideration mentioned in the claimant's deed to the Grand Trunk Railway Company was in full of the damages claimed herein.

2ndly. The evidence in *Simoneau's Case* (3) shows that the crown has properly maintained the ditches on the railway.

Angers, Q C. followed for respondent:

Under the deed the crown is not bound to keep the water-courses in question in repair; and, moreover, it is therein expressly provided that the said water-courses shall be regulated by the provisions of the *Municipal Code of the Province of Quebec* (4).

BURBIDGE, J. now (November 28th, 1891) delivered judgment.

The claimant claims damages for the flooding of a portion of his farm adjoining the Intercolonial Railway in the County of Montmagny and Province of Quebec. The case does not differ from that of *Simoneau* v. *The Queen* (3) decided in this court in February, 1890, except in respect of the amount of damages claimed, and that the deed of sale, under which the right of way was originally acquired by the Grand Trunk Railway Company, contains the following clause which was not contained in the deed relied upon in *Simoneau's Case*:—

"Cette vente faite * * * à la charge par la dite "Compagnie de fournir au dit vendeur à travers le dit

(1) 3 L. N. 51.
(2) 8 Q.L.R. 102.
(3) *Ante* p. 391.
(4) Cites Arts. 867 & 871.

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" chemin, sur la dite terre, un passage convenable pour " communiquer d'une partie à l'autre de la dite terre " à son besoin et en toutes saisons et d'entretenir le " dit passage ainsi que tous les cours d'eau qui pour- " ront s'y rencontrer, et sera sujette à tous les règle- " ments municipaux, relativement à iceux."

By agreement between the parties, this case is, with the exception I have mentioned, to be determined by the evidence taken in *Simoneau's Case*. In that case I observed that the deed of sale did not contain any covenant on the part of the company to keep open and in good order the ditches and water-courses on each side of the railway track, and the culverts communicating from one side of the track to the other. But I made the observation incidentally and because the claimant appeared to rely upon there being some such express covenant in the deed. I took care, however, to preface my brief allusion to that aspect of the case by stating that the absence of such a covenant was not a consideration material to the determination of the case. I am of the same opinion still.

It is not, under the evidence upon which that case and this depend, necessary to determine whether or not the crown, or its officers, are under any duty or obligation to keep open the railway ditches and culverts, for neglect or breach of which the injured proprietor would have a remedy in this court. The railway authorities, whatever their exact legal position may be, accept that obligation and duty and say that since the portion of the Intercolonial Railway that crosses the claimant's farm came into the possession of the crown the railway ditches and culverts have been maintained in good order and condition. The flooding of the lands of the adjoining proprietors, that takes place there, is not occasioned by any defect or want of repair in the railway ditches or culverts, but happens

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because such proprietors have not kept their own ditches open and in good repair. That was the finding of the registrar of this court in *Simoneau's Case*, and he had the advantage not only of hearing the evidence but of viewing the *locus*, and seeing, with his own eyes, how the matter stood. I am satisfied as well that the conclusion to which he came is not only justified by the evidence, but the only conclusion that could be reasonably come to. For five or six years after the railway was constructed there was no flooding of the lands in question; but, subsequently, the proprietors having neglected their boundary ditches, the water that collected at the sides of the railway had no way of escape, and their lands were in consequence drowned. Mr. Choquette, for the claimant, said that he would be satisfied with a judgment that established the liability of the crown to keep open the ditches on each side of the railway, and to maintain sufficient culverts to drain the lands south of the railway. But it seems to me that the real controversy between the parties goes beyond that. What the proprietors really want is that the Minister of Railways shall keep their boundary ditches in order for them. That contention cannot, I think, be supported.

By the 68th section of the Imperial *Railway Clauses Act*, 1845, it was, among other things, enacted that the company should make, and at all time thereafter maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, all necessary arches, tunnels, culverts, drains or other passages, either over or under or by the sides of the railway, of such dimensions as would be sufficient at all times to carry the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as might be; and that such works should be made from time to time as the railway works proceeded.

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But while railway companies in Canada have power to make such works (1), they are not, as Mr. Justice Meredith pointed out in *The Grand Trunk Railway Co.* v. *Miville* (2), compelled by the statute to make them. No doubt if a railway company in Canada does not use or exercise its powers in such a way as to drain the lands through which its railway runs as effectually as they had been drained by the old water-courses before the construction of the railway, it must make compensation or pay damages (3). Where, as in *Simoneau's Case* (4) and this, the claimants' lands lie in a hollow and are crossed by a railway, the result must be that the railway ditches will collect water upon the adjacent slopes and discharge it upon such lands. It may happen, however, as in this case, that there will be no flooding or drowning of the lands so long as the proprietors keep their boundary ditches open. But more water will of necessity flow through such ditches than before the construction of the railway and so far as this is an injury to the proprietor, or throws upon him any additional burden, he is entitled to compensation. Such an injury is, however, one that may, it appears to me, be foreseen at the time the railway is constructed, and must, I think, be taken to be covered by an acquittance, such as was given in this case, of all damages resulting from such construction. But anyway that is a question which does not arise between the claimant and the crown. As I stated in *Simoneau's Case* (4), the mischief complained of had made itself manifest many years before the crown purchased from The Grand Trunk Railway Company the portion of the railway referred to, and since the purchase nothing has been done or

(1) *The Railway Act*, 51 Vic. c. 29, s. 90; *See* also *The Expropriation Act*, 52 Vic. c. 13, ss. 3 & 4.

(2) 14 L.C. R. 480.

(3) *The Grand Trunk Railway Co.* v. *Miville*, 14 L.C.R. 469; and *The Canadian Pacific Railway Co.* v. *Pichette*, 31 L. C. J. 36.

(4) *Ante*, p. 391.

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omitted on the crown's part to alter the position of the matter or to give rise to the claim put forward.

The railway ditches and culverts have been kept in good order and repair, and the crown not being bound to repair the boundary ditches between the properties adjoining the railway, the claimant's case fails.

Judgment for respondent with costs.

Solicitor for claimant: *P. A. Choquette.*

Solicitors for respondent: *O'Connor, Hogg and Balderson.*

GERSHON S. MAYES.....SUPPLIANT; 1891

Nov. 28.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Contract for construction of a public work—Delay in exercising crown's right to inspect materials—Independent promise by crown's servant, effect of—The Government Railways Act, 1881.

It was a term in suppliant's contract with the crown for the construction of a public work that certain timber required in such construction should be treated in a special manner, to the satisfaction of the proper officer in that behalf of the Department of Railways and Canals. By another term of the contract it was declared that the express covenants and agreements contained therein should be the only ones upon which any rights against the crown should be founded by the suppliant.

The suppliant, immediately after entering upon the execution of his contract, notified A., the proper officer of the Department in that behalf, that he intended to procure the timber at a certain place and have it treated there in the manner specified, before shipment. A. approved of the suppliant's proposal, and promised to appoint a suitable person to inspect the timber at such place. The inspector was not appointed until a considerable time afterwards, and by reason of such delay the suppliant had to pay a higher rate of freight on the timber than he otherwise would have had to pay, and was compelled to carry on his work in more unfavorable weather and at greater cost, for which he claimed damages.

Held, on demurrer to the petition, that the crown was not bound under the contract to have the inspection made at any particular place; and that in view of the 98th section of *The Government Railways Act*, 1881, and the express terms of the contract, A. had no power to vary or add to its terms, or to bind the crown by any new promise.

2. The suppliant's contract contained the following clause:—"The "contractor shall not have or make any claim or demand, or bring "any action, or suit, or petition against Her Majesty for any dam- "age which he may sustain by reason of any delay in the progress "of the work *arising from the acts of any of Her Majesty's agents*; "and it is agreed that, in the event of any such delay, the contrac-

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"tor shall have such further time for the completion of the work "as may be fixed in that behalf by the Minister."

Held, that this clause covered delay by the Government's engineer in causing an inspection to be made of certain material whereby the suppliant suffered loss.

Statement of Facts.

DEMURRER to a petition of right for damages arising out of a contract between the crown and the suppliant for the construction of a pile trestle bridge on the Intercolonial Railway, between Brown's Point and Loch Broom Point, in the County of Pictou, N.S.

The facts of the case as admitted by the demurrer are stated in the reasons for judgment.

The full text of the clauses of the contract referred to in the reasons for judgment is as follows:—

Clause 8. "The engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute, with regard to work or material, as to the meaning or intention of this contract, and the plans, specifications and drawings shall be final; and no work, or extra or additional work, or changes, shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor."

Clause 10. "In case any material, or other things, in the opinion of the engineer, not in accordance with the said several parts of this contract, or not sufficiently sound, or otherwise unsuitable for the work, be used for or brought to the intended work, or any part thereof, or in case any work be improperly executed, the engineer may require the contractor to remove the same, and to provide proper material or other things, or properly re-execute

the work, as the case may be, and thereupon the contractor shall and will immediately comply with the said requisition, and if twenty-four hours shall elapse and such requisition shall not have been complied with, the engineer may cause such material or other things, or such work, to be removed, and in any such case the contractor shall pay to Her Majesty all such damages and expense as shall be incurred in the removal of such materials, or other things, or of such work; or Her Majesty may, in Her discretion, retain and deduct such damages and expenses from any amounts payable to the contractor."

use 15. "The contractor shall not have or make any claim or demand, or bring any action, or suit or petition against Her Majesty for any damage which he may sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; and it is agreed that in the event of any such delay the contractor shall have such further time for the completion of the work as may be fixed in that behalf by the Minister."

Clause 32. "It is distinctly declared that no implied contract of any kind whatsoever, by or on behalf of Her Majesty, shall arise or be implied from anything in this contract contained, or from any position or situation of the parties at any time, it being clearly understood and agreed that the express contracts, covenants and agreements herein contained and made by Her Majesty, are and shall be the only contracts, covenants, and agreements upon which any rights against Her are to be founded."

Clause 35. "It is distinctly declared and agreed that none of Her Majesty's Ministers, officers, engineers, agents or servants, have or shall have power or

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authority in any way whatever to waive, on the part of Her Majesty, any of the clauses or conditions of this contract, it being clearly understood that any change in the terms of this contract to be binding upon Her Majesty must be sanctioned by order of the Governor-General in Council."

The following is the full text of clause 8 of the specifications referred to in the reasons for judgment:

(8). " The piles in one length, and square upper parts of spliced piles, including the upper cleat in the splice, as shewn, must contain not less than 16 lbs. per cubic foot of the best dead oil of coal tar creosote, injected under a pressure of from 120 to 160 lbs. per square inch. All piling intended to be creosoted must be heated through with the temperature between 212 and 250 degrees, Fahrenheit, have all the air and moisture exhausted, and in that condition receive the creosote."

" The whole of the work of creosoting must be done in the most approved manner, and to the satisfaction of the engineer, or inspector, who shall have full power to reject any creosote, or creosoted timber, whether before or after treatment."

August 20th, 1891.

It was ordered, by consent, that instead of the argument on demurrer being made orally, counsel might submit their contentions to the court in writing.

Ritchie, in support of demurrer, submitted, *inter alia*, the following:—

1. The crown was not bound to send an inspector to South Carolina. (See clauses 8 and 10 of contract) (1).

2. No implied contract to make the inspection at South Carolina can arise under the express provisions of the written contract. (See clause 32 of contract) (2).

(1) *Ante* p. 404. (2) *Ante* p. 405.

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3. Suppliant relies upon an agreement of the engineer to have the inspection made there. It is objected to this :—

(*a*). That such agreement is without consideration.

(*b*). That the engineer had no power to alter the contract, or to bind the crown to send an inspector to South Carolina. (See clause 35 of contract) (1).

4. Suppliant's claim is by reason of delay by the engineer, and such delay, under the terms of the contract, can give rise to no claim. (See clause 15 of contract) (2). Cites *O'Brien* v. *The Queen*, (3) ; *Jones* v. *The Queen* (4).

Pugsley, Q.C., (Solicitor-General, N.B.), *contra*, submitted, *inter alia*, the following :—

1. In answer to the first point taken, that the crown was not bound to send an inspector to South Carolina, it is alleged in the petition of right that the creosoting had to be done in the United States, there being no place in Canada where it could be done. This is admitted by the demurrer.

As the creosote and the creosoting had to be to the satisfaction of the Government engineer or inspector, he had the right, under the contract, to say that the creosoting should not be done until he had inspected the timber and the creosote, and to have an inspector present when the work was being done. It was, therefore, necessarily a part of the contract that the engineer should appoint a time and place of inspection. It is admitted by the demurrer that he appointed Charleston, S. C., the place named by the suppliant, and agreed to send an inspector as alleged in the petition. The crown, through its engineer, having agreed to send an inspector to Charleston, was clearly under obligation to do so, as the suppliant could not begin the work of creosoting until the inspector was present.

(1) *Ante* p. 405.
(2) *Ante* p. 405.
(3) 4 Can. S. R. 529.
(4) 7 Can. S. C. R. 570.

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It is provided by clause 8 of the specifications (1) that all the creosoted square timber for the upper part of the piles were to be of North Carolina yellow pine; it surely never was contemplated that the timber should be brought to Nova Scotia, then inspected, and taken back to the United States to be creosoted. By this clause, too, it was provided that the process of creosoting was to be done to the satisfaction of the engineer, thus clearly showing that it was contemplated that he would be present while the work of creosoting was going on.

2. The suppliant does not rely upon an implied contract in this behalf, but upon the express promise of the crown through its engineer; and this promise was made under and in accordance with the contract, and is essential to its execution by the suppliant.

3. In answer to the objection that the agreement of the engineer to have the timber inspected in South Carolina was without consideration, it is submitted: 1st, that it is not necessary to have any consideration independent of the contract which provided for the inspection; 2ndly, if any new consideration were necessary, the fact that the suppliant was, by the contract, obliged to delay the work of creosoting until the inspector was present, would afford a sufficient consideration.

In answer to objection (*b*), that the engineer had no power to alter the contract, or to bind the crown to send an inspector to South Carolina, it is submitted that this was not an alteration of the contract. If by an agreement to perform any work it would be reasonable that the party for whom the work is to be performed should inspect it, then anything that arises between the parties in connection with inspection arises out of the contract, and not *dehors* the contract.

(1) *See Ante* p. 406.

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In the present case it was not only reasonable that the inspection should take place, but it was expressly provided by the contract that such inspection should be had. As the crown intrusted the inspection to the engineer, he was acting within the scope of his authority in appointing Charleston as the place of inspection, and the crown is bound by his act in this particular.

4. Clause 15 (1) of the contract does not apply to this case. It was only intended to include cases where the extension of time for completion of the work would afford compensation for the delay caused by acts of *agents* of the crown. It would apply to unavoidable acts of the crown's agents, but not to wilful or intentional acts. The delay herein complained of did not arise from acts of the crown's agents, but from the crown's *engineer* not having attended to the work as he was bound to do. The delay here has caused a loss in respect of which no extension of time would afford relief, because the damages arise in connection with the charter of vessels to carry freight.

Ritchie in reply :

Assuming that the contract contemplated that the inspection of the creosoting was to be done in the United States, this does not bind the crown to inspect there. The right of inspection is a privilege given to the crown, not something which the crown contracts to do.

BURBIDGE, J. now (November 28th, 1891,) delivered judgment.

About the 5th May, 1886, the suppliant entered into a contract with the crown, bearing date the 20th of April, preceding, for the construction, for the sum of $32,900, of a pile trestle bridge between Brown's Point and Loch Broom Point, in the County of Pictou

(1) *Ante* p. 405.

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and Province of Nova Scotia, the work to be completed by the 31st of October following. Part of the structure was to consist of piles of North Carolina yellow pine timber, which were to be of the quality and dimensions mentioned in the specification, and were to be treated with creosote in the manner therein set out. Such piles were to contain not less than 16 lbs. per cubic foot of the best dead oil of coal tar creosote injected under a pressure of from 120 to 160 lbs. per square inch, and were to be heated through with the temperature between 212 and 250 degrees, Fahrenheit, have all the air and moisture exhausted, and in that condition receive the creosote. The whole of the work of creosoting was to be done in the most approved manner, and to the satisfaction of the engineer or inspector, who had full power to reject any creosote or creosoted timber either before or after treatment. By the contract the word engineer was defined to mean the Chief Engineer and General Manager of Government Railways, and to include any of his assistants acting under his instructions, and it was provided that the engineer should be the sole judge of work and material in respect of both quantity and quality, and that his decision in regard thereto should be final. At the time when the contract was entered into, Mr. P. S. Archibald was the Chief Engineer of the Intercolonial Railway, and (I am stating the facts as admitted by the demurrer to the suppliant's petition) the engineer to whose satisfaction such creosoting had to be done. There was no place in Canada where timber could be treated with creosote. The suppliant immediately after entering upon the work which, under his contract, he had to perform, notified Mr. Archibald that he was about to procure the North Carolina yellow pine timber at Charleston, South Carolina, and to have the same creosoted there. Mr. Archibald approved, and

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promised to appoint a suitable person to inspect the creosoting and all matters connected therewith at that place. In a letter of 28th April, 1886, he suggested to the suppliant the advisability of the latter communicating with a specialist in creosoting, whom he named, stating that there had been a number of failures of creosoted piles in the South attributable to the use of imported dead oil. He added that he would go himself, or send some one, to ascertain exactly what kind of oil they used where the suppliant proposed to buy his timber, and that the latter better not make any definite arrangement without "their" approval, as he would run the risk of having the timber condemned if not in accordance with the specification. On the 1st of May, 1886, Mr. Archibald wrote the suppliant, that "in "order to forward the work he would probably "send his assistant, Mr. McKenzie, down to in- "spect the piles and creosoting process in the "course of two or three weeks." This was not done, and although the suppliant continued his efforts to get an inspector appointed, no such appointment was made until about the 5th of July. By reason of this delay the suppliant was compelled to pay a higher rate of freight on the timber than he otherwise would have had to pay, and the timber was not delivered at Pictou until the 29th of September; whereas, if the inspection had been promptly made, it could have been put down there by the 30th of July. In consequence, he had to carry on his work in more unfavorable weather, and at a greater cost, than if the piles had been delivered at Pictou at the earlier date. For the loss thereby occasioned, and for the increased rate of freight he was compelled by reason of such delay to pay, he brings his petition of right.

Briefly stated, the suppliant's case is that the crown was bound, upon being notified that the timber would

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be subjected to the process of creosoting at Charleston, in South Carolina, to appoint without undue delay a person to inspect the same and such process at that place; and that there was undue delay in making such appointment, resulting in a loss to the suppliant, for which he is entitled to damages. To this the crown demurs on the grounds (among others which I shall not have occasion to consider): (1). That the petition does not disclose any such obligation: and (2). That if it were assumed that it did, the suppliant has, by his contract, agreed that such delay should not give him any right of action for any damages resulting therefrom.

Whatever answer may be given to the inquiry as to the crown's obligation to name a person to inspect the timber and the process of subjecting the same to creosote at Charleston, the second objection is, it appears to me, and for reasons that I shall have occasion briefly to notice, conclusive against the suppliant's claim to maintain his petition.

I shall proceed, however, in the first place, to examine the contention that the crown was under the obligation referred to, not because such an examination is, in the view I take of the case, necessary for its determination, but for the reason that it will, I think, assist somewhat to a just appreciation of the position of the parties. By the 32nd clause of the contract set out in the petition, it was declared and agreed that no implied contract of any kind whatsoever, by or on behalf of Her Majesty, should arise or be implied from any thing contained in the contract, or from any position or situation of the parties at the time, and that the express contracts, covenants and agreements contained in the contract should be the only ones upon which any rights against Her Majesty were to be founded. By the 8th clause of the contract

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it was agreed, as has been seen, that the engineer should be the sole judge of work and material, and that his decision on all questions in dispute should be final; and by the 10th clause, that in case any material which, in his opinion, was not in accordance with the contract, or not sufficiently sound, or otherwise unsuitable for the work, was used for, or brought to, the intended work, or in case any work was improperly executed, he might require the contractor to remove the same and to provide proper material, or to properly execute such work, as the case might be. By the 8th clause of the specification it was provided, as already stated, that the whole of the work of creosoting was to be done in the most approved manner, and to the satisfaction of the engineer or inspector, who should have full power to reject any creosote or creosoted timber, whether before or after treatment.

The suppliant argues, and I think with reason, at least so far as the process of creosoting was concerned, that this gave the crown a right to an inspection of the timber, of the creosote, and of the work or process of creosoting, at the place where such process was carried on. Involved in that right, he adds, is the reciprocal obligation to appoint a person to make such inspection there. But does that follow ? The suppliant was free to buy the North Carolina yellow pine where he pleased and to prepare it where he saw fit. He was bound, I think, to give the crown an opportunity of examining the creosote intended to be used, and, probably, of inspecting the timber before treatment and the process of treatment. This of course could not under the circumstances have been done elsewhere than at Charleston. But, on the other hand, there is nothing in the contract expressly binding the crown to inspect the creosote or the process of creosoting the timber. The inspection provided for was, as Mr. Ritchie contends,

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for its benefit, not something that the crown contracted to do. It was no doubt the duty of the engineer to see that the inspection was made, but that, primarily, at least, was a duty that he owed to the crown.

The suppliant having made arrangements for the purchase of the timber, and its treatment with creosote, at Charleston, was, it seems to me, in this position, that it was his duty to give the engineer notice of what he had done, and to afford him a fair opportunity of making any inspection at Charleston that he saw fit to make there. But the suppliant, however prudent it may have been to take such a course, was not, I think, bound to submit to any undue or unreasonable delay on the engineer's part. Having afforded the engineer the opportunity spoken of, it was open to him to satisfy himself that his timber was of the dimensions and quality specified in the contract, and that it was prepared in accordance with its provisions, and to proceed with his shipments. It may be that any inspection that the engineer could have made when the timber had been delivered at Pictou, where it was to be used, would, in respect of the process of creosoting, have been more or less imperfect; and that he would have had to rely in a measure upon the evidence supplied to him by the contractor that the specification had in that particular been complied with. But that was the crown's affair, not the contractor's. The real difficulty, as appears from the petition, no doubt was that the persons who were to prepare the timber would not deliver it to the suppliant until it was inspected, unless his acceptance was taken to be an admission that they had fulfilled their contract with him. The risk involved in taking delivery of the timber under such terms, and before it had been passed by the Government inspector, was one that naturally enough he wished to avoid. But unless the crown was bound to have the inspection

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made at the place where the timber was subjected to the process of creosoting, it was a risk from which, under certain circumstances, he could not escape No doubt it was fair and business-like for the inspection to be made at Charleston, and the engineer was, it appears to me, acting reasonably and within the line of his duties in arranging for such inspection to take place there; but that is not the issue. The question is, was the crown under any obligation to appoint some one to make the inspection at Charleston? and I fail to find in the contract any such undertaking on its part.

The suppliant relies, however, on Mr. Archibald's promise. To this contention the respondent answers that by law and the contract Mr. Archibald had no power to vary or add to its terms, or to bind the crown by any new promise. By the 98th section of *The Government Railways Act*, 1881 (44 Vic. c. 25), in force in 1886, he could make no contract binding upon the crown, unless specially authorized in writing by the Minister of Railways; and in respect to the work in question the Minister could not give any such authority, for the reason that by the 35th clause of the contract it was distinctly declared and agreed that none of Her Majesty's Ministers, officers, engineers, agents or servants had or should have any power or authority in any way whatever to waive on the part of Her Majesty any of the clauses or conditions of the contract, it being clearly understood that any change in the terms thereof, to be binding upon Her Majesty, must be sanctioned by order of the Governor-General in Council. The answer appears to me to be conclusive.

The second ground of demurrer to which I have referred is based upon the 15th clause of the contract, by which it was agreed that the suppliant should not have or make any claim or demand, or bring any action, or suit, or petition against Her Majesty for any damage

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which he might sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; and that in the event of any such delay he should have such further time for the completion of the work as might be fixed in that behalf by the Minister. The suppliant does not complain that he has not been allowed an extension of time in which to complete the contract. His contention is that clause 15 does not apply to this case; that it was only intended to include cases where the extension of time for the completion of the work would afford compensation for the delay caused by acts of the agents of Her Majesty, and would not cover a case like the present, where the damages arise in connection with the charter of vessels to carry materials, in respect of which no extension of time would afford relief; and, anyway, that it does not apply to a delay such as that for which it is alleged Mr. Archibald was responsible. With that view I cannot agree. The language of the clause is plain and free from ambiguity, and I see no reason to doubt that it applies to the case under consideration. Whether the extension of time provided for would in any given case afford adequate relief is not material to the enquiry. The question is, has the suppliant agreed to accept it as the only relief to which he is entitled, and thereby barred himself from prosecuting his petition? That question must, I think, be answered in the affirmative.

There will be judgment for the crown on the demurrer to the petition of right, and with costs.

Demurrer allowed with costs.

Solicitor for suppliant: *C. N. Skinner.*

Solicitor for respondent: *Wallace Graham.*

SMITH AND PATTERSON.....CLAIMANTS; 1891

AND Dec. 9.

HER MAJESTY THE QUEEN.....RESPONDENT.

Customs duties—The Customs Act, R.S.C., c. 32, ss. 58, 59, 65; 51 Vic. c. 14, s. 15—52 Vic. c. 14, s. 6—Market value—Value for duty—Misrepresentation—Costs.

The rule for determining the value for duty of goods imported into Canada, prescribed by the 58th and 59th sections of *The Customs Act* (R.S.C., c. 32), is not one that can be universally applied.

When the goods imported have no market value in the usual and ordinary commercial acceptation of the term in the country of their production or manufacture, or where they have no such value for home consumption, their value for duty may be determined by reference to the fair market value for home consumption of like goods sold under like conditions.

The *Vacuum Oil Company* v. *The Queen* (2 Ex. C. R. 234) referred to.

2. The goods in question in this case were part of a job lot of discontinued watch cases, and at the time of their sale for export were not being bought and sold in the markets of the United States. They could be purchased for sale or use there, but only at published prices which were greater than anyone would pay for them.

The claimants bought the goods for export at their fair value, being about half such published prices. They let their agent in Canada know the prices paid, but withheld from him the fact that the purchase was made on the condition that the goods were to be exported. The agent, without intending to deceive the Customs appraiser, represented that the prices paid were those at which the goods could be had in the United States when purchased for home consumption. The representation was untrue. On the question of the alleged undervaluation the court found for the claimants, but, because of such misrepresentation, without costs.

CLAIM arising out of the seizure of certain goods at the port of Montreal for an alleged violation of the Customs laws.

The matter came before the court on a reference by the Minister of Customs under *The Customs Act* (R.S.C.

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c. 32, sections 182 and 183, as amended by 51 Vic. c. 14, s. 34). No pleadings were ordered by the learned judge.

The question submitted for trial under the reference was whether certain watch cases, which had been imported by the claimants from the United States, had been properly valued for duty.

The facts of the case appearing upon the evidence are sufficiently stated in the reasons for judgment (1).

(1) The following are the provisions of the Customs Acts referred to by the learned judge in his reasons for judgment.

R. S. C. c. 32, sec. 58. 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.

Sec. 59. Such market value shall be the fair market value of such goods in the usual and ordinary commercial acceptation of the term, at the usual and ordinary credit, and not the cash value of such goods, except in cases in which the article imported is, by universal usage, considered and known to be a cash article, and so *bonâ fide* paid for in all transactions in relation to such article; and all invoices representing cash values, except in the special cases herein referred to, shall be subject to such additions as to the collector or appraiser of the port at which they are presented appear just and reasonable, to bring up the amount to the true and fair market value, as required by this section.

52 Vic. c. 14, sec. 6. The fair market value of goods shall be taken to include the amount of any draw-back which has been allowed by the Government of any other country, also the amount of consideration or money value of any special arrangement between the exporter and the importer or between any persons interested therein because of the exportation or intended exportation of such goods, or the right to territorial limits for the sale or use thereof, and also the amount or money value of any so-called royalty, rent, or charge for use of any machine or goods of any description, which the seller or proprietor does or would usually charge thereon when the same are sold or leased or rented for use in the country whence they have been exported to Canada. When the amount of such draw-back, consideration, money value, royalty, rent, or charge for use has been deducted from the value of such goods, on the face of the invoice under which entry is to be made, or is not shown thereon, the Collector of Customs or proper officer shall add the amount of such deduction, draw-back, consideration, money value, royalty, rent or charge for use, and cause to be paid the lawful duty thereon.

R.S.C. c. 32, sec. 65. No deduction of ony kind shall be allowed from the value of any goods im-

November 10th, 1891.

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Greenshields, Q.C. and *R. C. A. Greenshields* for claimants;

Osler, Q.C. and *Hogg*, Q.C. for the respondent.

BURBIDGE, J. now (December 9th, 1891) delivered judgment.

This matter comes before the court on a reference by the Minister of Customs under sections 182 and 183 of *The Customs Act*, the claimants having declined to accept his decision maintaining a seizure made, at the port of Montreal, of 1149 open face and 670 hunting cyclone rolled plate watch cases for undervaluation and misrepresentation. The claimants, who are wholesale dealers in watches and jewelry, have their principal place of business at Boston, in the United States,

ported into Canada, because of any draw-back paid or to be paid thereon, or because of any special arrangement between the seller and purchaser having reference to the exportation of such goods, or the exclusive right to territorial limits for the sale thereof, or because of any royalty payable upon patent rights but not payable when goods are purchased for exportation, or on account of any other consideration by which a special reduction in price might or could be obtained: Provided, that nothing herein shall be understood to apply to general fluctuations of market values.

51 Vic. c. 14, sec. 15. Whenever goods are imported into Canada under such circumstances or conditions as to render it difficult to determine the value thereof for duty, either because such goods are not sold for use or consumption in the country of production,—or because a lease of such goods or the right of using the same is sold or given, but not the right of property therein,—or because such goods having a royalty imposed thereon, the royalty is uncertain or is not, from other causes, a reliable means of estimating the value of the goods,—or because such goods are usually or exclusively sold by or to agents or by subscription, or are sold or imported in or under any other unusual or peculiar manner or conditions,—of all which matters the Minister of Customs shall be sole judge,—the Minister of Customs may determine the value for duty of such goods; and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

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and a branch house at Montreal. The watch cases mentioned formed part of a job lot that the claimants had purchased from the Keystone Watch Case Company, of Philadelphia, for export to Canada. For two or three years prior to 1890 the Keystone Watch Case Company had been manufacturing watch cases that bore its trade-mark, and were known as cyclone rolled plate watch cases. The company was a member of the American Watch Case Manufacturers' Association, the object of which was to sustain uniform discounts on the goods manufactured by the members of the association, and, generally, to further the interests of the watch case business. As a member of such association, the company was free to establish such list prices as it deemed best in its own interest for any case made by it, subject to a uniform discount prescribed by the rules of the association; but it was bound to send a copy of such price lists to the secretary and each member of the association, and if it discontinued the manufacture of any case, to give notice to all members of the National Association of jobbers in American watches, and to distribute such cases, *pro rata* as near as practicable, among such members of the latter association as might desire such goods. In November, or December, 1890, the Keystone Watch Case Company entered into an agreement with the Crescent Watch Case Company and Joseph Fahys & Company, whereby the three companies agreed, for one year, not to sell any discontinued watch cases in the markets of the United States.

Some time prior to the autumn of 1890, a competitor of the Keystone Watch Case Company put on the market a better looking case than the Cyclone case, and the sale of the latter dropped off. Then the company brought out a new case under the old name with a new style of chasing or ornamentation. There was

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no difference in the intrinsic values of the old case and the new, and both were listed at the same prices, namely, $4.50 for the open face case, and $5.00 for the hunting case. This, it may be added, was about twice their real value. The new case caught the eye of the trade, and after January, 1891, when it was put on the market, there was no sale of the old cases. They had gone out of fashion, and jobbers who had them in stock returned them, and the company gave credit therefor. At the time the company had on hand from 3,000 to 5,000 old cases. So far as concerned the more public restraints upon their liberty to sell created by the rules of the association, the company might have reduced the price of the old cases, giving the requisite notice, and have sold them in the markets of the United States ; and there can be no doubt, I think, that under such circumstances the company would not have been able to get a better price for them than that paid by the claimants. But by the private arrangement with the Crescent Watch Case Company and Joseph Fahys & Company, to which reference has been made, the Keystone Watch Case Company was prevented from adopting that course during the year 1891, and it was compelled either to hold the old Cyclone cases in stock, to sell them for export, or to melt them down. No one would buy them at the published prices, and they could not be sold for less in the United States markets.

The Canadian market, it appears, is not so quickly affected by a change in style or fashion as the United States market; and the claimants thought these old Cyclone watch cases would be more salable in Canada than in the United States, and that something was to be made by exporting them to Canada. Mr. Patterson, one of the claimants, in giving his evidence expressed that view in the following terms :

" The Canadian buyers don't catch on to the new

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" styles so quick, and we thought we could market " them and make a few cents out of them before " they found that there was a newer and hand- " somer and better case on the market."

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Accordingly, the claimants in January, 1891, purchased a quantity of the old Cyclone watch cases, paying $2.52 each for the hunting case, and $2.67 for the open face case, and shipped them to Montreal to Mr. Abbott, who was the manager of the branch house there. The claimants knew that at the time these cases could not be purchased for sale in the United States except at the list prices, and it was part of their bargain with the Keystone Watch Case Company that the cases should be exported. These facts, however, they did not communicate to Abbott. They confined their communications to him to letting him know that the cases were part of a job lot, and that the prices mentioned were the actual prices paid for the cases; and they instructed him to see Mr. Ambrose, a Dominion Appraiser at the port of Montreal, and ascertain if he would pass the entry at such prices. Abbott saw Ambrose and submitted a sample of the goods, letting the latter know the price that had been paid and that the importation was part only of a job lot. Ambrose, at the time, knew the list of prices, and he made enquiries and found out that the manufacture of the cases had been discontinued, and satisfied himself that under the circumstances the prices paid, and at which Abbott proposed to enter the cases, represented the fair market value of the goods when sold as a job lot. After completing his enquiries, Ambrose told Abbott that he would pass the cases at the prices mentioned if the whole lot were entered at the same time. Abbott, as has been seen, did not know that the claimants had purchased the cases on the condition that they were

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to be exported, and that they could not be purchased at the same prices for sale in the United States. His principals had not seen fit to let him know the true facts of the case, and so it happened that, without intending to deceive Ambrose, he gave the latter to understand that the cases could be bought from the manufacturers for home consumption at the prices paid for them by the claimants. That representation he would have had to repeat in a more formal manner if, with his entry, he had been required to make the oath usually exacted from the importer or his agent; but which, in this case, so far as I can ascertain from the copies of the entry papers put in evidence, was dispensed with.

The claimants, complying with the demands of the appraiser, completed their arrangements for the purchase of an additional number of the cases, and shipped them to Montreal, where, on March 2nd, 1891, the whole number purchased were entered and passed at the Custom House at the prices agreed upon between Abbott and Ambrose. On the 1st of April, the cases, except some 200 that had in the meantime been sold, were seized by a special officer of the Customs for undervaluation and because of the misrepresentations made by the importer to the Customs Appraiser. Mr. Parmalee, the Assistant Commissioner of Customs, upon the enquiry reported to the Minister of Customs that the goods had been undervalued, and that the importers had secured their entry at such undervaluation by misrepresentation of the facts of the case; and he recommended that the seizure be maintained unless the claimants should pay a sum of $3,785.80, which represented the amount of the undervaluation and the duty thereon. The Minister took the same view of the case as Mr. Parmalee, and confirmed his report.

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The principal question to be determined is the value for duty of the watch cases in question.

For the crown, it was contended that the published prices disclosed the true value for duty. By sections 58 and 59 of *The Customs Act* such value is declared to be the fair market value, in the usual and ordinary acceptation of the term, at the usual and ordinary credit of such goods 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. Until January, 1891, the Cyclone watch cases of the old style were bought and sold at the published or list prices for consumption in the United States markets. Such prices, without doubt, at that time represented the value for duty. The manufacturers never took any steps to reduce the price, and subsequently there were no sales for home consumption; and it is contended that there is nothing to show that the goods ever lost the market value that they admittedly had acquired.

Reliance is also placed upon the 64th and 65th sections of *The Customs Act*. By the 64th section it is enacted that the fair market value of goods shall be taken to include, among other things, the amount of consideration or money value of any special arrangement between the exporter and the importer, or between any persons interested therein, because of the exportation or intended exportation of such goods; and by the 65th, no deduction of any kind shall be allowed from the value of any goods imported into Canada because of any special arrangements between the seller and purchaser, having reference to the exportation of such goods. But I do not see that sections 64 and 65 add anything in this respect to the requirements of sections 58 and 59. If on the one hand the market value for home consumption of the watch cases was represented by the pub-

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lished prices, the latter indicate the value for duty whether there was any agreement for export or not ; and, on the other, if the prices paid by the claimants represented the true value for duty, there cannot be said to have been any deduction from such value depending upon the proposed exportation. And that brings us back to the question under consideration, as to whether or not the value of the cases for duty was to be determined by list prices continued by the manufacturers without any thought or expectation of finding a purchaser at such prices, and at which, in fact, no one would think of buying them for any purpose.

It is obvious that the rule for determining the value for duty of goods imported into Canada, prescribed by the 58th and 59th sections of *The Customs Act*, is not one that can be universally applied. An article may have no market value in the usual or any acceptation of the term ; or it may be produced or manufactured for export only, and, there being no home consumption, it can, it is clear, have no market value for home consumption. The latter difficulty is recognized by the 2nd sub-section of the 65th section of the Act in 51 Vic. c. 14, s. 15, where it is provided that whenever goods are imported into Canada under such circumstances or conditions as to render it difficult to determine the value thereof for duty, either because such goods are not sold for use or consumption in the country of production, or for any one of a number of other reasons therein enumerated, the Minister of Customs, who is to be the sole judge of all such matters, may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied. Perhaps I should stop to add here that the powers entrusted to the Minister by this provision were not invoked or exercised in this case,

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which, as has been noticed, comes before the court under sections 182 and 183 of the Act, under which the court is to "decide according to the right of the "matter."

The weak point in the argument for the crown, it appears to me, is that after the new cyclone cases were brought out there was in the United States no consumption of, and no market for, the old cyclone cases; and it is not possible to find or say that they had a market value for home consumption in the principal markets of the United States.

There can, I think, be no reason to doubt that if the Keystone Watch Case Company had been free to offer the cases in question for sale in the United States for consumption there, the prices paid by the claimants would have represented the fair value as well as the fair market value thereof. Such prices, it appears from the evidence, represented also the market value of like goods sold under like conditions for use in the United States; and that is a test which, in *The Vacuum Oil Company* v. *The Queen* (1), I thought might be applied in certain cases in which there were no actual sales by which the question could be determined.

Applying these tests, which in a case of this kind are, I think, safer and better than the test afforded by published prices, which, under the circumstances, meant nothing, and at which no one would think of buying or selling, it appears to me that there was no undervaluation of the watch cases, the subject of the seizure now in question.

With reference to the representation made by Abbott to Ambrose that the cases could be purchased for sale in the United States at the prices at which it was proposed to enter them for duty, I did not understand counsel for the crown to contend that they were liable

(1) 2 Ex. C. R. 242.

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to forfeiture because the representation was untrue. The misrepresentation was proved, but, I inferred, for the purpose of showing that no undue importance should be attached to Ambrose's valuation. Not having been made knowingly or wilfully, and as a part of the entry, the misrepresentation, whatever other effect it might have, cannot have the effect of a wilfully false statement, such as the provisions of sections 47 and 204 of the Act are directed against. I think, however, that the untrue statement made to Ambrose was one of the principal reasons, and constituted "probable cause," for the seizure in this case. The claimants knew the truth and withheld it from their agent. If it had been disclosed, an opportunity might have been afforded the Minister of Customs to determine the value of the cases for duty under the 2nd sub-section of the 65th section of the Act, to which reference has been made. They took the risk of not disclosing all the facts and now, it appears to me, have no great reason to complain that the agent's misrepresentation was followed by the seizure.

Under the circumstances there will be judgment for the claimants without costs.

Judgment for claimants without costs.

Solicitors for claimants: *Greenshields & Greenshields.*

Solicitors for respondent: *O'Connor & Hogg.*

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Sept. 24.

MARY MATILDA OTLEY LYON FELLOWES..... } APPELLANT;

AND

HER MAJESTY THE QUEEN..... .....RESPONDENT.

Appeal from award of Official Arbitrators—Expropriation of land for Experimental Farm—Grounds upon which court will not interfere with award.

Where the Official Arbitrators in making their award have not proceeded upon a wrong principle, nor arrived at an estimate of value not warranted by the evidence, the court ought not to disturb such award. *Re Macklem and Niagara Falls Park* (14 Ont. App. 20), and *Re Bush* (14 Ont. App. 73) followed.

APPEAL from an award of the Official Arbitrators. The facts of the case are sufficiently stated in the judgment.

May 28th, 1888.

Scott, Q.C. and *Wylde* for the appellant;

Christie, Q.C. and *Ferguson* for the respondent.

BURBIDGE, J. now (September 24th, 1888) delivered judgment.

This is an appeal from an award made by Messieurs Muma, Simard and Compton, on January 20th, 1887, allowing the claimant $10,839 with interest from the date of the expropriation for $89\frac{35}{100}$ acres of land situated in the township of Nepean, near the city of Ottawa, and expropriated for the purposes of the Central Experimental Farm. From this award Mr. Cowan, chairman of the board, dissented; but whether on the ground of the amount awarded being in his opinion insufficient or excessive, does not appear.

The amount of the award has, it appears, been paid into the Chancery Division of the High Court of Justice

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for Ontario for distribution; and the only question to be decided is as to whether or not the appeal should be allowed, either because the Arbitrators in assessing the value of the property proceeded upon a wrong principle, or made an estimate not warranted by the evidence. If these lands had, at the date of expropriation, been valuable for farming purposes only, no great difficulty would, I think, have been experienced under the evidence in arriving at a just conclusion as to their value. But it is clear that their proximity to the city, and their situation, gave them an additional value because of the probability of their being, at some time, salable in villa or building lots; and in examining the evidence one will find, I think, that the estimates of value given by the witnesses called were high or low according to their views of the probability of the city of Ottawa, in the near future, extending in the direction of this property, so as to render its sale in small lots probable.

Mrs. Fellowes claimed compensation at the rate of $350 per acre. The Arbitrators allowed about $121 per acre, taking the property as a whole, and including the portion—some 35 acres—which was described as being covered with brush.

The estimates of value given by the witnesses for the claimant varied from $150 to $400 or $500 per acre, and for the portions of it most advantageously situated a higher value (viz., $600, $800 and $1,000 per acre) was given by some witnesses.

Speaking generally, the witnesses called by the respondent valued the uncleared land at about $60 per acre, and the cleared at sums ranging from $75 to $100. A sale to the crown, for the purposes of the Experimental Farm, of adjoining lands was proved at $100 per acre.

It was contended by counsel for the crown that this

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court, should, in cases of appeal from the Official Arbitrators, be guided by the principles adopted by the Court of Appeal for Ontario in appeals under 49 Vic. (Ontario) chapter 9 s. 1 (1), and although the Act mentioned, and section 192 of the *Common Law Procedure Act* therewith incorporated, differ from the corresponding provisions of the Act (R.S.C. c. 40) under which the appeal comes before this court, the contention is in the main, I think, correct.

The award is, I think, considerably more than under the evidence the Arbitrators would have allowed had they considered the property as available for farming purposes only, and not as having value in addition thereto by reason of the chances of its being salable at some date in villa or building lots. I believe that they have, in making their award, given such effect to this consideration as from the whole evidence and their inspection of the premises they thought it entitled to.

I am satisfied, therefore, that they have not proceeded upon a wrong principle. While it is clear that there is evidence in regard to what I may call the speculative value of the property which would sustain an award considerably larger than that made, I am not able to say that the award is not warranted by the facts presented to the Arbitrators. On the contrary, I think there is ample evidence to support their finding, and I ought not, in view of the principles which should guide my action on this appeal, to disturb the award made.

Appeal dismissed with costs.

Solicitors for appellant: *Scott, MacTavish & MacCraken.*

Solicitors for respondent: *O'Connor & Hogg.*

(1) *In re Macklem*, 14 Ont. App. 20; and *In re Bush*, 14 Ont. App. 73.

APPENDIX No. 1.

LEADING UNREPORTED CASES DECIDED IN THE EXCHEQUER COURT OF CANADA BEFORE OCTOBER 1ST, 1887,—BEING A SUPPLEMENT TO VOL. I. EX. C. R.

APPENDIX No. 1.

THE HALIFAX CITY RAILWAY COMPANY..... } SUPPLIANTS; 1877 April 23.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Intercolonial Railway—Petition of Right—Tort—Demurrer—Acts authorized by statute—Proper remedy for damages arising therefrom—31 Vic. c. 13 s. 14—Official Arbitrators.

On the 8th November, 1876, the suppliants filed a petition of right claiming redress against the Dominion Government for damages sustained by them by reason of the partial expropriation of their railway tracks, and incidental injury, owing to the extension of the Intercolonial Railway into the City of Halifax. The crown demurred to the petition on the grounds that the acts in respect of which the suppliants complained were authorized by 31 Vic. c. 13 (*The Intercolonial Railway Act*), and that the suppliants had not shown good cause for relief against the crown by petition of right.

Held, that under the 14th section of 31 Vic. c. 13 the only remedy suppliants had was by reference to the Official Arbitrators; and that, apart from this enactment, inasmuch as the claim was founded in tort, no action could be maintained against the crown.

DEMURRER to a petition of right claiming damages against the crown for injury to suppliants' property in Halifax, N.S., caused by the extension into that city of the Intercolonial Railway.

The following are the allegations contained in the petition:—

"On the 29th day of April, A.D. 1863, an Act was passed by the Parliament of Nova Scotia, entitled *An Act to incorporate the Halifax City Railroad Company*, for the purpose of constructing, maintaining, and operating lines of railroad for public use in the conveyance of persons and property, in and through the City of Halifax, for a period of twenty-five years

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from the passing thereof. The capital stock of the company was limited to $250,000 to be divided into shares of $100 each. Exclusive authority, subject to certain regulations, was given to the company to construct and maintain a line of railroad with single or double tracks, extending from the terminus of the railroad at Richmond through Upper Water street, Hollis street, and Pleasant street, to the southern limits of the city, with a branch line through Lower Water street, and through such other streets as the City Council might thereafter approve of on application to them for that purpose by the company, and to run horse-cars thereon for public use and accommodation in the conveyance of persons and property. By the eleventh section of said Act of incorporation it was provided that the Provincial Government might, at any time after three months' notice, become owner of and entitled to take possession of the property and stock of the company, and in such event the company should be entitled to receive from the Provincial Treasury the actual cost of such railroad and works, and if the net profits of the company should not have been equal to interest at the rate of six per centum per annum, then the company should be entitled to receive such an amount as, together with the profits, should amount to six per centum per annum; and should be entitled to receive a bonus of twelve per cent. upon such actual cost."

"On the seventh day of May, A. D. 1866, the said Act was amended by the Nova Scotia Legislature, by which the said eleventh section of the said Act was repealed, and it was further enacted that: "The Governor in " Council might at any time thereafter assume the pos- " session and ownership, for the Province, of the City " Railroad with its appurtenances; and that so soon as " an order-in-council for that purpose should pass, and " the railroad and appurtenances should become the

" property of the Province, upon the making of such " order, the Government of the Province should pay to " the owners of such railroad the value thereof, to be " ascertained by two arbitrators, the one to be chosen " by the Government, and the other by the owners of " the railroad; and in case of disagreement of the said " arbitrators, the value should be ascertained by the said " arbitrators, or one of them, with a third person, to be " named as hereinafter provided;" and again: " In case " the said arbitrators fail to appoint such third person, " he may be appointed by the Custos of the County of " Halifax."

" When the said Acts were passed, the two lines of railway running east and west through Nova Scotia were constructed, owned and maintained by the Provincial Government. The terminus was, as at present, located at Richmond, a distance of two miles from the business centre of the city, which was found to be both inconvenient to the travelling public and detrimental to the success of the railway policy. The Provincial Government were anxious to induce capitalists to embark in a private enterprise for the purpose of constructing a line of horse railway from Richmond *dépot* to the southern portion of the city, running along the principal business centres. The large outlay which would be required in extending the Provincial Railway into the city, and the financial condition of the Province not warranting the expenditure, the Halifax City Railroad Act was passed, and the clauses relating to the Government taking possession thereof were inserted as a guarantee to the company that their vested rights would be protected whenever circumstances justified the further extension of the Provincial Railway into the city, which would deprive the horse railway of its principal source of revenue, besides the running of horse-cars alongside locomotive cars would

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not only be a ruinous competition for the former, but altogether impracticable and dangerous to life and property."

"The Government Engineer, in 1861, reported to the Provincial Government: "That to make the railways "already built properly available and adapted to the "wants of the public, the extension into the city be- "comes a necessity, the want of this connection not "only subjects all passengers entering and leaving the "city to much delay and inconvenience, but also to "unnecessary expense, &c."

"The suppliants were, by their said charter and the amendments thereof, guaranteed that compensation would be secured to them whenever the Government might possess themselves of the horse railroad, and in the face of such guarantee the suppliants embarked their capital and constructed and fully equipped within the city about nine miles of railroad, commencing at the Richmond *dépot* and running to Fresh Water, the extreme southern portion of the city proper, besides branch lines established in other parts of the city."

"The suppliants' cars commenced running in the month of June, A.D. 1866, and continued in operation until compelled to cease running by the interference of the Government, as hereinafter more particularly set forth."

"Under *The British North America Act* the Provincial railways of Nova Scotia were transferred to and became the property of the Dominion Government. The Acts respecting the incorporation of the Halifax City Railroad Company have never been repealed by Dominion or Provincial legislation, and the charter rights of the said company are in full force and effect."

"The extension of the Intercolonial Railway into the City of Halifax to North Street, which crosses the Hali-

fax City Railroad tracks and appropriates a considerable portion of their double tracks, and from which the suppliants have been driven by force, the running of locomotives on the proposed tracks and alongside of the City Railroad tracks have forced the latter to abandon their line of railway, and have and will entail upon them direct and consequential damages. Direct damages by tearing up the City Railroad tracks, taking forcible possession of the line, and cutting off all communication by rail between the line of the Halifax City Railroad south of the Hospital Gate on Water Street and the company's *dépot*, where their stables, horses and rolling stock are kept; depriving them of the revenue from the conveyance of passengers and goods over the entire line; rendering perfectly valueless to suppliants the lines of railway south of the Hospital Gate; loss sustained in being compelled to sacrifice at auction a large lot of valuable horses; depreciation of the company's bonds, stock, loss of interest, revenue and profits. Indirect, or consequential damages,—loss of chartered privileges, loss of sale of the company's line; loss of rolling stock which was capable of running many years, but which will be of no further use, and which would not find a purchaser if offered for sale; loss by having erected extensive stables, buildings, &c., which are not required any longer; interest, insurance, &c., on same. The suppliants allege the foregoing as among the direct and consequential damages sustained, together with all other necessarily accruing losses occasioned by the acts of the Dominion of Canada, through its Government and officials."

"That the suppliants, forseeing the damages which would accrue to them by the extension of the Intercolonial Railroad, notified the Honourable the Minister of Public Works of Canada, as early as the second day of June, A.D. 1875, that the extension would cause

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both direct and consequential damages to suppliants and seriously interfere with their chartered rights; and, afterwards, by letter under date January 13th, 1876, addressed to the Honourable the Minister of Public Works, notified him that the Government Engineer intended to interfere with the tracks of suppliants in the night time, without permission or legal right, and urged the Honourable the Minister of Public Works not to permit such illegal and unjustifiable conduct."

"The suppliants allege that, on the night of the seventeenth day of May last past, the officials under the authority of the Government of Canada, and engaged in constructing the extension of said Intercolonial Railway, took and continue to keep forcible possession of a portion of the tracks of the Halifax City Railroad Company."

"That, on the said night of the seventeenth day of May last past, suppliants were forcibly ejected and expelled from the tracks of the Halifax City Railroad, and from the use of the same, and from thence hitherto have been deprived of the use and enjoyment thereof, as they had a right to under the said hereinbefore in part recited Acts of the Parliament of Nova Scotia."

"That the Government of Canada dedicated and appropriated the said tracks of the Halifax City Railroad Company to the Government, and fenced in and took possession of the same, and still holds exclusive possession thereof against the suppliants, having by their officials and employees forcibly ejected the suppliants and their workmen therefrom."

"The suppliants allege that the Government have taken exclusive possession of portion of the company's tracks, fenced in the same, and commenced and are still carrying on blasting operations therein, to wit: on that portion as set forth and described in the annexed certified copy of dedication and plan, whereby

and by means of the foregoing the company have been forcibly ousted from their user of the said tracks and highway granted them under their charter."

"The suppliants claim they are entitled under the terms of their charter, as amended, to have the damages as therein set forth assessed; and also that they are entitled to damages for the several wrongs hereinbefore set forth."

"The suppliants allege that no damage or amends, or offer of compensation or amends, have been tendered to them, although the Government of Canada have been requested so to do."

"The suppliants therefore humbly pray that Your Most Gracious Majesty may be pleased to order that the several matters alleged in the foregoing petition may be tried in Her Majesty's Exchequer Court of Canada, to be holden in the City of Halifax, Province of Nova Scotia."

"The suppliants claim the sum of two hundred and sixty thousand dollars in damages and for compensation for the several claims, wrongs and injuries herein set forth."

To this petition the crown demurred as follows:

"1. That no case is shown in the said petition for any relief against Her Majesty."

"2. That a petition of right does not lie for the matters in the said petition complained of."

"3. That the Acts of Parliament relating to the Intercolonial Railway, and referred to in the petition, authorized the Government of Canada to take and hold possession of the parcel of land, in respect of which damages are sought, for the purposes of the said railway."

"4. That it appears in and by the said petition, that the said possession was taken and is held in pursuance

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of the said Acts of Parliament, and for the purposes of the said railway."

"5. That if Her Majesty's officers and employees did anything illegal and not warranted by the said Act of Parliament, Her Majesty is not responsible."

"6. That Her Majesty is not responsible in a proceeding by petition of right for the damages or injuries mentioned in the said petition or any part thereof."

Issue joined.

April 16th, 1877.

MacLennan, Q.C. in support of demurrer;

Cockburn, Q.C. contra.

Sir WILLIAM B. RICHARDS, C.J., now (April 23rd, 1877) delivered judgment.

The statement of the suppliants as to the incorporation of their company and certain rights acquired by the statutes passed by the legislature of the Province of Nova Scotia seems to have been introduced with a view of showing that, as the Local Government was empowered to take possession of their railroad on paying the value thereof, (to be ascertained in the manner pointed out by the statutes referred to) therefore the Dominion Parliament could not pass any law which would interfere with their rights without giving them compensation in the same way. It was also pressed in argument that as the local legislatures had the exclusive right of passing laws affecting property and civil rights, the Dominion Parliament had no right to pass a statute authorizing the interference complained of with their property and franchises.

The various statutes relating to the Intercolonial Railway were referred to in the argument. In the 13th section of the petition of the suppliants they allege that the Government had taken exclusive possession of

a portion o the company's tracks, fenced in the same, and commenced and are now carrying on blasting operations on that portion set forth and described in the certified copy of the description and plan annexed to the petition, whereby the company had been forcibly ousted from the use of the said track and highway granted them under their charter.

The certificate referred to contained the description and plan required to be deposited of record in the office of the Registrar of Deeds, under the 7th sec. of 31 Vic. c. 13, for the construction of the Intercolonial Railway. It was deposited on the 11th of May in the office of the Registrar of Deeds for Halifax, and, under the same section of the statute, it was provided that such deposit shall operate as a dedication to the public of the lands taken which shall thereupon be vested in the crown. Under section 14 of the statute, in case of disagreement as to the value or price of lands or other property necessary for the construction or use of the railway, the claim for the same shall, on the request of the claimant, be referred to the award of the Official Arbitrators to be appointed under *The Public Works Act.*

The 10th, 11th and 12th paragraphs of the petition allege that the officials, under the authority of the Government of Canada, engaged in constructing the extension of the Intercolonial Railway, took and continued to keep forcible possession of a portion of the tracks of the suppliants' railway and expelled them therefrom, and deprived them of the use and enjoyment of the same, and that the Government of Canada dedicated and appropriated the tracks of the company to their use, and took possession of the same, and hold the exclusive possession thereof against the suppliants, having by their officials and employees ejected the suppliants and their workmen therefrom. They therefore prayed that

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Her Majesty might be pleased to order that the several matters alleged in the petition might be tried in Her Majesty's Exchequer Court of Canada, to be holden in the City of Halifax. They claim the sum of $260,000 as damages, and for compensation for the several claims, wrongs and injuries set forth in the said petition.

The crown demurred to the petition.

[His Lordship here refers to the demurrer which will be found on p 439.]

The suppliants' claim, in effect, is for damages for a trespass committed by the officers of the Government of Canada employed in constructing a portion of the Intercolonial Railway. The suppliants are in this dilemma: If the statutes of the Dominion Parliament authorized the doing of the acts complained of and vested the land (which the suppliants claim was their own or in which they had an interest) in the crown, then their remedy is that pointed out in the statute. If the parties who committed the trespass were not doing acts warranted by the statute and the land was not vested in the crown under the Act, then the parties who did the acts were trespassers, and under a petition of right the crown cannot be proceeded against for trespass.

In *Tobin* v. *The Queen* (1) the matter of redress by petition of right was elaborately discussed by Sir W. Erle, Chief Justice, who delivered an exhaustive judgment, and on this very point decided for the crown. His words are (2): "On the third ground above mentioned, viz., that a petition of right cannot be maintained to recover unliquidated damages for a trespass, our judgment is also for the crown." He then refers to authorities shewing that the doctrine is based on the fundamental principle that the king can do no wrong. But the person doing the act though authorized by the superior power would be answerable.

(1) 16 C.B.N.S. 310 (1864). (2) *Ibid.* p. 353.

In *Feather* v. *The Queen* (1) the same doctrine is affirmed by Chief Justice Cockburn who, in his judgment, says, he sees no reason to dissent from the conclusion arrived at by the Court of Common Pleas. Further on in his judgment, he says (2): "The maxim "that the king can do no wrong applies to personal as "well as political wrongs, and not only to wrongs done "personally by the sovereign (if such a thing can be "supposed to be possible), but to injuries done by a "subject by the authority of the sovereign. For, from "the maxim that the king cannot do wrong, it follows "as a necessary consequence that the king cannot au- "thorize wrong. For to authorize a wrong to be done "is to do a wrong, inasmuch as the wrongful act when "done becomes in law the act of him who directed or "authorized it to be done. It follows that a petition of "right which complains of a tortious act done by the "crown, or by a public servant by the authority of the "crown, discloses no matter of complaint which can en- "title the petitioner to redress. As in the eye of the law "no such wrong can be done, so in law no right to re- "dress can arise, and the petition therefore which rests "on such a foundation falls at once to the ground." Further on in his judgment, he says (3): "But in our "opinion no authority is needed to establish that "a servant of the crown is responsible in law for "a tortious act done to a fellow-subject, though done "by the authority of the crown, a position which ap- "pears to us to rest on principles which are too well "settled to admit of question, and which are alike "essential to uphold the dignity of the crown on the "one hand and the rights and liberties of the subject "on the other."

Thomas v. *The Queen* (4) was decided in November

(1) 6 B. & S. 294; 12 L. T. N. S. 114.
(2) 6 B. & S. 295.
(3) *Ibid.* 297.
(4) L.R. 10 Q.B. 31.

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1874. Blackburn, J., in giving the judgment of the "court, said (1): "The authorities to which we must "have recourse are, many of them, antiquated and con- "nected with forms of procedure with which no one "now alive is familiar, and which we now approach "with diffidence, as they may be misapprehended by "us."

The suppliant's claim, in that case, was based on the fact that itwas agreed if he furnished the War Department with models of improvements that he had made in artillery, and attended a committee at Woolwich and gave his personal explanations, in the event of the invention being approved of and being adopted in Her Majesty's service, a reward in that behalf should be given by Her Majesty's Government to the suppliant, to be determined by the master-general and board of ordnance. Suppliant averred performance of condition precedent, yet the amount of the reward had not been delivered nor had the same or any part thereof been paid to the suppliant.

The second paragraph alleged that he had invented certain artillery constructed upon a new principle, and, having in his possession certain plans and drawings explaining the same, and having incurred heavy costs, charges, and expenses in perfecting the invention, in consideration of the suppliant showing and delivering his plans to Her Majesty's Government, Her Majesty's Government promised the suppliant that, in the event of certain trials showing a successful result so far as the principle was concerned, the expenses to which the suppliant had been put should be reimbursed to him by the Government. He averred the performance of all conditions precedent, and that Her Majesty's Government had not reimbursed him. The Attorney-General demurred to the petition and the two paragraphs thereof.

(1) L. R. 10 Q. B. p. 34.

The case was argued on the grounds:—That a petition of right will not lie for any other object than specific chattels or land, and that it will not lie for a breach of contract nor to recover money claimed either by way of debt or mortgage.

It was left for further discussion to determine who had authority to make contracts on behalf of Her Majesty, and whether the contracts on which the suppliant relied were, in fact, made by anyone on behalf of Her Majesty, and, if so made, whether they were made within the scope of that person's authority. The learned judge who gave the judgment of the court said that contracts can be made on behalf of Her Majesty with subjects, and the Attorney-General, suing on Her behalf, can enforce these contracts against the subject, and if the subject has no means of enforcing the contract on his part there is certainly a want of reciprocity in such cases. The court held, on the authority of the *Bankers Case* (1), that the suppliant's claim for damages arising out a contract could be made under a petition of right.

In *Rustomjee* v. *The Queen* (2) it was decided that a petition of right would not lie charging the crown with receipt of money as a trustee, and that decision was affirmed on appeal (3). In *Dixon* v. *The London Small Arms Company*, [decided in the Queen's Bench (4); reversed on appeal (5), and the latter decision in turn reversed and the original judgment restored in the House of Lords (6)] *Feather* v. *The Queen* (7) is referred to, but only on the point whether the crown may manufacture a patented article notwithstanding the exclusive rights granted by the patent. It was held that the crown's privilege to manufacture such article ought not to be

(1) 14 How. St. Tr. 1.
(2) 1 Q. B. D. 487.
(3) 2 Q. B. D. 69.
(4) L. R. 10 Q. B. 130.
(5) 1 Q. B. D. 384.
(6) 1 App. Cas. 632.
(7) 6 B. & S. 257.

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extended to a person who, on his own behalf, enters into a contract to supply the crown with such article.

In Re Tufnell, in Chancery (1), it was held that compelling an officer or a surgeon in the army, having the permanent medical charge of the military prison at Dublin, to retire on half-pay, gave no right to claim to be compensated for loss, damage or injury sustained by him through such forced retirement, on the ground that his office, like that of all other officers of the army, was only tenable *durante bene placito*.

In *Kirk* v. *The Queen* (1), the question of right to proceed for torts by petition of right is discussed at some length, but the conclusions arrived at are entirely in harmony with the doctrine laid down in the earlier cases.

There can be no doubt of the right of the Dominion Parliament to legislate in reference to the Intercolonial Railway. By *The British North America Act*, 1867, it is stated, in section 145, to be the duty of the Government of Canada to construct and complete, with all possible speed, a railway to connect the River St. Lawrence with the City of Halifax. As it is a railway connecting the Province of Nova Scotia with the Provinces of New Brunswick and Quebec, it is excepted out of the class of cases as to which the local legislatures have the exclusive right to make laws, by section 92, sub-section 10. And under section 91, it is one of the matters coming within the class of cases on which the Dominion Parliament has the right to make laws.

It may also, to some extent, be included in the right to legislate concerning the public debts and property of the Dominion, as part of the road in Nova Scotia is referred to in one of the statutes as constructed by the Government of Nova Scotia, and became the property of the Dominion under *The British North America Act*.

(1) 3 Ch. D. 164.

(1) L. R. 14 Eq. 558.

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Having the right to legislate on the subject, the Dominion Parliament must decide on the means which they consider best for carrying out its objects. It is necessary that they should be able to take lands and property on and over which to construct the railway if they are to build it, and they in their wisdom must decide the manner and basis on which it is to be taken and the mode of compensating the owner.

The taking of a man's property for public purposes certainly interferes with his civil rights. But it would be impossible to construct a railway without giving the right to acquire, by compensation if necessary, the land on which it is to be built. All the legislation as to building railways shows such to have been the case. The right to take the land belonging to an incorporated street-railway, or to build a track over or under, it seems to me to involve interference with civil rights, or the rights of property, to no greater extent than to take the land of an individual.

The 7th and 9th sections of the Act. 31 Vic. c. 13, for the construction of the Intercolonial Railway, authorize the taking of the land and making the road upon and across any rails or tramways, and the statutes 38 Vic. c. 22 and 39 Vic. c. 16 declare the line from Richmond station to North Street in the City of Halifax, then under construction, forms part of the Intercolonial Railway.

In argument it was not contended that, by the statutes referred to, the *locus* in question was not a part of the Intercolonial Railway, nor was it argued that all the powers, under 31 Vic. c. 12, conferred on the commissioners were not possessed by the Minister of Public Works in reference to the part of the road out of which this dispute arises.

As at present advised, taking the statutes together, they appear to authorize the servants of the crown or

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the crown, when sued, to set up the right to do the acts complained of under the statutes and that the statutes did authorize them to take possession of the land which thereby became vested in the crown.

The result is that whatever remedy the suppliants have in the premises is, as I have before indicated, by reference to the Official Arbitrators under the provisions of sec. 14 of *The Public Works Act*.

Even if this view is not correct, the authorities show that the suppliants cannot, under writ of right, recover damages against the crown for the trespasses complained of, and the demurrer must be allowed with costs if asked for.

Since writing the above and looking at *The Petition of Right Act*, 1876, it occurred to me that the suppliants may wish to contend that under the 19th section (*b*) of that statute the Government were to be considered as referring the question of the amount of compensation to be paid the suppliants to this court instead of the Official Arbitrators. That question was not raised on the argument, and if the suppliants wish to raise it I think they should have an opportunity of doing so, and they may apply in chambers for leave for that purpose.

*Demurrer allowed, costs reserved.**

Solicitors for suppliants: *Cockburn & Wright.*

Solicitors for respondent: *Mowat, Maclennan & Downey.*

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* The point indicated by the learned judge as reserved for leave to argue was heard before him, and was decided (October 1st, 1877) in favor of the respondent, with full costs of demurrer.

The suppliants' claim was then referred to the Official Arbitrators who, after taking evidence, reported as follows:—

"1. We find, with regard to the first item of the claim, that the company [suppliants] are not entitled to recover for the loss of their railroad and its plant, and real and personal properties, be-

cause their railroad was neither totally nor partially lost by any actual interference of the Government with the company's property."

"2. We find, with regard to the second item of the claim, that the company are not entitled to be paid any compensation, because the Government have not "divided their (the company's) railroad into two portions, rendering each valueless," or destroyed the value of the railroad."

"3. We find, with regard to the third item of the claim, that the company is not entitled to any compensation, because the Government did no actual damage to the crossing, and because the company were not obliged to sacrifice horses, plant, or properties in consequence of any act of the Government, and did not suffer any depreciation in the value of their real estate within the meaning of *The Public Works Act* (31 Vic. c. 12), and did not lose their charter, and the privileges and rights guaranteed under it, by any act of the Government."

"4. We find, with regard to the fourth item of the claim, that nothing is due to the company for interest."

On appeal from this award to the Exchequer Court, Mr. Justice Henry set the same aside and gave judgment in favor of the suppliants for a lump sum of $8,000. He based his allowance of such sum chiefly on the assumption that inasmuch as the Dominion Parliament had passed an Act (42 Vic. c. 10), three years after the doing of the acts complained of by the suppliants, amending the Act authorizing the extension of the Intercolonial Railway into the City of Halifax (39 Vic. c. 16), and providing, *inter alia*, "that nothing in this Act or in the Act intituled *An Act respecting the Public Works of Canada* shall injuriously affect or prejudice in any way the rights, franchises and properties of the Halifax City Railroad Company, as granted to them under certain Acts of the Legislature of Nova Scotia," the passing of such Act must be taken to have been intended as a legislative declaration that compensation should be made to suppliants in the premises.

On appeal from this judgment, the Supreme Court of Canada reversed the same and restored the award of the Arbitrators with costs against suppliants.

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April 30.

THE CORPORATION OF THE CITY OF QUEBEC..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Crown property—Municipal taxes assessed thereon—Liability.

The crown is not liable for municipal taxes assessed upon real property belonging to the Dominion of Canada.

PETITION OF RIGHT for the recovery of a sum of $1,580.50 alleged to be due by the crown in respect of an assessment of municipal taxes upon property belonging to the Dominion of Canada and situated within the City of Quebec.

The following facts were alleged by the suppliants in their petition:

"1. That there is due to the said corporation, by the Government of the Dominion of Canada, the sum of one thousand five hundred and eighty dollars and fifty cents for divers works done, materials furnished, and money disbursed, for sidewalks (trottoirs) in front of the different immoveable properties belonging to the said Government in the said City of Quebec, and other works, as detailed in the bill of particulars hereunto annexed."

"2. Wherefore your suppliants humbly pray that it may be ordered and adjudged by the court that Her Majesty the Queen and the said Government of the Dominion are indebted unto the said corporation of the City of Quebec in the said sum of one thousand five hundred and eighty dollars and fifty cents, and that an order and judgment to the effect thereof be given for the payment of the said sum."

By his statement in defence Her Majesty's Attorney-

General for the Dominion of Canada pleaded, *inter alia*, as follows:

"2. Her Majesty's Attorney-General admits that the suppliants performed certain works, furnished materials and expended money for sidewalks in front of the different immoveable properties belonging to the Government of Canada in the City of Quebec, and for other works, as alleged in the suppliants' petition of right."

"3. Her Majesty's Attorney-General alleges, as the fact is, that the said works performed, materials furnished and money expended, in the said petition mentioned, were not so done, furnished and expended by the suppliants at the request of Her Majesty; but were so done, furnished and expended by the suppliants, in pursuance of and by virtue of certain powers vested in them by the Act of the Province of Canada, passed in the 29th year of Her Majesty's reign, chapter 57, intituled, *An Act to amend and consolidate the provisions contained in the Acts and Ordinances relating to the incorporation of, and the supply of water to, the City of Quebec*, and the several Acts in amendment thereof, and for which the suppliants might make assessments as therein provided; and that the suppliants' claim is for the recovery of the taxes so assessed upon the said lands and immoveable properties of Her Majesty in the City of Quebec; but the said Attorney-General submits that the said lands and immoveable properties are not liable to taxation, and that no action lies against Her Majesty for the recovery of taxes; and Her Majesty's Attorney-General claims the same benefit from this objection as if he had demurred to the said petition."

Issue was joined, and proceedings were thereupon taken as in a case of demurrer.

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THE CORPORATION OF THE CITY OF QUEBEC v. THE QUEEN.

Judgment.

April 30th, 1886.

The case was argued before Mr. Justice Fournier.

Pelletier, Q. C. for suppliants;

Hogg for respondent.

Per curiam: The crown is not liable in respect of the claim put forward by the suppliants, and the petition must be dismissed with costs.

Judgment for respondent with costs.

Solicitors for suppliants: *Pelletier & Chouinard*;

Solicitors for respondent: *O'Connor & Hogg*.

APPENDIX No. 2.

LEADING PATENT AND TRADE-MARK CASES DECIDED IN THE DEPARTMENT OF AGRICULTURE SINCE THE ENACTMENT OF 32-33 VIC. C. 11,

(The Patent Act of 1869.)

NOTE.

In addition to the general jurisdiction conferred upon the Exchequer Court of Canada in respect of Patents, Copyright and Trademarks by section 4 of 54-55 Vic. c. 26, the Court, by 53 Vic. c. 13 (as amended by 54-55 Vic. c. 33), is invested with the jurisdiction in respect of the forfeiture of patents formerly exercised by the Minister of Agriculture; and by 54-55 Vic. c. 35 the Minister is empowered to refer any matter of dispute touching the registration of a trademark, or the cancellation or rectification of any such registration, to the Court, to be therein heard and determined.

Since the year 1869—when the first Patent Act was passed by the Parliament of Canada—many cases of undoubted importance have been determined in the Department of Agriculture,—among them being that of *Barter* v. *Smith* which was heard before Dr. Taché, D. M. A., whose exhaustive decision therein has been favorably noticed by the Courts. It was, therefore, thought desirable to place the text of the more valuable decisions in the hands of the profession through the medium of the Exchequer Court Reports.

The Trade-mark cases of *Groff* v. *The Snow Drift Baking Powder Company* and *The J. P. Bush Manufacturing Company* v. *Hanson, et al.* were the only important cases of that class in which the necessary material for compiling a report was available, and for this reason it was thought advisable to insert them among the Patent cases in chronological order.

In dealing with these cases an effort has been made to conform, so far as circumstances would permit, to the ordinary requirements of reporting; but beyond this the text does not differ from the matter constituting the Departmental records in the several cases.

APPENDIX No. 2.

BENJAMIN BARTER .....PETITIONER; 1877 Feb. 15.

AND

GEORGE THOMAS SMITH,.....RESPONDENT.

Petition for avoidance of patent on ground of non-manufacture and improper importation—35 Vic. c. 26, s. 28—38 Vic. c. 14, s. 2, construction—Duty of patentee as to creating market for patent—Burden of proof—Intention of legislature in restricting importation of patented invention—Effect of patentee's consent to importation by others—Contractual character of patent.

Although a patentee may not have commenced to manufacture the patented article within the period limited in section 28 of 35 Vic. c. 26 (as amended by 38 Vic. c. 14, s. 2), yet so long as he is in a position either to furnish it, or to license its use, at a reasonable price to any person desiring to use it, his patent ought not to be declared forfeited.

(2.) It is not incumbent upon a patentee to show that he has made active efforts to create a market for his patented invention in Canada. It rests upon those who seek to defeat the patent to show that he neglected or refused to sell the invention for a reasonable price when proper application was made to him therefor.

(3.) The intention of the legislature in enacting the provisions of section 28 of 35 Vic. c. 26, which prohibit the patentee from importing his invention in a manufactured state after the expiry of a given time from the granting of his patent, was to protect the industrial interests of Canada, and the prohibition should not be extended to operate a forfeiture in cases where the character and circumstances of the importation tend to promote rather than prejudice such interests.

(4.) If, after the time has expired wherein the patentee may have imported the invention without prejudice to his rights, he consents to its importation by others, such consent brings him within the prohibition of the statute and avoids his patent.

(5.) The granting of letters-patent to inventors is not the creation of an unjust monopoly, nor the concession of a privilege by mere gratuitous favor; but it is a contract between the State and the discoverer, which, in favor of the latter, ought to receive a liberal interpretation.

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BARTER v. SMITH.

Statement of Facts.

PETITION to the Minister of Agriculture praying that certain patents, granted to the respondent in the year 1873, should be declared null and void for non-compliance with the provisions of the 28th section of 35 Vic. c. 26, entitled *An Act respecting Patents of Invention*, as amended by 38 Vic. c. 14, s. 2 (1).

It was alleged in the petition that the Minister of Agriculture had granted to the respondent, who was a resident of the United States, three several patents, viz: No. 2409, for a Process of Milling; No. 2257, for a Flour-Dressing Machine; and No. 2258, also for a Flour-Dressing Machine. It was further alleged that the respondent had violated the provisions of the above cited enactment by not manufacturing his patented inventions in Canada within two years after the date of the granting of the patents, and by import-

(1) 28. Every patent granted under this Act shall be subject and expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall cease and determine and the patent shall be null and void, at the end of two years from the date thereof, unless the patentee, or his assignee or assignees, shall, within that period have commenced, and shall, after such commencement, continuously carry on in Canada the construction or manufacture of the invention or discovery patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it, in Canada, and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee, or his assignee or assignees, for the whole or a part of his interest in the patent, imports, or causes to be imported into Canada, the invention for which the patent is granted; and provided always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture, or his deputy, whose decision shall be final.

2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the Commissioner may at any time not more than three months before the expiration of that period grant to the patentee a further delay on his adducing proof to the satisfaction of the Commissioner that he was for reasons beyond his control prevented from complying with the above mentioned condition.

ing such patented inventions from another country after the expiry of twelve months from such date.

The petition asked that the respondent should be required to furnish particulars in case he alleged that his inventions had been duly manufactured in Canada.

November 3rd, 1876.

Edgar, Fenton and Ritchie for petitioner ;

Grahame, Howland and Ryerson for respondent.

The preliminary hearing took place before the Deputy Minister of Agriculture. Counsel for petitioner opened the case by reading the following statutory declaration of the petitioner in support of the allegations contained in his petition :—

"That he (Barter), during the summer of the year "1876, visited the mill of Messieurs Howland and "Spink, at Thorold, and saw machines branded "*G. T. Smith, Patentee*, and *Rakes, Lockport*, "*Manufacturer*. That the said machines were "imported machines, and covered the material "portions of the inventions claimed by patents "No. 2257 and No. 2258 ; that these machines were "ascertained to have been made in the State of "New York by Rakes for the patentee Smith, "who caused the said machines to be imported "during the month of April, 1876 ; that these "machines were imported, two on the 25th day of "April aforesaid, as "*Smith's Purifiers Machines*," "on which $109 duties were paid, and two "on the 29th, on which same amount of "duties was also paid ; that these machines are "constructed and adapted for the performance of "material and substantial portions of the process "patented by Patent No. 2409 ; that diligent en- "quiries have led him (Barter) to believe that "Smith's inventions were not manufactured in

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Argument.

Preliminary Ruling.

"Canada until about August, 1876, with the exception of one machine, manufactured during "the winter months of the year 1876."

He contended that the petitioner having thus established *primâ facie* evidence of delinquency, the respondent should be forced to assume the burden of proof by reason, first, of the peculiar constitution of this tribunal, which was instituted to protect the public against the extension of the patentee's privileges; secondly, from the absence of power to compel witnesses to appear; and, thirdly, because it would otherwise force the petitioner to prove a negative.

The counsel for the respondent argued, in substance, as follows:—

It would be a most extraordinary thing to force the patentee to prove a forfeiture against himself, especially when there is positively no other evidence adduced by the petitioner than assertions made by himself, and the allegations of his petition.

That this is an attempt on the part of a rival patentee to fish out a grievance, in order to deprive a competitor of his acquired rights.

That unless the petitioner declares himself ready to go on with his evidence, of which not a thread is so far shown, this day's proceedings on his part amount to a non-suit, and the case should be dismissed at once.

Per TACHÉ, D.M.A.—The burden of proof is on the petitioner, but a sufficient case has been made out to necessitate a thorough investigation of the matter in dispute.

November 25th, 1876.

The evidence was completed on this date and the case argued.

The following is an analysis of the documentary evidence adduced:

1. The exemplification of Patent No. 2257, granted to respondent, George Thomas Smith, for a "Flour Dressing Machine," under date the 18th day of April, 1873.

2. The exemplification of Patent No 2258, granted to respondent for a "Flour Dressing Machine," under date the 18th day of April, 1873.

3. The exemplification of Patent No. 2409, granted to respondent for a "Process of Milling," under date the 4th day of June, 1873.

These three patents have, on their face, the conditions of forfeiture prescribed by the 28th section of *The Patent Act*, hereinbefore quoted.

4, 5, 6. Three petitions addressed to the Commissioner of Patents, in the month of August, 1876, in relation to the three above named patents, by the patentee, George Thomas Smith, representing generally that he has been unable to dispose of his inventions for want of demand or acceptance on the part of the public; that he believes he has fulfilled the spirit of the law, but as doubts and disputes have arisen, he prays for a further extension of delay, and for a declaration that the offering of his inventions for public use upon payment of a reasonable royalty is sufficient compliance with the statute.

(The official answer to these petitions was that from the allegations of the patentee it did not appear that the said patents had been avoided.)

7. A letter of Messieurs Grahame, Howland and Ryerson, of Toronto, solicitors of the patentee Smith, inquiring about the mode of obtaining a conclusive decision in the matter of the said disputes, and suggesting that parties questioning the existence of their client's patents should be cited to appear and prove their case, and in default that the decision be given on the showing of the patentee.

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(The official answer was to the effect that the Patent Office could not undertake to initiate a case of dispute.)

8. A letter of Messieurs Edgar, Fenton and Ritchie, of Toronto, solicitors of the petitioner, raising the present dispute against the three hereinabove mentioned patents of the respondent.

9. A certified copy of an invoice dated 21st April, 1876, from Charles Rakes, of Lockport, in the United States, to Messieurs Howland and Spink, of Thorold, in the Province of Ontario, as attested by Wm. Leggett, Collector of Customs.

10. A printed circular addressed "To Millers" by the petitioner, not dated, but posterior to the 25th of July, 1876, offering for sale "The Original Middlings Purifier." This circular contains certificates of millers having made use of Mr. Barter's machines. Of these certificates ten indicate that they are from the Province of Ontario, the oldest of which is dated the 1st December, 1875, and four are dated July, 1876, the others are from the United States, the oldest being dated the 2nd December, 1872.

11. An authenticated copy of a bill of complaint filed in Chancery, in Toronto, on the 9th September, 1876, on behalf of George Thomas Smith (the respondent) against James Lawson (a witness in this case), concerning an alleged infringement of his (Smith's) patent for a "Process of Milling."

The following statutory declarations were put in in addition to that of the petitioner to be found on page 457:

1. That of Thomas Laurie, of the City of Hamilton, Millwright, dated 22nd of November, 1876, accompanied with two exhibits marked "*a*" and "*b*,"—the first being a copy of the specifications of Smith's patents, and the other a printed circular from Thomas Pringle, of Montreal, dated 21st March, 1873, advertising "Middlings Purifiers," stating:—

"That on the 6th of November, 1876, he called, in "company with the petitioner, on Charles Rakes, "at Lockport, State of New York, for the purpose "of making enquiries; that the said Rakes in- "formed them that he had manufactured for the "patentee, Smith, the machines erected in Mes- "sieurs Howland and Spink's mill, at Thorold; "that he (Rakes) had nothing to do with selling "these machines to Howland and Spink; that the "said Rakes told further, that Smith was charging "for his machines considerably more than the cost "of manufacturing; that, being asked to make an "affidavit of these facts, Rakes refused to do so; "that he (Laurie) had visited during the then "current month of November, 1876, the mill "of Howland and Spink, at Thorold, and, as a "practical millwright of forty years standing, says "that these machines are the machines and the "putting into operation of the process described "in Smith's specification; that Smith's machines "do not require a large expenditure, but could be "readily manufactured at any mill with ordinary "tools; that for at least three years past there has "been a great demand among millers in Ontario "for Middlings Purifiers of the description paten- "ted by Smith; that he is aware that many "machines, as advertised in the annexed circular, "were sold in Ontario during the years 1873, 1874 "and 1875; that he is not aware of any of Smith's "machines having been manufactured, sold or "offered for sale in Canada for more than two "years after the date of Smith's patents, and that "if any active effort had been made to introduce "them, he (Laurie) should have become aware of it."

2. The statutory declaration of James Lawson, of

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the Town of Thorold, Miller, dated 14th November, 1876, stating:—

"That he knows the respondent, Smith, who, in "company with one Charles Rakes, of Lockport, "N. Y., visited him at his (Lawson's) mill, in May "1876, to ask him (Lawson) to purchase the same "machines as he (Smith) was putting up in Mes- "sieurs Howland and Spink's mill; Smith informed "Lawson that Rakes was making these machines "for him (Smith) at the price of $350, to which "price Smith was adding $250 additional; that "he (Lawson) asked to be furnished with the said "machines at a lower price, to which proposal "Smith's answer was that this was his lowest price; "that before that interview Rakes had told about "Smith coming to Thorold and expressed his hopes "that Lawson might purchase the machines from "Smith to give Rakes the job of building them; "that he (Lawson) is acquainted with Smith's "machines and knows they are not of expensive "manufacture, but could be built with ordinary "tools and materials at any mill. He (Lawson), "having been a miller for about twelve years on "his own account, is aware that for at least four "years past there has been an active demand "among millers in Ontario for these Middlings "Purifiers. Mr. Spink had told him (Lawson) "that he had been negotiating with Smith for "the purchase of his machines, and afterwards "that he had purchased them from Smith; that "in the early part of last summer he (Lawson) saw "Smith, who was regulating the Purifiers at "Spink's mill, and on having remarked about the "workmanship, Smith told him that he was not to "have any more constructed by Rakes; that Mr. "Spink told him that he had a written contract with

"Smith for the Purifiers, but being asked by "Barter, on the 14th November, 1876, in his "(Lawson's) presence, to give affidavit on the "subject, Spink declined to do so."

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3. A second statutory declaration of Barter, the petitioner, dated 16th November, 1876, accompanied with an exhibit marked "*a*," being letters exchanged between the said petitioner and the firm of Howland and Spink, stating:—

"That he, in company with Thomas Laurie, "visited Charles Rakes at his place of business at "Lockport, where they were informed by said "Rakes that he (Rakes) had manufactured the "machines at Messieurs Howland and Spink's "mill for G. T. Smith, who made the bargain for "them; that the said Rakes informed them that "he (Rakes) never saw the said Messieurs How-"land and Spink or any one on their behalf "until he went to Thorold, at the request of and "for the said Smith, to make arrangements about "putting the said machines into the said mill; "that Rakes told Laurie, in Barter's presence, that "Smith charged considerably more than the cost "of manufacturing; that Rakes refused to make "affidavit of his said statements; that Smith "admitted to him (Barter) that the machines put "in Howland and Spink's mill are his (Smith's) "Purifiers; that Smith's machines do not require "much expenditure but can be built with ordinary "tools and machinery at any mill; that for several "years past there has been an active demand "among millers in Ontario for machines of that "description; that the letter annexed is in the "handwriting of Mr. Spink, of the firm of How-"land and Spink, and was received by him "(Barter); that he (Barter) was informed by Mr.

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"Spink, on the 26th February, 1876, that Smith "had been telegraphed to come over to close the "bargain for the purchase of the said machines; "that later, Mr. Howland told him (Barter) that he "was too late, their firm having bought from "Smith, who had come to Toronto to sell his "machines; that Messieurs Howland and Spink "have declined to give evidence in the case."

The letter of the firm of Howland and Spink, dated the 9th February, 1876, annexed to the above declaration and referred to, is to the following effect:—

"That Mr. Spink has just returned from the United "States; that he has found Smith's Process of "Milling the best he has ever yet seen; that "Smith's Purifiers are sold for less money "than Barter's machines; that Smith's machines "have such a reputation that American mil-"lers will have no other; that they expect "Smith to come soon, and in the meantime should "like to see Barter, as their machines will have "to be ordered from some manufacturer in a few "days, and that he (Barter) had better call on "them at once."

The answer of Mr. Barter to this letter is dated 12th February, 1876, and is to this effect:—

"That he purposes soon going to Thorold; that "the (so-called in the States) Smith's plan of "milling is good, meaning the mode of milling at "present adopted there, but that as the means "by which it is effected belong to himself (Barter), "the mode of milling for which the means were "invented must also of necessity belong to him. "That he is anxious for the patronage of the firm "and should be most sorry if they do not come to "terms."

4. A third statutory declaration of Barter, the petitioner, dated 20th November, 1876, stating;—

"That he (Barter) had been informed, in February, "1876, by Mr. Spink, that G. T. Smith had had "one of his machines manufactured at Dexter, in "the County of Elgin; that he (Barter) went in "the month of May, 1876, to Dexter and St. "Thomas to enquire about the fact; that he, "having enquired from millers around, could "not find any one who knew of any such ma- "chine as a Middlings Purifier having been made "or offered for sale in that neighborhood; that "he verily believes that no such machine as "patented under No. 2257 was ever constructed "there previous to May 1876."

5. An affidavit of the respondent, George Thomas Smith, made and signed in Jackson County, State of Michigan, and dated 23rd November, 1876, stating:—

"That he (Smith) had never imported into Canada "any of the machines manufactured under his "Canadian patents; that he had offered to millers "in Canada personally, and through agents, to sell "the right to use his inventions for a reasonable "compensation; that he never refused to furnish "his machines manufactured in Canada; that he "did not purchase nor import the machines "placed in Messrs. Howland and Spink's mill at "Thorold; that the sale of said machines and the "payment thereof was a transaction between the "millers and Rakes in which he (Smith) had no "interest; that he (Smith) sold to Messrs. Howland "and Spink the right of using his process under "patent No. 2409, and superintended the arrange- "ments of the machinery for carrying the said "process; that his (Smith's) royalty for the use "of his process and machine No. 2257 was the

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"only profit and emolument which he received "in connection with the said Howland and "Spink's mill at Thorold."

6. The statutory declaration made in Toronto, on the 22nd day of November, 1876, by Charles Rakes, Machinist, of Lockport, in the State of New York, stating:—

"That he had constructed at Lockport the machines "put up in Messrs. Howland and Spink's mill at "Thorold; that such machines are after American "patents of which G. T. Smith is the patentee, "and are nearly equivalent to the Canadian "Patent No. 2257, and that the distinguishing "feature of No. 2258, namely, the grading reel, "does not appear in the machines set at Thorold; "that the first opening in connection with this "transaction was the meeting of Mr. Spink, in "December, 1875, at the North Buffalo Mills; that "the said Mr. Spink told there, to him (Rakes), "that he had been visiting that part of the State "of New York to enquire into the relative merits "of the various Middlings Purifiers, and that he "(Rakes) had been recommended to him (Spink) "by M. A. Chester, of the firm of Thornton and "Chester, Millers, of Buffalo; that previous to "that interview with Mr. Spink he had not had "any communication with G. T. Smith, nor with "any person on his behalf, in regard to putting "Purifiers in the said mill of Messrs. Howland "and Spink, and that he (Rakes) never said that "he had had such previous communication with "G. T. Smith,—"the assertion contained in Ben-"jamin Barter's declaration to that effect is false;" "that on the occasion of the said first interview, "Mr. Spink visited Rakes' factory at Lockport, "that he (Rakes) visited Thorold, on or about the

"11th February, 1876, and met there George T. "Smith and Mr. Spink, arranging for the sale "of the right to use Smith's inventions. They "all three went to Toronto to meet the other "member of the firm, and it was when returning "to Thorold that he (Rakes) finally bargained "with Mr. Spink to build the said machines for "him at the price of $350 a piece, free on board at "Lockport; that he was to be paid by Messrs. "Howland and Spink; was paid $1100 by them, "and looks to them for the balance still due; that "he (Rakes) has had, for about two years, an "agreement with Smith to furnish millers with "Smith's inventions in the United States at stated "prices, but not for use in Canada; that at the "time that he (Rakes) was putting up the machi-"nes in Messrs. Howland and Spink's mill at "Thorold, the said Smith proposed to him (Rakes) "to undertake the manufacture in Thorold of "machines to be used in mills in Canada; that it "was expressly proposed by the said Smith that "if Mr. James Lawson should purchase the right "of using his inventions that he (Rakes) should "manufacture the necessary machines at Thorold "in Canada; that the said Lawson did not "purchase the said right; that he (Rakes) does "not recollect having told Barter, in the terms "of Barter's declaration, that the bargain for "the machines had been made by Smith, if "anything were said on the subject it must "have been that Smith had concluded an "agreement for the sale of the right to use his "inventions; that, to the best of his(Rakes') know-"ledge, Smith has had no interest or commission "or profit in the sale of machines manufactured "by him (Rakes) in any case; that he had

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"travelled a good deal in Canada during the last "four or five years for the purpose of selling mill "machinery, and that until within the last year "or two he saw very little use of, and heard of "very little demand for, Middlings Purifiers; that "the connecting machinery to apply Smith's "process at Messrs. Howland and Spink's mill, at "Thorold, was made by the millwright at the "said mill, at Thorold, under direction of said "Smith; that he (Rakes) declined to give an "*ex parte* affidavit, but expressed his willingness "to Barter to appear before any judicial authority "to be examined on oath, that he (Rakes) has "made the present declaration on account of "having been informed, by Messrs. Grahame, "Howland and Ryerson, that the conversation he "(Rakes) had with Barter was to be made use of "to influence the decision of the Commissioner "of Patents, and because the statements reported "as contained in Barter's declaration were mis-"representations and tended to give a false im-"pression of the facts of this case."

The following facts were admitted by the parties :

(*a.*) The petitioner admits that nothing is proved as regards the alleged importation of the invention patented under No. 2258.

(*b.*) The petitioner admits that he has never made any request to George Thomas Smith for the use of Smith's patented machines and process.

The following fact was ascertained by the Deputy Minister from the records of the Patent Office :—

1. That the petitioner, Benjamin Barter, obtained a patent for a "Flour-Dressing Machine" on the 20th day of January, 1874, numbered 3014.

Counsel for the respondent argued in substance :—

To avoid a patent on account of non-manufacturing

it is necessary to prove that the patentee has refused to furnish his invention to some one desirous of obtaining it, and to avoid a patent on account of having imported the invention requires the proof that the patentee himself, or his assignee, has imported, or caused to be imported, the said invention.

Now, nothing of the kind has been proved here. The evidence, such as it is, being only an attempt to establish that Smith did not actually manufacture his machines, and that he was a party to the importation of invention No. 2257, which the petitioner tries to connect with patent No. 2409 for a process,—a position which is utterly untenable. It is plain that machines of a large size and costing several hundred dollars, and especially a process which involves the construction of a mill to apply it to, are not things which may be made in advance of demand and kept in stock. For several years the Canadian millers have waited for the result of experiments carried on in the United States with these Middlings Purifiers, and it is only of late that a demand has been created for them in Canada. The whole evidence given by Barter and his witnesses is mere hearsay, mere conversations filtered through the medium of interested parties. The subsequent declarations of Barter amount to an admission that he tried to get information on what he had already presumed, in advance of such information, to become a witness. Rakes' alleged answers to the enquiring Barter and friends are susceptible of an interpretation very different from that attributed to them in the declarations filed in this case. Smith admits that he did sell to the millers, on payment of a royalty, the license to use his invention ; but nothing proves that Smith was the channel through which Rakes undertook to manufacture the machines imported at Thorold ; the correspondence between Barter

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and Spink, filed by Barter himself, is proof to the contrary.

The whole evidence adduced by Barter is quite consistent with the interpretation that the negotiations, which have caused the importation of machine 2257, are totally independent of Smith's contract with the millers for the privilege of using his process of milling, or even the imported machine; the whole in fact proves very little more than the Customs records, which show that the goods were sent by Rakes to the miller. To have imported or caused to be imported in the spirit of the statute, the patentee must be either the consignor, the consignee or the owner of the thing imported. Smith is proved to be neither the consignor nor the consignee. Was he the owner? Nothing is proved to show that he was.

There is evidently no proof that Smith, the patentee, did refuse manufacturing for, or selling to, any applicant, and there is no proof that he imported or caused to be imported any of his three inventions; but to add to the want of proof of the petitioner a positive proof that the respondent has done nothing to forfeit his patents, we have filed an affidavit of Smith and a statutory declaration of Rakes the manufacturer.

The petitioner's counsel argued, in substance:—

To start with, the application of the respondent for an extension of time is an admission of non-manufacture, besides containing in words the admission that he did not manufacture. The stringency of the law rests on the word *unless* the patentee does a certain thing, which ought to be construed in its strictest sense because it refers to an exclusive privilege which the legislature intended to restrict in certain defined imits; the patent is a restriction in favor of an indi-

vidual against the public, and these conditions are restrictive upon the individual in favor of the public.

The law is not to be interpreted to mean what it ought to mean or as any one would like it to be, but as it is. The patentee loses his patent "*unless he shall have commenced*," *&c.* (see the 28th section hereinbefore cited). To the plain condition of manufacturing, the law adds another condition, which is that it must be done in a manufactory; if the law had stopped at the word *patented*, it might have been made in a cellar, but the Act requires that it must be done openly. The letter of the law must be taken as it is, because it shows the spirit of the law. (Cites *Potter's Dwarris on Statutes.*) (1)

This tribunal has no latitude; it is a court in which the Commissioner, or his Deputy, is not acting as an executive officer, who, in the ordinary dealings of the Patent Office, can exercise a certain discretion and show a certain leniency; here he is bound to take the words of the law. There are cases in which the strict meaning of the law would create impossibilities, such as, for instance, the case of a graving dock being patented; if the law had not provided for such cases it would become necessary to fight for the spirit of the law as applied to an exceptional case; but the statute has provided for such cases by sub-section 2 of the 28th section, which gives to the Commissioner the power of granting an extension of time, which may be for any number of years of the duration of the patent. The letter of the law is binding upon this tribunal as well as upon any court of law.

The three patents of the respondent expired with the two years of delay for want of manufacture. The forfeiture applies to Patent No. 2409, although for a process, as well as to the two others. The law says

(1) P. 193, note 12.

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that this condition is to be inserted in every patent granted ; therefore it is necessary that a meaning be found for that condition as relating to a process as well as to anything else. The patentee did himself admit, in his petition for the extension of time, that he has no more worked the process than the machines. The avoidance on account of importation does apply to the process, inasmuch as the machines are the means to carry the process into operation, as is admitted by the patentee in his petition where he asserts that these machines are necessary for that purpose. In fact, in the question of importation as well as of manufacturing, the process cannot be separated from the machines.

An answer by letter was given the other day by the Patent Office to a question, put at my advice, that the importation of the various parts of a machine to be put together in Canada is, in the meaning of the law, an importation of the invention. That it would have been easy to manufacture these inventions in Canada is fully established ; it is also proved that there was an active demand for them, the circular received by Laurie in 1873 shows that they were in demand.

I am not prepared to say that Smith imported himself, but it is proved that he caused an importation of Invention No. 2257, and consequently of Invention No. 2409. Smith denies having imported the machines, but he does not deny having caused them to be imported. The statute does not speak of the interest the patentee might have in the transaction. Smith got his royalty and superintended the arrangements of these machines. The evidence of Barter, Lawson and Laurie, taken together, with the admission of Rakes and Smith, show that the bargain was entered into between Smith, Rakes and the firm of Howland and Spink.

It is proved that Smith has a written contract with Messrs. Howland and Co., but the last mentioned gentlemen have refused to furnish a copy of the said contract and also refused to give evidence on the subject.

The respondent's own case shows that Smith has not manufactured, within two years of the date of his patents, any of his machines, and that he has caused to be imported, after the expiration of twelve months from the said date, the machines of Patent No. 2257, and, consequently, the process of Patent No. 2409.

Counsel for respondent argued, in reply, in substance :—

The hearsay evidence and disconnected conversations adduced by the petitioner are destroyed by Rakes' testimony, which gives as proof the history of the whole transaction, which originated out of Smith's knowledge, during a visit made by the miller in the United States for the purpose of examining Middlings Purifiers there, and of selecting the best he should happen to meet with, irrespective of patents or persons. There is not a shadow of evidence to show that Smith did cause the importation ; of course having decided after that visit to adopt Smith's process and machines, the millers had to settle with Smith for his royalty. The law rules that the patentee must allow *any person desirous to use, &c.* (1); but the patentee is not requested to bind the purchaser as to where and from whom the article is to be procured. The patentee is bound to sell the use of his invention ; he is not bound to dictate to the purchasers what tools and what men they (the purchasers) are to employ. It is argued that Smith did not, in his affidavit, say in so many words that he did not cause the importation ; such technical omission has no weight in such a de-

(1) 35 Vic. c. 26, s. 28 ; 38 Vic. c. 14, s. 2.

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claration; Smith denies, supported by Rakes' evidence, that he (Smith) had anything to do with the importation.

A patent is not a matter of privilege, it is a contract, and the interpretation ought to go to limit the conditions of forfeiture and not to extend them. As regards a process there are many ways of carrying the same process into operation, and each particular way of doing it is not necessarily connected with and cannot be taken as being identical with it.

The petitioner's counsel argued in rejoinder:—

That there could not be any doubt about the failure of the patentee to manufacture within two years of the date of his patents; he has not sold or produced any machine or mechanical combination to work his inventions in Canada within the time fixed by law, and he admits this in his petition for an extension of the delay primarily fixed by the statute, and having failed to manufacture his inventions within the extended period, his patents become null and void.

That as regards importation, it is equally clear that Smith has caused this to take place. Howland and Spink clearly could not purchase or import this machine without the assent of Smith, the patentee. Smith assented to the importation before it took place. If he had not given that assent he would have caused it not to be imported; therefore when he gave his assent he occasioned or caused its importation.

TACHÉ, D.M.A. now (February 15th, 1877) rendered his decision.

The importance of this case, serious in itself, is enhanced by the circumstance that it is the first of its kind in Canada, and that the legal interpretation and the appreciation of facts which it involves apply to very many patents granted, and, eventually, to all patents to

be in future granted. For these reasons ample time has been devoted to the study of the question, and it has been thought not only desirable, but almost necessary, to enter at some length into the explanation of the principles and construction of facts upon which the present decision is based.

It seems proper to take up, first, the preliminary points raised in the case, which were at once decided as stated in the report of the proceedings hereinfore given.

It was asked that it be ruled that the *onus probandi* lies with the respondent, inasmuch as this tribunal, being an exceptional one, not restrained by any form of proceedings or subjected to any special kind of evidence, and having no power to compel witnesses to appear, is bound to exact from the respondent proof that he has complied with the requirements of the law; and, furthermore, inasmuch as to rule otherwise would be imposing upon the petitioner the duty of proving a negative.

The constitution of this tribunal is not of an unknown character; such jurisdiction is given to the administration in many countries; and in some, in the Austro-Hungarian Empire, for instance, that jurisdiction extends so far as to vest in the executive officer the exclusive power of deciding all cases concerning the invalidity or lapsing of patents. This tribunal is not devoid of all means of getting at the truth, the fact of not being restrained by fixed rules of procedure and stringent modes of evidence being a compensation for the want of power to compel the attendance of witnesses. It is self-evident that it was the intention of the law-maker to exact only one condition in the judge's mind in delivering his decision,—that he be convinced of the subtantial justice of such decision on sufficient information, no matter how obtained.

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Notwithstanding that this tribunal is not restricted by fixed rules of practice, it is nevertheless bound to abide by the rules of common justice, by the dictation of common reason, and to be enlightened by such decisions as may be held to embody the common consent of mankind.

It is apparent that in this case, being one in which the petitioner urges the forfeiture of an acquired right which the respondent is presumed not to have lost or alienated, the burden of proof cannot be admitted to lie on him who holds a public title which must be taken as good so long as nothing to the contrary is established, even if the evidence involved the proof of a negative. In this case the evidence does not rest on establishing a negative, but on ascertaining the existence of positive facts.

It would not be right, however, to say—and this ought not to be taken as meaning—that in no case should the respondent be forced to make discovery; there might be cases in which, from the position of the parties and the aspects of affairs, this tribunal might be compelled to make use of all the latitude allowed it by the statute, in order to attain the ends of justice. The nature of the 28th section of *The Patent Act*, both in providing against certain mischiefs a certain remedy and in establishing a special tribunal to mete out the remedy, involves a policy which goes, on public grounds, beyond the limits of any particular case to be adjudicated upon. This is evidently the reason why the legislature has selected the Minister of Agriculture to constitute the tribunal to decide such questions, thereby availing itself of his practical knowledge of, and acquaintance with, the nature and bearings of such matters acquired in the daily working and dealings of the Patent Office.

It has been hinted in the argument, that should a

decision intervene declaring a patent null and void, it ought to specify that the patent was void at the date of the expiration of the delay mentioned in the law, and has stood null since to all intents and purposes. As this incidental question touches rights which do not come within this jurisdiction, it appears clear that, in duty and through respect for the higher courts, this tribunal is forbidden from entering such domain, even by expressing an opinion, being bound to restrict its investigations and decisions within the narrowest possible limits. The law orders that the Minister of Agriculture should say "*whether a patent has or has not become null and void,*" consequently the judgment is simply to decide *it has* or *it has not*, as the case may be ; all the consequences that may follow are to be adjudicated upon by the ordinary judges of such disputes between citizens.

There is a view of the subject-matter of patents for inventions invoked in this case which it is of great importance to examine, as bearing in a marked manner on the interpretation and construction to be put upon both law and facts connected with the working of patents ; the question comes to whether a patent should be held as an embarrassing privilege, a kind of onerous monopoly which constitutes the patentee as a sort of adversary to the liberty of the subject, and as opposed to public interest, by the very fact of his holding a position which, then it is argued, should be jealously watched and which ought to be made to terminate at the first opportunity.

It is universally admitted in practice, and it is certainly undeniable in principle, that the granting of letters-patent to inventors is not the creation of an unjust or undesirable monopoly, nor the concession of a privilege by mere gratuitous favor ; but a contract between the State and the discoverer.

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In England, where letters-patent for inventions are still, in a way, treated as the granting of a privilege, more in words however than in fact, they, from the beginning, have been clearly distinguished from the gratuitous concession of exclusive favors, and therefore were specially exempted from the operation of the statute of monopolies.

Invention being recognized as a property, and a contract having intervened between society and the proprietor for a settlement of rights between them, it follows that unless very serious reasons, deduced from the liberal interpretation of the terms of the contract, interpose, the patentee's rights ought to be held as things which are not to be trifled with, as things sacred in fact, confided to the guardianship and to the honor of the State and of the courts.

As it is the duty of society not to destroy, on insufficient grounds, a contract thus entered upon, so it is the interest of the public to encourage and protect inventors in the enjoyment of their rights legitimately, and sometimes painfully and dearly, acquired. The patentee is not to be looked upon as having interests in direct opposition to the public interest, an enemy of all in fact.

"The gain made by the inventor, when his invention "is known will be," says Agnew, "proportionate to "the amount of benefit which the public derive from "the use of it." (1)

"It is almost self-evident," says an able American "author, "or at any rate readily susceptible of proof, "that the magnificent material prosperity of the "United States of America is directly traceable to wise "patent laws and their kindly construction by the "courts." (2)

(1) Agnew:—The Law and Practice relating to Letters-Patent for Inventions. London, 1874. Page 4.

(2) Simonds:—Manual of Patent Law. Hartford and New York, 1874. Page 10.

"The increasing development," says Armengaux, "which inventive genius undergoes, is principally due "to the protection, very insufficient as yet, which is "granted by most governments to those who are the "the real promoters of Arts and Industry." (1)

These short quotations, which might be easily multiplied almost *ad infinitum*, are to show what view is taken of the matter by writers who have devoted a great deal of their life to the study and practice of the laws relating to the very important subject of inventions, and in the consideration of the influence on public prosperity of patents granted to inventors as the price paid for their discoveries.

The manner in which this tribunal should construe the law was argued in the sense of a strict literal interpretation of words, and quotations were made in support of this view. The soundness of the doctrine propounded in these quotations is undeniable and undenied.

In order that no doubt should exist as to the rules of interpretation adopted in the present decision, it is well to express them in plain terms. It is held that the words of the law constitute the body of the law in which dwells the spirit of the law, and that to separate one from the other would be the death of the law.

The legislature cannot adequately provide for the administration of the statutes, it cannot see into the details necessary to attain the object in view, it cannot foresee the combination of circumstances appertaining to each case; it does not go into the technicality of specific subjects, and it cannot prophecy what uses might be made of the language of the law; hence the necessity of legislation being followed, step by step,

(1) Armengaux :—Guide-Manuel de l'Inventeur et du Fabricant. Paris, 1853. (Préface).

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by jurisprudence. The very words which may be invoked, in a certain sense, as applicable to certain points in one case, might serve to defeat the object of the legislature in another case.

This tribunal, like all others, has to make sure of the intention of the legislature. A certain public advantage is sought for and a mischief provided against by *The Patent Act*, as applied to this case. The duty of the tribunal is, therefore, to see whether the advantage has been virtually and effectually withheld, and whether the mischief has been actually committed, and to apply the remedy, if need be, to attain the object in view, without undue and inadequate detriment to acquired and vested rights.

The provisions of the 28th section of *The Patent Act of* 1872 were introduced into Canadian legislation *pari passu* with the extension of the privilege of obtaining patents for inventions, first, to all residents, and second to all-comers. Such provisions as to manufacture and importation do not exist in the patent laws of England or in the present patent laws of the United States, but they do exist in the patent laws of other nations.

The Patent Act of 1869, removing other disabilities, extended the right of obtaining patents to every resident for one year in Canada, and subjected all patented inventions to the condition of manufacturing within three years and of not importing after eighteen months. The decision of the question as to whether or not a patent had lapsed for reason of non-compliance was left to be pleaded and to the ordinary courts to adjudicate. The law of 1872 extended the right of obtaining patents to all-comers, and provided a special tribunal to apply the law in the manner mentioned in the 28th section hereinbefore quoted.

So far, the intention of the legislature, as shown by

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the history of legislation, is evidently to guard against the danger of Canadian patents, granted to aliens, being made instrumental to secure the Canadian market in favor of foreign patents to the detriment of Canadian industry ; for in the measure that the right of taking patents was extended, the remedy against the dreaded danger was made more ample. But at the same time the jurisdiction over such cases of disputes as might arise was transferred from the judicial tribunals to the administrative tribunals, evidently for the purpose of avoiding an over-strict application of the provision made against the possible evil of a patent being taken for the sole purpose of depriving Canada of the use of a useful invention. The 28th section is also intended as a sort of protective policy in favor of Canadian labor. The legislature has, certainly not without intention, provided for a kind of paternal tribunal, formed by the Commissioner of Patents, the natural protector of patentees, which intention can be no other than that every case should be adjudicated upon in a liberal manner.

The duty of this tribunal is, therefore, on one hand, after having satisfied itself of the facts, to apply the remedy if the mischiefs provided against by the statute have been really committed in intent or effect ; and, on the other hand, to guard against the cruel injustice of inflicting such a punishment as the total destruction of an acquired and vested right, when no real damage was either intended or done. The common principle of justice which says that where there is no injury inflicted no damages are to be granted, and that when no offence has been committed no penalty is to be imposed, must govern this matter, as well as the principle that no offender should be sheltered from the punishment for offence or injury perpetrated by him.

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In order to arrive at a correct interpretation of the words *construction or manufacture of the invention*, it is necessary to well understand and carefully consider the nature of the obligation thereby imposed.

As to patents, it applies to *every patent granted*; as to subjects, it applies to every conceivable thing which may be invented or improved; as to persons who have the right to exact it, it applies to all inhabitants of the Canadian Confederacy; as to extent of territory, it applies to the whole Dominion from ocean to ocean, and to every Province and locality therein; as to time, it applies to thirteen out of fifteen years of the longest patent and to three out of five years of the shortest.

This simple enunciation of the nature of things to which the law refers, is sufficient to demonstrate that the law-maker could not have had in contemplation to force, on penalty of forfeiture, the patentee to actually fabricate his invention with his own capital, within specific establishments, with his own tools, and to keep it in stock for every moment of the existence of his privilege; and where? All over the Dominion, and whether he has purchasers or not!

The patent might be for a process, for an object to be used in conjunction with something else, or for an improvement on another patent still in existence; it might be for a railway bridge, switch, or spike; it might be for a mail-bag, and in all these cases it lies within the power of others than the patentee to say whether the invention shall or shall not be used at a given time or at any time.

Therefore, the real meaning of the law is that the patentee must be ready either to furnish the article himself or to license the right of using, on reasonable terms, to *any person desiring to use it*. But again, that desire, on the part of such a person, is not intended by

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the law to mean a mere operation or motion of the mind, or of the tongue; but in effect a *bonâ fide* serious and substantial proposal, the offer of a fair bargain accompanied with payment. As long as the patentee has been in a position to hear and acquiesce in such demand and has not refused such a fair bargain proposed to him, he has not forfeited his rights.

If it were necessary to furnish a collateral proof of the intention of the legislature, within the law itself, of requiring on the part of the customers an actual substantial demand or request accompanied with a settlement of royalty, it would be found in section 21, (1) in which an exception to that obligation of demanding is made in favor of the Government, which is, by way of derogation to the general rule, allowed to make use of all inventions without going to the patentee, even during the two years delay, free of any blame for infringement, by resorting to a special and an exceptional mode of settling upon the price to be paid to the patentee.

The same rules of interpretation apply to the provision of the Act as regards importation. The law says that the patent shall be void if, after twelve months of its being granted, "the patentee, or his "assignee or assignees, for the whole or a part, imports "or causes to be imported into Canada the invention."

The evil aimed at by the legislature, in ordering the penalty of forfeiture, is the importation of patented inventions being made to the detriment of their being manufactured in Canada. If that was done even by other persons than the patentee, or his assignees, but with his consent, that would call for the application of the remedy, although the mere wording of the law might

(1) Section 21 — The Government of Canada may always use any patented invention, paying to the patentee such sum as the Commissioner may report to be a reasonable compensation for the use thereof. — "*The Patent Act of 1872.*"

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be pleaded as exonerating the patentee from the responsibility of having actually imported or *caused* to be imported. On the other hand the actual importation of a few machines, as models, or for the purpose of bringing the usefulness of the invention before the eyes of the Canadian public and thereby hastening the working of the patent in Canada, could not be reasonably taken as being the commission of the evil of injuring the manufacturing interests of the country. It may be, on the contrary, in some given cases, the best and promptest way of benefiting Canada with a new and yet unappreciated invention; and such an importation of a few models would be fostering the object of the law, which is—that Canadian industry and Canadian labor should, in the shortest possible time, be made to profit by new inventions.

The words *carry on in Canada the construction or manufacture*, with their context, cannot, therefore, mean anything else than that any citizen of the Dominion, whether residing in Prince Edward Island, in British Columbia, in Ontario, Quebec, or elsewhere on federal soil, has a right to exact from the patentee a license to use the invention patented, or obtain the article patented for his use at the expiration of the two years delay, on condition of applying to the owner for it, and on payment of a fair royalty. The words *imports or causes to be imported into Canada* cannot mean anything else than injury to home labor, which injury if actually done by or with the connivance of the patentee most decidedly entails forfeiture of his patent.

It has been argued, in view of meeting the above mentioned interpretation of the words *construction* or *manufacture*, that the statute has foreseen the difficulties of special cases and has provided for them by subsection 2 of section 28, in giving to the Commissioner the power to extend indefinitely the delay in

such cases as, for instance, would be illustrated by a patent granted for a graving dock.

The purport and effect of sub-section 2 is totally different from, and even at variance with, the meaning given to it in this argument. A delay does not at all remedy the condition of impossibility in which a patentee is to establish, at any time, manufactories accessible to a population scattered over the territory which extends from ocean to ocean, with an area amounting to millions of miles; it does not do away with the impossibility, at any time, of keeping articles in stock without purchasers, and so forth.

But this is not all;—sub-section 2, construed as is proposed by the said argument, would lead to a positive defeat of the intention of the legislature, which clearly is that the patentee must supply Canadian citizens with the invention when requested to do so by any one, on payment of a reasonable price or royalty.

The effect of the delay of two years and the effect of any further extension thereof mean that, during that time, the patentee is permitted to withdraw entirely (the Government excepted) the use of his invention from the Canadian public, that he can refuse the use of it to all and everyone, under any and every circumstance. It follows that the granting of a long delay would amount to depriving, during such time, Canadian industry of the use of such invention, which could not be imported and which the inventor would not be bound to furnish on any condition. As it is logically necessary to carry the argument to the extent that, as there are many cases in which the difficulty exists at all times, the delay, of necessity, should be carried to the whole duration of the patent, it amounts to saying that the Commissioner of Patents is empowered to grant, and in fact forced to grant, that Canada should remain for a long period of time, or

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the whole period of the duration of patents, *quoad* the utility of certain inventions, in a state of industrial inferiority as compared with other countries.

Another proof of the total error of the argument is that the whole of the 28th section applies to "*every patent granted*," precluding, in the very terms of the law, the idea that it intended to deal with particular cases; nay, expressly enacting that the same provisions are to apply equally to all patents, as a matter of course, in the legitimate sense which is naturally and equitably suggested by the nature of things in matters of inventions and patents of invention.

The views taken on the question at issue are fully sustained by the construction and interpretation put on similar or identical legal enactments in other countries. The jurisprudence established, and the doctrine laid down by jurists and patent experts, in countries where the patent laws contain the same provisions as ours about *manufacturing* and *importing*, appear, from extensive reading on the subject, unanimous. It will be sufficient to enter into a short exploration of this ground to prove the assertion of such common consent of nations in the matter.

In England the patent laws do not contain the same prescription as our statute presents, and no *specific* provision is made to secure to the public the use of the invention, or to home labor the benefit of its working; but there exists in the present letters-patent issued in England a proviso which shows, by analogy, what doctrine prevails on the general question of the obligations of the patentee, where he is bound to furnish his invention under pain of forfeiture.

Among the circumstances that cause English letters-patent to "*cease, determine and become void*," is the following: If he, the patentee, "shall not supply or "cause to be supplied for our service all such articles

"of the said invention as he shall be required to sup-"ply by the officers or commissioners administering "the department of our service for the use of which "the same shall be required, in such manner, at such "times and at and upon reasonable prices and terms "as shall be settled for that purpose by the said "officers, &c." This shows that it is not supposed that the legitimate obligation of the patentee towards the customer is to keep open shops, to keep stock; but to supply the invention only when requested to do so by a formal demand accompanied with a settlement of the royalty.

Similarly to the laws of England, the present patent laws of the United States do not contain the condition of lapsing for reason of non-manufacturing or of importing; the absence of such provisions from the patent Acts of these two prominent manufacturing countries is, it must be conceded, antagonistic to the idea of Draconian interpretation of the said conditions where they do exist.

The obligation of manufacturing in the United States did exist for a certain time; it was introduced by a short Act in 1832; this Act was repealed by the Patent Act of 1836, but a provision of the kind was maintained in the last mentioned statute. By the 15th section the defendant, in an action of damages, was permitted to plead the general issue. At the end of the enumeration of defects, we read:—"..... or that the "patentee, if an alien at the time the patent was "granted, has failed and neglected, for the space "of eighteen months from the date of the patent, to "put and continue on sale to the public, on reasonable "terms, the invention or discovery for which the "patent issued; in either of which cases, judgment "shall be rendered for the defendant with costs."

The provision of this clause was invoked in one case

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of an assigned alien's rights (*Tatham vs. Lowber*) (1) where it was decided:—

"That even if the plaintiffs took their right with "the condition attached to alien patentees, yet they "had satisfied the statute: that they need not prove "that they hawked the patented improvement to ob- "tain a market for it, or that they endeavored to sell "it to any person; but that it rested upon those who "sought to defeat the patent to prove that the plain- "tiffs neglected or refused to sell the patented inven- "tion for reasonable prices, when application was made "to them to purchase."

The French legislation, as does the legislation of most countries, contains conditions similar to those of the 28th section of our Patent Act of 1872.

The doctrine and jurisprudence adopted on the subject is amply summed up in the quotations of two eminent writers on patents and patent laws, which will follow after citing the text of the law.

The French law reads thus:—Article 32, "Shall be deprived of all his rights * * * * "2. The patentee who shall not have worked his inven- "tion in France, within a delay of two years from the "date of the signature, or who shall suspend his "operations for two consecutive years, unless he show "cause for such inactivity. 3. The patentee who shall "have introduced into France articles manufactured in "foreign countries similar to those guaranteed by his "patent."

It must be remarked that the proviso at the end of paragraph 2 of the French law is similar in effect to the means adopted by our statute for making the non-manufacturing a *condition* of nullity to take effect only when rendered applicable by an administrative decision. The nullity enacted by the French law can be

(1) 2 Blatchf. 51.

pleaded in courts ; the nullity enacted by our Act is *conditional* upon a decision of the Minister of Agriculture, who alone is to say whether the condition is to be enforced or not.

Renouard, after quoting Arago's speech, in the *Chambre des Députés* (1844), against the stringency of the then proposed legislation, goes on to explain how it is to be understood :—

"The tribunals will appreciate, he says, according "to circumstances, whether it has been worked or "not ; whether or not the working has been inter- "rupted ; if the reasons of not working are sufficiently "justified." (1)

This was said by a magistrate of the highest order and a specialist, in anticipation of the judicial decisions which afterwards confirmed his views of the matter. Many years after, Bédarride, reviewing the jurisprudence established on the subject, recapitulates it, and exposes the doctrine in the following sentences :—

"The spirit of the law is therefore indubitable. It "intends to punish only voluntary, premeditated, "and calculated inactivity." (2)

It is to be remarked that Bédarride is not a loose, but rather a strict, interpreter of laws ; he holds that the laws of France do not admit of prætorian interpretation, and are not to be mitigated by the courts no matter how severe and hard they may be. Bédarride again says :—

"The voidance in paragraph 2 of Article 32 touches "only voluntary inactivity. The law wishes to punish "for inaction only the one who has willingly remain- "ed idle. *It would have been really too unjust* to extend "the penalty to the one who has abstained on account "of circumstances independent of his will." (3)

(1) Renouard : Traité des Brevets d'Invention, Paris, 1844—page 243.

(2) Bédarride : Commentaires des lois sur les Brevets d'Invention, Marques de Fabrique et de Commerce, &c., &c., Paris, 1869—Volume I, page 448.

(3) Bédarride, Vol. I page 450.

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As regards the importation, Bédarride says:

"The prohibition having for its unique object the "protection of national labor, it would have been "unreasonable to extend it to cases in which such "protection could not be injured." (1),

"The judicial authority, exclusively inspired by "this spirit, refused to apply the penalty of forfeiture "when the importation, *although unauthorized*, was "not in its nature susceptible of damaging national "labor." (2)

"It is proper to decide to-day as it was decided by "the Courts of Douai and Paris in 1846 and in 1855. "It should not be considered as a violation of the prohib- "ition of the law, where the importation is a few speci- "mens of the articles, or the importation of machines, "having no other object in view than to find either "associates or licensees for the invention." (3)

It would only be a matter of time and labor to extract similar authorities and decisions from the records of other countries, where the laws are either identical or similar to our statute in this respect. All this shows, to borrow the very words of Renouard, "how "the practice of nations solves, by common sense and "experience, the questions raised by necessity....."

The questions of law having been thus established, it remains to examine the facts of the case and to confront them with the meaning of the statute. The evidence adduced is ample to give any one a clear and unmistakable knowledge of the state of affairs.

As to manufacturing, it is proved that none of the respondent's inventions were put up in Canada within the time prescribed; but no proof is given that he has refused to furnish them to anyone at any time. On the contrary, it is shown in the clearest manner

(1) Bédarride, Vol. 1, p. 455. (2) *Ibid.* Vol. 1, p. 457.
(3) *Ibid.* Vol 1, p. 463.

that he has not been requested by any one to be supplied with them during the time of inactivity.

As to importation, it is proved that the machines imported at Thorold by Messieurs Howland and Spink, more than twelve months after the date of the patent, are Smith's invention No. 2257 ; that Smith was neither the consignor nor the consignee, nor the owner thereof; that he did not actually import them but that he consented to the importation, which action amounts to causing them to be imported. It is clear that Smith's consent in this instance was not intended to defy the law, that it did not cause any appreciable injury to Canadian industry, but had for its object to bring the merits of his patents and process before the Canadian public, with the honest intention of manufacturing in Canada, as his efforts to introduce his process in Lawson's mill prove.

The petitioner, aiming at the Process of Milling patented under No. 2409, has tried to connect Patent No. 2257 with Patent No. 2409, as being necessarily dependent on each other in the way of cause and effect or rather object and means, but has failed in that, and by his evidence has, in fact, proved the contrary of his proposition, in establishing that Smith's process does not require any special plant or machinery, but can be added to any mill by ordinary tools and workmanship, and with ordinary materials, which is, besides, made plain by a careful study of the patents.

The petitioner has also tried to prove unwillingness on the part of the patentee to furnish the Canadian market at the same time that an active demand is alleged to have existed in Ontario for several years for such processes of milling as Smith's, an assertion which is poorly sustained by Barter's third declaration and his own Trade Circular (hereinbefore analysed),

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and by the fact that one of the witnesses who makes this assertion, Mr. Lawson, had no Middlings Purifiers of the sort in his own mill at Thorold, in May, 1876, when he refused the offer made by Smith to himself (Lawson) to have one put up for him, he having objected to the ordinary price charged for royalty.

The petitioner insisted on the point that the three petitions of the respondent (documents hereinbefore analysed) are a virtual admission of his having failed to comply with the exigencies of the statute. It would be hardly fair to take even an unconditional admission of the sort, made under the circumstances and in error, as carrying with it the necessary destruction of the patent. The petitions referred to are not, however, an admission of that kind. The patentee, after a statement of facts, says he "submits that his "acts as aforesaid are a sufficient compliance with the "terms of the said 28th section of *The Patent Act of* "1872"..... He has been unable, "for reasons afore-"said, to comply literally with the terms of the said "section," and he concludes by asking for a "declaration "that the said patent has not become forfeited," and also for "an extension of time to commence the manufacture."

It is clear that the patentee was conscious of having complied with the spirit of the law, but was apprehensive of the interpretation given to the words on account of threats. He asked for an extension of delay, a long time after the expiration of the statutory delay, which extension can, of course, be granted by the Commissioner only as a continuation (without interruption) of the respite of which it is the mere prolongation. When the statutory delay has expired, a patent then is either voided or in operation, according to the spirit of the law, and no other proceeding

on the point in question can intervene, unless a dispute is raised.

These few remarks seem sufficient to show the real meaning of this incident, and to prove that the fact of the patentee having presented the said petitions, or the terms of such petitions, cannot, in the least, affect his position.

The counsel for the petitioner has argued in favor of the conclusions of his dispute from an official answer given to a letter written to the Patent Office, at his (the counsel's) advice, *pendente lite*. As this is a matter of constant occurrence, and as it gives an occasion of showing how necessarily different is an answer to a question put in the abstract from an decision of a case presented with all its bearings and particulars, it is of importance to the Patent Office and to the public to dispose of the argument.

The letter written contained the following question :—"Is it considered as '*construction*' sufficient to hold "the patent, if an article composed of various parts is "*imported* in *parts* and put together and constructed in "a Canadian manufactory ?"

The letter in answer was as follows :—"You ask if "the manufacturing clause of *The Patent Act* would "be complied with by importing the whole of the "parts of a machinery to be only put together in "Canada ? Evidently this would not be in com-"pliance with the requirements of the law."

To such an interrogation no other than an answer based on the supposition of a breach of the law could be safely given. But if, departing from the abstraction of the above given question, the investigation were made as regards a certain patent, under specific circumstances, the conclusion might be widely different from the general answer. In fact, it is not difficult to imagine a case in which the importation of

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all and every one of the component parts of an invention, to be simply put together in Canada, would not be an *importation* within the meaning of section 28 of *The Patent Act*, but, on the contrary, would be the only means of obeying the statute as to manufacturing, and therefore, to all intents and purposes, a full compliance with the spirit of the law and the nature of the contract. Such would be, for example, the case of a patent granted for a *composition* of *matter*, all the ingredients of which would be products not to be found in the country; a compound of exotic gums and extracts, for instance, or a medicine composed of portions of tropical plants.

This is sufficient to illustrate the difference of cases, every one of which must stand on its own merits, viewed in the light of the facts confronted with the spirit of the law.

The conclusion is, that the respondent,—having refused no one the use of his inventions, and the importation, assented to by him to be made, being inconsiderable, having inflicted no injury on Canadian manufactures and having been so countenanced, not in defiance of the law, but evidently as a means to create a demand for the said inventions, which the patentee intended to manufacture and did, in fact, offer to manufacture in Canada,—has not forfeited his patents.

Therefore, George Thomas Smith's Patents No. 2257, for a "*Flour Dressing Machine*," No. 2258 for a "*Flour Dressing Machine*," and No. 2409 for a "*Process of Milling*" have not become null and void under the provisions of section 28 of *The Patent Act of* 1872.

THE TORONTO TELEPHONE MANUFACTURING CO..... } PETITIONERS;

AND

THE BELL TELEPHONE COMPANY OF CANADA..... } RESPONDENTS.

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Jan. 24.

Patent—New combination of old materials or devices—Importation in parts—Connivance in importation by patentee, effect of—Obligation to sell invention—35 Vic. c. 26, s. 28—38 Vic. c. 14, s. 2.

An invention consisting of a new and useful combination of well known materials or devices which produces a result not theretofore so obtained is a proper subject for a patent.

2. The importation of the component parts of a telephone, in such a state of manufacture as to simply require putting together in Canada to make the completed instrument, falls within the prohibition of section 28 of 35 Vic. c. 26, as amended by 38 Vic. c. 14, s. 2.

3. Upon application being made to the respondents to purchase a number of their telephones for private purposes they refused to sell the same, accompanying such refusal by the statement: "We do not sell telephones, but we rent them."

Held, that the respondents had thereby afforded a good ground for forfeiture of their patent.

4. Connivance by the patentee in an improper importation is equal to importing or causing to be imported within the meaning of the statute.

PETITION against the continuance of Patent No. 7,789, granted on the 22nd of August, 1877, to Alexander Graham Bell, and now owned by the Bell Telephone Company of Canada, on the ground of non-manufacturing and of importing, contrary to the provisions of section 28 of *The Patent Act of* 1872.

The petition addressed to the Minister of Agriculture (bearing date 2nd September, 1884,) alleged that Patent No. 7,789 is null and void, and should be so declared, for non-compliance with the provisions of the 28th section of *The Patent Act of* 1872, requiring manufac-

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ture within two years and forbidding importation after twelve months (1).

October 20, 1884.

The matter came on for hearing before the Minister of Agriculture.

Roaf, *McLean*, *White* and *Johnston*, for petitioners; *Cameron*, Q.C., *McCarthy*, Q.C., *McMichael*, Q.C., *McDougall*, Q.C., *Lash*, Q.C. and *Wood*, for respondents.

Counsel for respondents argued,—that the petitioners had no *locus standi* to entitle them to a hearing, having no specific interest in raising a dispute,—that the Minister had no jurisdiction in this case and should therefore not proceed with it, the more so that there is no power vested in him to summon witnesses and to administer the oath to them,—and that the extension of the patent for further periods than the five first years amounted to an acknowledgment by the Commissioner of Patents that the patent was still in full force at the time of the extension.

(1) 28. Every patent granted under this Act shall be subject and expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall cease and determine and the patent shall be null and void, at the end of two years from the date thereof, unless the patentee, or his assignee or assignees, shall, within that period have commenced, and shall, after such commencement, continuously carry on in Canada the construction or manufacture of the invention or discovery patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it, in Canada, and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee, or his assignee or assignees, for the whole or a part of his interest in the patent, imports, or causes to be imported into Canada, the invention for which the patent is granted; and provided always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture, or his deputy, whose decision shall be final.

2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention

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The Minister decided that there was a dispute raised and that he was bound to act upon it, seeing that he, or his Deputy, alone had jurisdiction in such a matter, and that an extension of the term is no decision as to the validity of the patent.

Respondents then asked to postpone the hearing until new legislation could be obtained giving the Minister power to summon witnesses, and to swear them.

This postponement not being granted, the respondents intimated their intention to apply for a writ of prohibition to restrain the Minister from proceeding with the case, inasmuch as the 28th section of *The Patent Act of* 1872 is *ultra vires*, in that it deals with civil rights assigned to the Provincial legislatures by *The British North America Act.* The respondents asked for an adjournment, pending the decision on their application for a writ of prohibition. Granted.

November 10th, 1884.

The case was resumed before the Deputy Minister, who, on account of the unavoidable absence of the Minister in charge of the case, declared a further adjournment to the 24th of November.

On the resumption of the case, on the 24th November, a judgment of Mr. Justice Osler, of the High Court of Justice of Ontario, Common Pleas Division, dismissing the application for a writ of prohibition, was produced. (1)

The respondents, at this state of the proceedings,

within the two years hereinbefore mentioned, the Commissioner may at any time not more than three months before the expiration of that period grant to the patentee a further delay on his adducing proof to the satisfaction of the Commissioner that he was for reasons beyond his control prevented from complying with the above-mentioned condition.—*The Patent Act of* 1872, as amended by 38 Vic. c. 14 s. 2.

(1) REPORTER'S NOTE : *See* the report of the application and the reasons for judgment of OSLER, J. in 7 Ont. 605.

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asked for a further adjournment to allow them time to get a decision on an appeal from the judgment of Mr. Justice Osler.

The Minister decided against a further adjournment on that ground.

Counsel for the respondents submitted that, being forced to proceed, they had a right to have it recorded that they did so under protest, anxious as they were of not appearing to have waived their objections to the hearing of this case.

The parties then went on with the evidence; after which another adjournment was resorted to for the purpose of bringing more witnesses, as was desired by the parties.

December, 2nd and 3rd, 1884.

The hearing of the case was continued.

The evidence adduced consisted of official documents of the Patent Office, of certified copies of Customs entries, of accounts, of letters and correspondence exchanged between agents of the Bell Telephone Company of Canada and various parties, of statutory declarations and of oral testimony. The effect of the evidence is stated in the Minister's decision.

The following is an analysis of the arguments on both sides:

McMichael, Q.C. for the respondents, argued in substance:—Section 28 of *The Patent Act* is a restriction on section 6 which gives exclusive privileges to the patentees; there are inventions which cannot be brought within the scope of section 28, and " Bell's system of telephony " is one of these, it being an art of a practical nature, which consists in transmitting articulated sounds by means of electricity conveyed in a circuit with instruments at each end. These instruments are simple things, not at all like an object of manufacture, as a plough or a sewing machine, com-

plete by themselves, and susceptible of being given over as such to be worked ; here we have a thing which requires to be worked with something else, by skilled management ; everybody cannot have his circuit of telephony to work it, it can only be utilized in the way the respondents have done. They have carried out in the most ample manner the spirit of the 28th section. Now, some one says : " I want four or five " hundred of your machines." The patentee says : " You cannot have them." " But I have a right to " get them," the other may say. " You have a right to " one, but not to become my agent," the patentee may answer. " We are ready to sell for a private line, but " have found it is far better that people should lease " than buy, on account of the danger of failure in the " hands of unskilful persons." Our company is assignee of the patent, having paid a large price for the same in the year 1880, and they bring before us something which they say happened while we knew nothing about it. The invention is an electric current, and how that invention could be imported and continue to be imported is not very clear. But on the supposition that it was confined to the machine, the component parts are simple things, articles of commerce. In reference to the sale, the refusal of which is not well proved, the company said :—" Here is what we will " do, we will lease it to you, we will take all the trou- " ble, we will bring that invention to your door, we " will place it in your house, and we will give you, " not merely a small circle to communicate with, but " we will give you a full wide-spread range over the " province." Our clients have fulfilled the law, in the spirit indicated by Mr. Taché in his decision in *Barter* v. *Smith* (1). The man who, by his ingenuity, has made a valuable discovery should not be deprived of

(1) Reported *ante* p. 455.

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his rights except upon the very strongest and most cogent reasons.

Cameron, Q C. argued, in substance, for the respondents: The 28th section, here invoked, has already received a judicial interpretation in the case, so often referred to, of *Barter* v. *Smith* (1). This interpretation has gone forth to the world. It is to be found in every patent office and in every patent solicitor's office. It, moreover, is a decision which has received the approval of our highest courts. It has received the approval of the Court of Appeal of Ontario, and it has received the approval of the Supreme Court, who not only have endorsed the conclusions, but have endorsed the reasons given by Mr. Taché, in what is described as his able judgment. It is the interpretation, in Canada, of the law relating to patents. If it is to be altered it can only be altered by Act of Parliament, just as when the law is once fixed by the decision of the courts. I ask you, then, to apply these broad and general principles, which Mr. Taché has laid down as law in that case, to the consideration of this one, and if you do, and if you compare the facts in that case with the facts in this, I submit you can come to no possible conclusion but that there has been no violation of the section against importation. As to the point in which an importation is alleged to have taken place between the 23rd and 29th days of August, 1878, let us consider the enormity of the proposition which my learned friends desire to support. Where there was no intention to violate the law, which Mr. Taché says is necessary to constitute an offence, where the evidence shows that there was a desire to comply with the provisions of the law, you are asked to decide, on a hair-splitting technicality, that this patent shall become void. On the allegation of subsequent and continued importation

(1) Reported *ante* p. 455.

nothing is proved. What is patented is a combination, the application of a principle. The whole section does not apply, but if it did apply the patentees have manufactured so far as they could. They instructed in Boston the man Cowherd, of Brantford, to make the instruments. Cowherd died, and they got a man from Boston to teach the man Foster in Toronto to manufacture them. Then, in 1882, the demand became so great that they started a manufactory in Montreal. If it were not for the section, it would have been far cheaper not to manufacture; but to obey the law they have started a manufactory, in which $50,000 capital is invested. But we are said to have imported the various parts of the instrument to 'assemble' them here. I say that construction is 'assembling,' that if we get the various parts in a partially manufactured condition and 'assemble' them, so as by putting them together to make a complete instrument, we construct the instrument. The different parts, steel band, drop forgings, boxwood bobbin, were imported in the raw state and worked here into instruments. Furthermore, the acts complained of were done before this company purchased the rights at a cost of about half a million of dollars; they are not accountable for an accidental delay in August, 1878, two years before they acquired the patent. Now for the refusal to sell, there is not one word in the Act that requires us to sell the invention at all. All that the patentee is required to do is that every one desirous of procuring the invention may have it at a reasonable price. In the case of Lohnes, this man wanted to make connection with our line at Whitby, making use of other instruments, to correspond east and west through our wires and exchange offices,—a thing we were not bound to do, as relating to our patentee's obligations. Again in Dinnis' case, that man came to lay a trap, being engaged in organizing a

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rival company, and was told that we were ready to sell the instruments at a certain price if he wanted them. He probably wanted to get a refusal, but did not get it. In Mr. Fergusson's case, he also wanted a refusal and only spoke to the first man he met in the office of the company, a person without authority, and thought he had got a refusal. In the case of Mr. Dickson, he also wanted a refusal, but did not meet with it. These people did not object to the price, nor had they discussed it; they did not insist on their so-called demand of a bargain, but simply wanted to try and get a refusal. The only other case is the Bate case in Ottawa. He was experimenting on our telephone, and, being told that he was infringing, he wrote a letter asking for the use of our patent to communicate between his and his father's house; he was told of the terms of our company and dropped the matter. Now we may look at the working of our company, which has brought this wonderful invention into general use in Canada. In Ontario alone there are about two thousand miles of lines in operation, connecting cities, towns and villages. Is there any complaint from the public? We are the representatives of Mr. Bell, the inventor, and entitled to the protection he deserves. We have invested one million of dollars in the business in Canada.

Macdougall, Q. C. counsel for shareholders, argued, in substance, in favor of the respondents:—The petitioners in this case have no *locus standi*, on a ground not taken by counsel preceding me; the petitioners are a company existing under letters-patent granted under a general Act of the Province of Ontario; the subject of telegraphs, which admittedly includes telephones, is exclusively vested under the jurisdiction of the Dominion Parliament, therefore the Provincial legislatures have no right to incorporate companies for the purpose of establishing telephonic connections,

and so the petitioners have no legal existence. I do not ask you to decide that question, but I raise it here for the purpose of putting it on record and making it a basis for future contention. This section of the law had in view to prevent inventors from taking a patent and leaving it fourteen years without use, and also to encourage home manufacture. Evidence is given that these little articles called "drop forgings" are the only ones which can be said to have been manufactured abroad, and upon this they base their allegation that there has been an infraction of the Act, the whole profit of the sale of such articles for a year would be some $10. Is it not a farce to talk of that being an infraction of the patent law? *De minimis non curat lex* is a maxim which applies to this case. I was surprised to find the learned Judge Henry endorse the view that is expressed, I believe, in Mr. Taché's judgment, that the Minister, or his Deputy, has the power under the Act to deal with a question of this kind and decide to impeach and repeal a patent. I think the dispute referred to there is departmental. I think this case ought to be dismissed and referred to the proper tribunals. (Cites authorities to show that the rule for the construction of patent cases is that they are to be construed liberally.) There has been no importation of the thing patented, according to that rule of interpretation. As to "construction," the word must have been inserted in that section for cases in which the word "manufacture" would not apply. "Construction," Webster tells us, is "the manner of putting together the parts of a machine or system." Now that is pretty nearly 'assembling,' as explained by the American witness that we heard yesterday. We have constructed the invention in Canada, by setting up our magnetic system, producing these various beneficial results. Although I do not agree with some of

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the views that I find in the decision in the case of *Barter* v. *Smith* (1), yet in some of the conclusions I do agree. At all events it is to be held as the law.

Wood, on behalf of the respondents, cited a recent decision of the English courts, (*Townsend* v. *Haworth*) (2) in which it was held that the importation of materials used in forming a patented compound for the preserving of vegetable fabrics from decay, was no infringement of the patent. This decision is a very strong authority for the respondents' contention, inasmuch as what is no material for infringement cannot be, in this case, a material for illegal importation.

Roaf, for the petitioners, argued in substance:—The ninth claim of Bell's patent brings it under the purview of the 28th section, being thus framed in the specification—as a new article of manufacture, a telephone constructed substantially as in figure 6,—that is the hand telephone and also the box telephone. I submit there can be no other construction put upon the acts that have been proved here but that these telephones have been imported both in a complete condition and also in a condition of being simply put together, one that comes clearly within the decision of Mr. Taché's ruling, at the latter end of the case of *Barter* v. *Smith*, (1) that the importation of a machine in parts is an importation of the machine which is not allowed by *The Patent Act*. The shipment, made in Boston on the 23rd August, 1878, was made after the twelve months' delay, and its entry into Canada, some days after, constituted an illegal importation of the article patented, and is fatal to the patent. They have tried to shave as close within the wording of the Act as they possibly could. These telephones were manufactured by Williams in the United States,

(1) Reported *ante* p. 455.

(2) 12 Ch. D. 831; Goodeve's Patent Cases, 467.

shipped by him in parts, afterwards to be merely put together, first by Mr. Cowherd in Brantford, at the rate of from thirty to thirty-five cents for each instrument. What was done first with Cowherd was done afterwards with Mr. Foster in Toronto, as is clearly proved by himself. The steel pieces were cut and punched in Boston, the *drop forgings* were made there to the extent at least of two cents of labor put upon every one of them, the disks were also cut and turned on an emery wheel in Boston ready for use; the rubber handle was manufactured abroad, and this had been going on till 1882, when they say themselves that they commenced the manufacture in Canada.—"We are soon about to commence the manufacture in Canada," wrote Mr. Sise, the General Manager, in 1882. The tendency of the company was also to evade the law by refusing to sell. Mr. Bate wanted to connect his with his father's house by private line; Mr. Dinnis wanted to purchase the patented article, and they were told they could only rent it. If they have imported after the twelve months and refused to sell after two years, they have forfeited their patent; this is the only question at issue. There is no parallel between the case of *Barter* v. *Smith* (1) and the present case. Mr. Taché decided that the importation by Smith was a mere importation of models to bring the article before the Canadian public; no such thing here, where the patented article has been imported in lots. This is no applying of the case of compounding drugs quoted by Mr. Wood; the difference is evident. Their asking $30 for an instrument, the cost of which is about $2, cannot be considered as a reasonable price.

McLean, on behalf of the petitioners, argued in substance:—The views taken by the learned counsel on the other side about the 28th section do not harmonize.

(1) Reported *ante* p. 455.

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Some think it is good, others think it is bad—exceedingly bad. But I would remind them that it suited the legislature which enacted it, and it suited the gentleman who had a prominent part in the making of it. As a lawyer in this case, however, it evidently does not satisfy my learned friend Mr. MacDougall. As to the meaning of the two terms "construction" and "manufacture," it appears clear that the first applies to such structures as bridges, graving-docks and so forth, and "manufacture" to things of a portable nature. It is contended that section 28 does not cover such a patent as this one; but the law says that every patent shall be subject to these conditions; and why do they say that this patent does not come within the provisions of this section? "Oh! Mr. Bell has been a public benefactor who has discovered a marvellous art." The patent covers this art; one says it covers the electric fluid not the wires, the other says it covers the wires. Mr. Bell has not invented telephony, but, as he describes it himself,—some new and useful improvements in electric telephony. He has invented and patented a machine to perform a certain function in telephony; it is the machine which is patented. An attempt was made to prove that the rubber handle is no necessary part of the invention; but it is claimed in the patent as such and it is clear that it is essential, whether made of rubber or other material. The manufacture commences when the raw material, as found in commerce for general purposes, is directed towards making a specific article, a telephone in this case. So far as the *wood* of the bobbin is concerned, the manufacture begins at the point at which it is sawed in a shape adapted to make the bobbin of a telephone; the *steel bars* are manufactured the moment they undergo a putting into shape by cutting, punching, and so forth, to enter as elements of a telephone; the *drop forgings* are man-

ufactured by the hammer and then perfected for their destination in a telephone. Another point is that no consideration of the parties, nor of the amount of their purchase, should influence the ruling, and no extraordinary leniency should be brought to bear; it is a question of contract, as in any other case, with fixed stipulations. The respondents cannot come here as innocent holders. In 1880 and 1881, when Mr. Foster was manufacturing, Mr. Sise knew exactly what was going into their shops, and he had had communications with Mr. Williams and knew that Williams was forwarding materials at his request.

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White, for the petitioners, argued:—It is laid down by all the authorities and endorsed by the very able judgment of your Deputy, that a patent of invention is a contract between the State and the individual. The contract may be conditional, or it may be unconditional. The contract in either case is one under which the State is supposed to receive something for the privilege which it has granted. The 28th section of *The Patent Act* prescribed the conditions to which the grant is submitted, and these conditions were confided to the jurisdiction of the Minister of Agriculture. I have no great fault to find with the judgment in *Barter* v. *Smith* (1), and I have no great fault to find with the doctrine that it shall be considered declaratory of the law of this country. It does not, however, mean that, because the patent was not annulled in that case, no patent should be annulled in any case. I take issue with the opinion that any such doctrine is propounded by the decision of Mr. Taché. Mr. Taché, on the contrary, held in that judgment and declared in that judgment what the object of Parliament was, and every person, no matter where he reads this judgment, whether in Europe or America, is put upon his

(1) Reported *ante* p. 455.

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guard as to what the law and policy of the country are intended to be. Mr. Taché declared hat the object of this legislation is that Canadian industry and Canadian labor should, in the shortest possible time, be made to profit by new inventions. In another part of his judgment he states that, although he found reasons in connection with that particular case not to declare the patent void, yet every one of these cases must stand on its own merits, viewed in the light of the facts, confronted with the spirit of the law. So that, immediately before pronouncing his judgment in that case, he is careful to inform the world that there is a difference in cases. It was under all the peculiar circumstances of that particular case that Mr. Taché was induced to render his judgment in the way he did, at the same time prefacing his judgment with the remark that every case must stand on its own merits. But the circumstances in this case are of an entirely different character; the circumstances are the very opposite. The respondents knew perfectly well that the demand was already created, and there was no difficulty in doing what they have since done after five years of the life of the patent. They failed in the condition as to importation, failed to comply with the conditions as to the establishment of a manufactory in this country. The facts are that, during the first year, they imported a number of articles complete; these telephones were manufactured by Williams in the United States and sent to Canada to Thomas Henderson, the acting agent of the patentee up to the year 1880. We have it, from Mr. Sise, that in 1880 he came to Canada to represent this interest, and continued to do so up to the present time. It was only in 1882 they started a factory in Montreal. They were not under any obligation to start a factory; but they were under

the obligation to know whether the article patented was being manufactured in the country or not. Mr. Sise tells us that five years after the life of the patent had begun, a capital of $50,000 had been expended in the establishment of a manufactory. The raw materials are there now turned into telephones, everything being done at that factory. There was as much obligation to do all that in this country in 1878 as there was in 1882. What they are now doing is no excuse for what they failed to do during the first five years. The evidence is clear. All the parts were manufactured in Boston, packed in boxes containing what was necessary to complete a certain number of instruments; they were imported into Canada to be put together for about thirty cents apiece, in Brantford, by a tinsmith, for upwards of three years, and then in Toronto, at Mr. Foster's establishment, for twenty-five cents apiece. For not doing before what they considered necessary to do in 1882, the judgment of this tribunal must hold that the patent is avoided, because the manufacture had not commenced after the period of two years, in fact never commenced until the year 1882. Then comes the question as to whether a patentee is under any obligation to sell the patented article, or if it is a full compliance with the law to rent it under lease. I understood Mr. Taché to have spoken of a process when he speaks in his judgment of *licensing* the right of using. An argument is made of the enormous loss that an avoidance of their patent will entail on the respondents. That is not the question. The patent was a contract. Have the conditions been fulfilled? That is the question. Besides, the avoidance of the patent will not destroy the business which has been built up by the patent, to the value of $1,000,000 invested, with a start of years over all competitors.

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THE HONOURABLE J. H. POPE, Minister of Agriculture, now (January 24th, 1885) rendered his decision.

This case is the second of the kind which has come before this tribunal. It happens that both cases concern interests of vast magnitude, a circumstance which contributed to enhance the sense of the heavy responsibility imposed by the law on me, as the Minister of Agriculture, or on my Deputy, in this respect. The first case, *Barter* v. *Smith* (1), was tried before Mr. Taché, in November, 1876, and his judgment was rendered in February, 1877.

I have to refer to that judgment, because it has been made the basis of argument by the learned counsel on both sides in this case, because it constitutes the declaratory law of the country on points raised by the application of the 28th section of *The Patent Act of* 1872,—being in matter of doctrine and of legal interpretation unquestionably correct; and because it is endorsed, as remarked by Mr. Cameron, by the highest judicial authorities, namely, the Court of Appeal of Ontario, the Supreme Court, and, in relation to this present case, by Mr. Justice Osler in his judgment rejecting an application for a writ of prohibition.

This tribunal is, therefore, bound to attach great weight to the doctrine and rules of interpretation laid down in that judgment by the Deputy Minister, which judgment embodies the jurisprudence adopted in Canada in dealing with that section of *The Patent Act*.

The feature of Patent No. 7,789, granted for what is known under the name of "*Bell's system of telephony*," is peculiar in so far as it consists both of a process, or art, and of a portion of the machinery necessary to carry the art into practice. The two elements are inseparable; the *electric circuit* and the *two instruments* are the means of giving a practical and tangible shape

(1) Reported *ante*, p. 455.

to "*Bell's system of telephony.*" Moreover, the instruments, described in the specification and illustrated in the drawings of the patent, are the mechanical contrivances which distinguish this invention from other methods of getting at a similar result. All the elements of which these instruments are composed are of the public domain, and public are also the means of erecting an *electric circuit*; therefore, the patent is a patent for a new and useful combination of old elements, to obtain an object known beforehand. The combination is the invention, and, consequently, the subject matter of the patent and the mechanism of which it is constituted are new articles of manufacture.

The doctrine, universally admitted, of the patentability of a variety of combinations of the same elements for the same object, has been clearly laid down by the Supreme Court in *Smith* v. *Goldie* (1). What is patentable is the subject of a privilege, and, in Canada, is submitted to the conditions of section 28 of *The Patent Act of* 1872.

This patent, like every other patent granted, is, therefore, under the obligations exacted from all patentees by section 28 of *The Patent Act of* 1872, and subject to the adjudication of this tribunal, should disputes arise as to whether it has or has not become null and void under the provisions of this section.

The patent was granted on the 22nd of August, 1877, to Mr. Alexander Graham Bell, and is now, through a series of assignments, the property of The Bell Telephone Company of Canada, the respondents in this case. It must be remarked that it matters not who the owners are for the time being, or were at any time. It is the patent which stands before me, as the Minister of Agriculture, to be adjudicated on, not the owners. The patent does so stand with the unin-

(1) 9 Can. S.C.R. 46.

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terrupted privileges as well as with the uninterrupted obligations attached to it.

This tribunal has not to investigate the *locus standi* of petitioners nor of respondents, nor, in relation to companies, to enquire whether they are legally incorporated or not; such questions are not within its jurisdiction, and besides, are quite indifferent to the issue in such cases. When this tribunal is made aware that disputes are raised, in accordance with the provisions of the 28th section, by some person who undertakes to prove his allegations, it immediately becomes the duty of the judges of such disputes to investigate the matter, in the interest of public rights, if the policy of the law has not been carried out, or in the interest of patent rights, if the obligations have been fulfilled. I, as Minister of Agriculture, have not to undertake to initiate cases of disputes, but I must take notice of all cases brought before me in a formal way.

The first allegations of the petitioners in this case are that illegal importations have been made of the patented articles after twelve months from the date of the patent, specifically in the latter days of August, 1878, in January, 1879, and during the years 1880 and 1881.

The facts of the first alleged act of illegal importation are as follow:—During the first year of the existence of the patent, the patentee, or his representatives in Canada, had contracted with Mr. Charles Williams, of Boston, in the United States, for one thousand telephones to be delivered within the twelve months allowed by law for importing the invention. At the expiration of the twelve months, Mr. Williams had not been able to complete his contract, more than half of the number contracted for not having been furnished. Under the misapprehension, created by the

date of the registering of the patent (24th August) that the twelve months would only expire with the 24th day of August, 1878, Mr. Williams forwarded from Boston, on the 23rd day of same month, a lot of seventy-five telephones, which, in the ordinary course of transit, should have entered Canada on the 24th; but which, owing to some mishap, did actually pass the frontier only a few days after. The circumstances of these facts show that there was no intention to break the law, and that the importation was not considerable; therefore this case of importation in the latter part of the month of August, 1878, cannot entail the avoidance of the patent.

At the same time that no stress is put upon these facts, it is, nevertheless, an occasion to warn patentees in general against the danger of running so close to the expiry of the twelve months as to incur the risk of coming even a day too late with their last importation. This tribunal is a paternal tribunal, the judges of which are the natural protectors of patentees' rights, and, as such, bound to give to the facts the most liberal construction consistent with a compliance with the spirit of the law; but the patentees are the first guardians of their own interests and should not put their property in jeopardy by placing these judges in the position of being obliged to overstretch leniency in order to save their patents.

During the first year of the existence of the patent, then, the patentee or his legal representatives imported, or caused to be imported, about five hundred instruments ready for use, as they had a right to do; a few days after the expiration of the twelve months they also imported, or caused to be imported, seventy-five complete instruments, which latter importation, being inconsiderable, and apparently done in good faith, and not with any intention to evade the law, is

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declared not to have forfeited the patent. There remains now to examine what was done after that time.

It is desirable, first, to enter into a cursory examination of the instruments patented as new articles of manufacture. It will, however, be sufficient to investigate the elements of one of these two instruments, the one commonly called the "Hand Telephone," represented in figure 6 of the drawings of the patent. It consists: 1st., of a casing with a side cover, the whole being at the same time a handle, with a flat ring piece fixed to it, called a disk in the trade, and a perforated cup-like screwed top; the whole, and the four distinct parts of which, are of a form special to this new article of manufacture; this handle casing may be made of any suitable materials, but as a matter of fact is in this case made of hard rubber;—2nd., of four bars of magnetized steel, bound together by screws and nuts;—3rd., of two soft iron pieces, called drop forgings;—4th., of a bobbin, on which silk-covered small copper wires are rolled around;—5th., of wire posts, also called screw cups, and a regulating screw;—6th., of a metallic vibrating plate or diaphragm, sometimes called disk, as a matter of fact cut out and otherwise worked from what is commonly called japanned or ferrotype plates;—7th., of a few other insignificant articles of construction.

It will expedite matters to consider, together, the two questions, raised in the dispute, of illegal importation and of non-manufacture; for in the measure that illegal importation goes on, in that measure the industry and the labor of the country are deprived of the benefit of manufacturing.

Therefore, we have to examine what, in these instruments, is raw material which does not fall under the application of the 28th section, and what are industry and labor; because it is clear that if the aggregate amount of industry and labor entering into the mak-

ing of such instruments was merely trifling (unless a criminal intention of totally disregarding the law was shown, which is not the case here,) it would not be a liberal nor a reasonable interpretation of the spirit of the law to destroy the patent, on account of its importation or non-manufacture; if it only, for instance, amounted in all to a value of ten dollars a year, or even if ten times as much as that for every year, it would be a case for the application of the maxim quoted by Mr. McDougall,—*de minimis non curat lex.*

As already said, it will suffice to confine our study of the case to the examination of one of the two instruments patented, the "Hand Telephone." The raw materials of this instrument comprise steel in bars, soft iron, wood and vulcanized rubber, to which must be added, as common articles of commerce, silk-covered wires, japanned plates or sheets of ferrotype, as some call them, screws, nuts, and may be wire posts. The value of each hand telephone complete is about $2.00; the value of the raw materials, including common articles of commerce, entering in each instrument, may be said with certainty not to reach the aggregate of $0.90. Therefore the industry and labor put upon each of these instruments may be set down at about $1.10. One would be inclined to take a much more exalted idea of the value of the labor put upon the two instruments patented from the statement made by Mr. Sise, the General Manager of the Bell Telephone Company of Canada, that their telephone factory at Montreal, established in 1882, has $50,000 capital invested in it, and that the pay-roll of that factory amounts to $30,000 a year, wages, notwithstanding that the rubber handles of the hand telephone are not yet manufactured in Canada, as we have it from Mr. Sise, who says that they cannot get them made in Canada, having again vainly tried to do so a week

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before he gave his evidence in this case; which, of course, can only mean that the Bell Telephone Company have not procured for themselves the moulds to manufacture these rubber handles. Although Mr. Sise does not discriminate the work done at their Montreal factory, it is clear that such an amount of yearly wages cannot be exclusively devoted to the making of the two instruments patented in Patent No. 7,789; but the statement, with all its surroundings, proves that the manufacture of the two instruments is not an insignificant trifle, but is on the contrary an advantage worth being looked after; there are many thousands of them now in use in Canada, and there were, at least, several thousands when the Montreal factory was started.

The question comes then:—Has the patentee or his legal representatives imported, or caused to be imported, after twelve months of the existence of their patent, the new articles of manufacture patented? There cannot be a shadow of doubt that they have so imported, or caused to be imported, the articles manufactured in parts, to be simply put together at an amount of labor costing at times $0.30, at other times $0.27, in Canada. It is in fact, virtually admitted by their counsel, that putting together or "assembling" the parts ready made is construction and manufacture, in the meaning of the law.

It is equally evident that, during the same period, that is coming to the year 1882, they have failed to manufacture to the extent that they have imported, and that, from the year 1882 to the date of hearing the evidence of Mr. Sise, the 3rd December, 1884, they had been importing the rubber handles in a manufactured state.

The intention, although not malicious, to evade the law, is nevertheless manifest. During that consider-

able time of the existence of the patent (to 1882), the same foreign manufacturer, Mr. Williams, with whom the patent owners had contracted for one thousand telephones to be delivered during the first twelve months of the life of the patent, and who furnished only about five hundred during that period of time, continued to send them to Canada for years, to supply an ever increasing demand; but to evade the law and give a color to the importation instead of sending the instruments consigned to the patentee's representatives, he sent them, in pieces to be put together in Canada, to some one through whose intervention the patentee's representatives received them when "assembled."

All this is proved in the clearest manner by Customs papers, by accounts furnished, by declaration from one of the Cowherds, from Mr. Foster, and by correspondence on the subject. We have it from Mr Sise himself, with some reticence but also with some details. He explains the reason why this importation and this non-manufacture were resorted to. Mr. Charles Williams, one of the owners of the patent, says Mr. Sise, "was and is the only manufacturer of Bell Telephones "in the United States; he is the only man who is "licensed by the Bell Telephone Company to manufac- "ture telephones; he is the only manufacturer to-day "that I have any knowledge of.....Mr. Charles Wil- "liams was the only man who had that knowledge of "it, and who had the control of Cowherd's shop..... "I think we paid Williams, and I think he was the man "who employed Cowherd.....Mr. Williams having "arranged with Mr. Cowherd to manufacture in "Canada, Mr. Cowherd had a number of machines "on hand (at the time of Cowherd's death), and "Mr. Foster continued the manufacture, and my "impression is that he continued to contract

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"with Mr. Foster until we got our shop into such "shape that we could make them ourselves.....There "was no time or period when we were not supplied "with telephones for the public, either from Cowherd, "Mr. Foster or our own manufacture. They were "continuously manufactured, inasmuch as they were "ready for the public always when they came for "them."

So far as the law requires a prompt introduction into Canada of a patentee's invention, the patentees have observed the law, as Mr. Sise remarks; but the protective policy of *The Patent Act*, they have, in intention and effect, disregarded and defeated to a very large amount of the industrial manufacturing value of the patented article.

In support of the contention that the importation of an instrument in parts is no importation, Mr. Wood, on behalf of the respondents, quoted a recent ruling of the English courts (*Townsend* v. *Haworth*) (1), in which case it was decided that the importation of the materials of a composition of matter was no infringement of the patent, and, said the learned counsel, with reason so far, what is no matter of infringement cannot be a matter for illegal importation. So far so good; but the conclusion, which is correct in the abstract, fails in the concrete, as applied to the present case. The materials of the composition are raw materials unworked; such as would be, in the present case, steel in bars, iron as a commercial article of trade, rubber and even silk-covered wires; but the moment these are worked into shape and form to constitute a Bell Telephone, they cease to be raw materials and become a manufactured article. Mr. Taché, in his judgment (2), has anticipated the ruling of the English courts in the very species of case cited

(1) 12 Ch. D. 831; Goodeve's Patent Cases, 467.

(2) *Barter* v. *Smith*, *ante*, p. 493.

by Mr. Wood. "It is not difficult, says Mr. Taché, to "imagine a case in which the importation, of all "and every one of the component parts of an inven- "tion to be simply put together in Canada, would not "be an importation in the meaning of section 28 of "*The Patent Act*, for example, the case of a patent "granted for a composition of matter." It is immediately after this that Mr. Taché adds, referring to such cases: "every one of which must stand on its own "merits."

The other and last allegation of the petitioners is, that the patentees have refused to sell their invention after two years of the existence of their patent, namely, to the inhabitants of Port Perry in 1882, to Messrs. Lohnes and McKenzie in 1884, and to others; and generally refused to sell in order to monopolize the control of telephonic operations throughout Canada, and derive from their inventions more than what they were entitled to for the use thereof.

A question has been raised as to the meaning of the words sale and license as applied to patents. One of the learned counsel was under a misapprehension about the signification of the words,—used by Mr. Taché in his decision—"license the right of using on reasonable terms (1)." In this sentence the word license is employed in its broad technical sense in patent science; it does not mean a lease upon payment of a rental, but the absolute transfer of a property, which becomes vested in the licensee or purchaser *quoad* the result suggested by the nature of the invention and the extent of the purchase in point of number. Of course, if one or many of the public prefer to lease and agree to do so, there is no disability created by the law to prevent them from entering into such a contract.

There are, in the nature of the things, three sorts of contracts in relation to patents:—1st., the license to

(1) *Barter* v. *Smith*, *ante*, p. 482.

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use, on the purchaser furnishing himself with the means to use; 2nd., the sale of the means to use the invention; 3rd., the assignment of the whole or portion of the patentee's privileges. As tersely expressed by Hall, J., in *Pitts* v. *Hall* (1), "a license, or assignment, or sale of a machine by the patentee is a transfer, *pro tanto*, of the property secured by the patent."

In all these cases, however, it must be borne in mind that our Patent Act differs essentially from the English and the present American laws. Our patentees are bound to license, that is to sell the use of their invention, and bound to see that their invention is not imported after twelve months, and that it is manufactured in Canada after two years, because connivance in an importation is equal to importing or causing to be imported. On the contrary, the English and American patentees are at liberty to import and at liberty to entirely withhold from the public use their invention, if they choose so to do; therefore they can select their own conditions in a contract, in the nature of which they are bound of course when entered upon; but into which they are not forced by law.

The instances of refusal to sell which were the subject of the evidence in this case are several, but, with the exception of three, they are mixed or seem to be mixed with demands to use poles, wires, communication with lines and exchanges, which, naturally, the patentees are not bound to furnish. The three clear instances of refusal are: 1st, the case of Mr. Bate of Ottawa, commenced in April, 1883; 2nd, the case of Mr. Dickson of Montreal, commenced in November, 1883; 3rd, the case of Mr. Richard Dinnis, of Toronto, commenced in March, 1884. The correspondence is completed and certified by statutory declarations.

In the case of Mr. Bate, he wrote on the 14th April, 1883, to the Bell Telephone Company of Canada, ask-

(1) 3 Blatchf. 207.

ing them to give him their lowest price for three telephones, including transmitters, for a private line. He was answered by Mr. McFarlane, that their agent at Ottawa was directed to call on Mr. Bate. Mr. Bate wrote a second letter to the company to explain that he wanted to purchase and not to rent the instruments. Mr. Sise, in answering this second letter, intimated to Mr. Bate the following: "We do not sell telephones, but we rent them."

In the case of Mr. Dickson, a protracted correspondence took place, first opened with Mr. Scott, agent of the company, to be continued with Mr. Sise, in which Mr. Dickson insisted on his right to get the instruments as his property, according to law, and Mr. Scott and Mr. Sise declined to sell but offered to lease or rent. To close the correspondence Mr. Dickson informed the company that being thus denied the purchase of the instruments, he had decided to have them constructed himself, for his own use; to which threat Mr. Sise answered that they could not consent to an unconditional transfer, but would sell a Bell Telephone for thirty dollars, subject to the stipulation,—"that it is to be used only between certain specified points."

In the case of Mr. Richard Dinnis, he wanted to purchase three sets of telephones to connect his office, his residence and his factory, and asked to be informed of the cost. Mr. Sise answered him that they had never sold these instruments, but that he (Mr. Dinnis) could have three sets rented at the rate of $20 per annum, he (Mr. Dinnis) building his own line; but that he would sell the instruments to him for $100 per set to be used only for the purpose stated by Mr. Dinnis. Mr. Sise referred Mr. Dinnis to Mr. Neilson, agent of the company at Toronto, for further information. Mr. R. Dinnis, in an interview with Mr. Neilson accompanied by Mr. Arthur Dinnis, both of whom render an account of the

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interview by statutory declarations, tried to get information from Mr. Neilson about prices, and asked if he could get the instruments at a more reasonable price and unconditionally, but was answered by Mr. Neilson that he could not give any other answer than the one contained in the letter of Mr. Sise. The price asked was unreasonable and with a limitation of use.

The case of Mr. Bate was one of flat refusal. The two other cases were instances of protracted resistance ending by offers to sell under restrictions, some of which were beyond the privileges of a patentee. The limitation as to where to use the invention, after purchase, is similar to a sale of a patented sewing machine to be used only in a particular house, or the sale of a patented plough to work only on a given plot of land. The patent license, in Canada, accompanies the purchaser wherever he chooses to move on the wide territory of the Confederation, provided he does not use more than the number of articles purchased.

The policy of refusal to license or sell, for the purpose of leasing at a rental, is made plain again by the answers, although very reticent, of the manager of the company to the interrogatories of counsel. A few quotations of his evidence will suffice:—"I do not think," says Mr. Sise, "there has ever been a set sold by us." "I would not swear that we have not refused to sell "private telephones. I would not say we did." "I "should not be able to say whether we had absolutely "refused to sell unconditionally one or two or more "instruments, nor would I say that we had not." "I "do not think we ever sold an instrument uncondi- "tionally."

The whole case is plain on the face of it; and it is also plain that the patentees or their representatives had in view to build up a commercial enterprise (for the benefit of the public as they contend), rather than

to content themselves with getting their mere royalty on licenses or sales as patentees. With such intention, simply, there is nothing to find fault, so far as this tribunal is concerned, if the steps necessary to carry it out had not led them beyond the provisions of *The Patent Act*.

The conclusion is, that the patentees, the respondents in this case, or their representatives, having extensively imported the patented articles, after the expiration of twelve months from the date of their patent; having not manufactured in Canada the said articles to the extent they were bound to do, after two years of the existence of their privilege; having resisted and refused to sell or deliver licenses as required by the statute to persons willing to pay a reasonable price for the private and free use of the patented invention, they have forfeited their patent.

Therefore, I decide that Alexander Graham Bell's Patent (No. 7,789) for "Bell's System of Telephony" has become null and void, under the provisions of section 28 of *The Patent Act of* 1872.

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THE TORONTO TELEPHONE MANUFACTURING COMPANY..... } PETITIONERS;

AND

THE BELL TELEPHONE COMPANY OF CANADA..... } RESPONDENTS.

Patent—Jurisdiction of Minister of Agriculture under sec. 28 of the Patent Act of 1872—Importation of elements common to several patented inventions belonging to same patentee—How patentee may satisfy requirements of statute as to manufacture.

The jurisdiction, in respect of the avoidance of patents, conferred upon the Minister of Agriculture by section 28 of *The Patent Act of* 1872 is exclusive of that possessed by any other tribunal in the Dominion.

2. Where the owner of several patents illegally imports elements common to the composition of all his inventions but uses the same in the construction of one of them only, such importation operates a forfeiture in respect of the particular invention so constructed but does not affect the other patents.

3. A patentee is within the meaning of the law in regard to his obligation to manufacture, when he has kept himself ready either to furnish the patented article or to sell the right of using, although not one single specimen of the article may have been produced, and he may have avoided his patent by refusal to sell, although his patent is in general use.

PETITION for the avoidance of three patents granted to Thomas Alva Edison (now owned by the Bell Telephone Company of Canada), namely:—No. 8,026, issued the 17th October, 1877, No. 9,922, issued the 1st May, 1879, and No. 9,923, issued the 1st May, 1879, for alleged forfeiture on the grounds of non-manufacturing and of importing, contrary to section 28 of *The Patent Act of* 1872 (1).

(1) Section 28.—Every patent granted under this Act shall be subject and expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall cease and determine and the patent shall be null and void at the end of two

November 4th, 1885.

The case was heard before the Deputy Minister of Agriculture.

After some proceedings had taken place to establish the particulars of petitioners' complaint, the question of the jurisdiction of the tribunal was argued substantially as follows:—

Cameron, Q C. for respondents said, in substance, that they maintain the same objection to the jurisdiction

years from the date thereof, unless the patentee, or his assignee or assignees, shall, within that period have commenced, and shall, after such commencement, continuously carry on in Canada the construction or manufacture of the invention or discovery patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it, in Canada, and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee, or his assignee or assignees, for the whole or a part of his interest in the patent, imports, or causes to be imported into Canada, the invention for which the patent is granted; and provided always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture or his deputy, whose decision shall be final.

2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the Commissioner may at any time not more than three months before the expiration of that period grant to the patentee a further delay on his adducing proof to the satisfaction of the Commissioner that he was for reasons beyond his control prevented from complying with the above-mentioned condition.—*The Patent Act of* 1872 as amended by 38 Vic. c. 14.

3. The Commissioner may grant to the patentee or his assignee or assignees for the whole or any part of the patent, an extension for a further period of time, not exceeding one year beyond the twelve months limited by the first paragraph of this section, during which he may import or cause to be imported into Canada the invention for which the patent is granted: Provided, that the patentee or his assignee or assignees for the whole or any part of the patent, shall show cause satisfactory to the Commissioner to warrant the granting of such extension; but no extension shall be granted, unless application be made to the Commissioner at some time within three months before the expiry of the twelve months aforesaid or any extension thereof.—*The Patent Act of* 1872 as amended by 45 Vic. c. 22.

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of this tribunal as was raised in the other case, tried before the Minister, between the same contending parties,—an objection which is the subject of an application for a *certiorari* to remove the proceedings and review the decision. Under such circumstances, the tribunal should not proceed with the adjudication upon this case. I have also another objection to the jurisdiction, which is a new one, and has not been urged before, arising from the circumstances of this case. The jurisdiction which you are authorized to exercise, under the 28th section of the Act in cases of this kind, is concurrent with the jurisdiction to try these very questions of importation and refusal to sell and manufacture vested in the ordinary courts of the country. A suit is now pending in which the Bell Telephone Company have brought an action against Mr. Roaf's clients for an infringement of these very patents. In that suit the petitioners in this case have pleaded as a matter of defence that these patents are void in consequence of importation, non-manufacture and refusal to sell. That question is, therefore, pending, and was pending, before the filing of this petition, in the Chancery Division of the High Court of Justice, in the Province of Ontario; the parties are at issue upon it; the question is to be tried in that case. I submit to you that that tribunal being seized of this question you ought not now to proceed, and I can show ample authority that, by the practice of the courts, where two courts have concurrent jurisdiction, the court which is first seized of litigation on any particular question is allowed to determine that question, and no other court which has concurrent jurisdiction will interfere with it pending the decision of the court which is already seized of the question. By *The Patent Act*, section 26, concurrent jurisdiction is given to the other court, and the petitioners in this case have them-

selves invoked this jurisdiction as a matter of defence, they have thereby admitted its existence. The 26th section is as follows:

"26. The defendant, in any such action, may specially "plead as matter of defence, any fact or default which, "by this Act, or by law, would render the patent void; "and the court shall take cognizance of that special "pleading and of the facts connected therewith, and "shall decide the case accordingly."

Roaf, for petitioners, said that it is established by the courts that the sole jurisdiction in such cases is vested in the Department of Agriculture. Section 26 has reference to matters that render the patent void from its commencement, cases in which a patent should not have been granted, but does not apply to a forfeiture of the patent by a breach of the terms upon which the patent was granted. The Act says that, in questions as to the breach of the terms, the Minister shall settle, and it is his duty to settle, any dispute arising under that matter. There is no decision establishing concurrent jurisdiction.

The Deputy Minister decided that the case should go on before him, as there was nothing to show the existence in law of the concurrent jurisdiction, now, for the first time, invoked here.

The counsel for the petitioners, not being ready to produce his evidence, the case was adjourned till Wednesday, the 9th December, 1885.

December 9th, 1885.

The proof adduced consisted of the record of another case between the same contending parties, in relation to the Bell Patent No. 7,789,—of the office documents relating to the three patents concerned in this dispute, —of the two sworn depositions of Messrs. C. F. Sise and C. T. Sclater, manager and secretary of the Bell

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Telephone Company, taken by Mr. J. A. Archibald, commissioner appointed in that behalf in relation to a suit before the High Court of Justice, Chancery Division, for Ontario,—of a number of Customs copies of invoices, certified by the Toronto Customs officials, of the verbal evidence of Mr. J. N. Foster, instrument maker, of Toronto, of Mr. L. E. Simoneau, electrician of Montreal, and of Mr. C. F. Sise.

The following is a short analysis of the arguments on both sides :—

Roaf, for the petitioners, in substance said : As regards Patent No. 8,026, the evidence shows that there was no attempt whatever to manufacture a single instrument under this patent until August, 1882,—there was no attempt to even offer patent 8,026 to the public. In relation to patents Nos. 9,922 and 9,923, the Gold & Stock Telegraph Company, who held the two patents at the time, sent several instruments as models and had instruments made according to those ; but they did not specify, nor can the evidence identify, this manufacture with these particular patents. The instruments manufactured were simply stamped "T. A. Edison's Patent." That is not a compliance with section 49 of *The Patent Act* which requires the date of the patent to be stamped on every article under a penalty. This manufacture comes down to one instrument made in two different forms. Extensive orders were given, and there was a public demand for these instruments, they were manufactured during sixteen months at the rate of nearly $1,000 worth a month. When does the stoppage take place ? As soon as the Canadian Telephone Company is incorporated and acquires all the patents that it can acquire ; the Bell Telephone Company comes in then and we find these instruments dropped out of the way. They intended to build up a monopoly, and it led them beyond the provisions of

The Patent Act in the case of the Bell Patent, according to the decision of Mr. Pope, and I submit that it has also led them beyond the provisions of *The Patent Act* in relation to these other patents. As to the importation it is true there is no importation of any one of those instruments made. The only importation is one upon which I do not lay much stress. I do not rely upon the importations as being of themselves importations sufficient to upset these patents without more proof. About the carbon button, it is an essential part of the patent, and it was imported, and the question arises whether they would have the right to import that carbon button. There has never been a carbon button made in Canada. It lies with the respondents, who assert that they have complied with the conditions of the Act, to show, and to show conclusively, that the articles made by them, or the parties through whom they claim manufacture, complied with the provisions of these patents. I submit that we are entitled to have the patent declared void because the parties did not manufacture the patented article in Canada according to the law.

Cameron, Q. C. for the respondents, in substance, argued: From the evidence brought here by the petitioners, we find that, as a matter of fact, the manufacture of the instrument, known in commercial language as the Edison telephone, was commenced in April, 1879, and continued to the year 1880 in Mr. Foster's shops in Toronto, and that the instruments manufactured were the result of the patents concerned in this case. The manufacture was contemporaneous with the petitioning for and obtaining of the two patents Nos. 9,922 and 9,923. As to patent No. 8,026, it is embodied in the two others, which are improvements in the putting into operation of the claims of No. 8,026. No instruments were made under

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the precise description of the last mentioned patent, and after 1880 it does not appear that instruments were made after the two other Edison patents in Canada, for the very simple reason that there was no demand for them, and that the owners of these patents had a quantity of these Edison instruments on their shelves, of which they could not, and cannot at this moment, dispose. The facts of this case are totally different from the facts of the *Bell Case* (1) tried before the Minister of Agriculture. In the present case the petitioners are driven to the paltry importation of $12 worth of carbon buttons, applied to the manufacture of $15,000 worth of instruments, which insignificance brings to memory the maxim *de minimis non curat lex*. As regards "manufacture," its meaning is the supply of a demand, and when no demand is made there is no breach of the condition imposed by law, as ruled in *Barter* v. *Smith* (2). The case then sums itself up to this, that the importation after the year was a bagatelle, and no violation of the spirit of the Act at all, and I submit, no violation even of the letter of the Act; that the manufacturing had been going on continuously as long as the public wanted the instruments, and we must assume that a certain number of them were imported during the period when the law allowed the importation. Between those that were so imported and those that have since been made there has been a manufacture of a greater quantity than the public now want; there is a lot of them on hand comparatively useless and unasked for. I ask you then to dismiss this application on the ground that the petitioners have not established any violation either of the letter or of the spirit of the Act.

Lash, Q.C. for the respondents, argued, in substance,

(1) Reported *ante*, p. 495. (2) Reported *ante*, p. 455.

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that in the decisions in *Barter* v. *Smith* (1), and the *Bell Telephone Case* (2), it is established that it is not the mere fact of importation, but injury to home labor which was intended to be guarded against by the legislature. The evidence in this case is entirely out of question, it comes within the class laid down in those two cases as that which would not avoid a patent. It is a surprise to hear counsel for the petitioners arguing that the onus of proof in this case is upon the respondents. We hold a title which is good as long as the contrary is not proved against us, surely not by us, but by the petitioners, as was ruled in *Barter* v. *Smith* (1). This case must be treated as the other cases, holding the law as not being directed to matters of form or *minutiæ*, but to broad principles, *i.e.*, to the articles invented, the manufacture and industry in Canada, the manufacture of the articles when demanded.

Wood, for respondents, argued that such part of the argument of the learned counsel for the petitioners as was directed to establishing that the instrument manufactured by Mr. Foster, for the patentee, was generally under Edison's patents, without referring to any one in particular, does not agree with Mr. Foster's evidence, where it is distinctly stated that these instruments were made under patents 9,922 and 9,923.

Roaf, in reply, said, in substance, that no attempt whatever was made here in Canada to carry out the combination referred to in the first patent. As to the two other patents, the question would be as to whether the patentee has satisfied the law by manufacturing instruments in which all the claims of the separate patents are not taken in and put in operation. Mr. Sise, who appeared for the respondents, cannot identify that manufacture with any one of the three patents;

(1) Reported *ante*, p. 455. (2) Reported *ante*, p. 495.

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then, I say, the onus of the proof lies on the respondents to show what part of the patents they intended to maintain. The petitioners come here because of a Chancery suit which is now pending between these very parties, in which these very patents are now in issue, and which the respondents are attempting to use to prevent the petitioners in this case manufacturing telephones for use in Canada; it is a part of their policy to keep everything to themselves by holding to a dozen of different patents for the sake of monopolizing the business. We have proved that they manufactured something different from the articles patented; the witness who made it is unable to identify it, except that he supposes it was made under these patents. They have patents with 30 or 40 different claims. They do not manufacture any one of those, but manufacture something which is a combination of these two or three put together; in reality they have made something which would be the subject of a new patent, being new combinations of parts. The policy of patent laws is to favor new combinations, and not to stop the exercise of superior brain and push from utilizing in a better way the elements previously made use of.

At the conclusion of the hearing, the Deputy Minister reserved his decision for a future day.

TACHÉ, D.M.A., now (December 19th, 1885) rendered his decision.

It is proper, first, to refer to the renewal of objections against the jurisdiction of this tribunal, and, especially, to the new point raised, which is, let it be remarked, in contradiction to the absolute denial of competency in this tribunal. This new exception is to the effect that the jurisdiction possessed by this tribunal is one concurrent with the jurisdiction of the ordinary

courts in matters of patents and in relation to section 28 of *The Patent Act.*

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Of course, if it were so that a concurrent jurisdiction existed, it would follow that the court first possessed of the question would be the proper tribunal to adjudicate upon it, it would be one of the many applications of the maxim—*prior tempore, potior jure.* The point here is as to whether there is or is not concurrent jurisdiction?

The law leaves no possibility of doubt about the jurisdiction of this tribunal, about this jurisdiction being an exclusive one, and about its decisions being final and therefore binding on every one. These three characters *The Patent Act* distinctly establishes in the 28th section, which governs the matter. After reciting special causes of forfeiture, it goes on enacting as to the manner and way, and by whom, such forfeiture is to be ascertained, and declares in the following terse, imperative and unmistakable language:—

> Provided always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture, or his deputy, whose decision shall be final.

Such a clear enactment could not fail to be sustained by the courts before which an objection might be raised against it; and, as a matter of fact, it has been so sustained by the courts where the question has been brought up.

It it now argued that, in virtue of the 26th section of *The Patent Act*, a concurrent jurisdiction is given to ordinary courts, whenever it is specially pleaded as a matter of defence in suits for infringements, to declare the patentee's rights forfeited for want of manufac ture or for importation contrary to the 28th section. To this contention the counsel for the petitioners

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answered that the 26th section does not refer to such defaults as are mentioned in the 28th section.

The 26th section, however, most assuredly, has reference to such defaults as well as to other defaults; for it says—"any fact or default, which, by this Act or by "law, would render the patent void;" but it does not, for all that, give rise to a concurrent jurisdiction, which is not mentioned nor even hinted anywhere in the Act. In that there are neither difficulties nor conflicts created. It is very easy to reconcile the two provisions of the statute in keeping with the ordinary rules of law and of procedure. When the forfeiture, on account of illegal importation or non-manufacture, is specially pleaded as a matter of defence in any suit for infringement, it simply becomes a *question préjudicielle*, which has to be determined by the arbitrator appointed by the law, whose decision, being final, is the only evidence which can be accepted to establish or contradict the allegation of forfeiture in the case. It does not vest the court seized of the suit for infringement with the jurisdiction of another tribunal; but it resolves itself into a simple question of the kind of evidence which is admissible on that specific point, which evidence, according to *The Patent Act*, can only be the decision of the Minister of Agriculture or his deputy.

The allegation of importation after the expiration of twelve months from the granting of each of the three patents involved in this case, has not been in any way sustained by evidence. It is not even necessary to examine whether the few articles imported after twelve months from the dates of any one of these patents could be properly, or to what extent properly, qualified as illegal importations, for the simple reason that the insignificance of their total value forbids the view of their being susceptible of affecting in the least

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any patent. The counsel for the petitioners has, with commendable good faith, admitted this in saying : "I "do not rely upon the importations as being of themselves importations sufficient to upset the patents, "without more proof."

The dispute raised in this case, as regards non-manufacture, must have been so raised through a misapprehension of the technical meaning of the word "manufacture" as employed in the 28th section of *The Patent Act of* 1872, unless it was intended to rest exclusively on applying the three refusals proved in the case of the *Bell Telephone* (1), tried by the Minister of Agriculture, to the three patents aimed at in this case.

The technical and legal meaning of the words—"carry on in Canada the construction or manufacture of the invention or discovery patented"—is not to be searched for in Webster or The Imperial Dictionary, but must be extracted from the very matter itself, in accordance with the reason of things and the application, to the subject, of the ordinary rules of legal interpretation ; it is not a question of grammar, but of jurisprudence.

Forfeiture might reach a patent for want of manufacturing, when Canada is at the same time flooded with the patented article ; a patent might be proof against any attack for non-manufacturing, when not a single one article patented has been produced, or "manufactured" in the grammatical sense of the word.

The interpretation of the 28th section is laid down at length in the decision of the case *Barter* v. *Smith* (2). That interpretation has been sustained by several of the highest courts in Canada, particularly by the Supreme Court in the case of *Smith* v. *Goldie* (3) ; therefore it is not necessary to enter here into any further details on the subject.

(1) Reported *ante*, p. 495. (2) Reported *ante*, p. 455.
(3) 9 Can. S. C. R. 46.

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The whole case then, as regards the three patents here in question, resumes itself into ascertaining whether or not the refusals to sell telephones, which have been proved in the dispute raised against Bell's patent, No. 7,789, applies to Edison's patents, No. 8,026, Nos. 9,922 and 9,923, as it is alleged by the petitioners, who have filed, as sole evidence on this point, the evidence produced in the *Bell Case* (1) before the Minister of Agriculture. If it were clearly proved that the refusals to sell which were a part of the defaults that caused the forfeiture of Bell's patent 7,789, were also refusals to sell Edison's patents, the forfeiture of the last mentioned patents would have also to be declared as the conclusion of the present dispute.

The proof adduced, in *Bell's Case* (1), of refusal to sell to Mr. Bate, of Ottawa, to Mr. Dickson, of Montreal, and to Mr. Dinnis, of Toronto, was brought against the existence of patent No. 7,789, (Bell's), and contributed in part to the avoidance of that patent; it is evidence specifically concerning the patent mentioned and under trial in another case; therefore it cannot legitimately serve to destroy three other distinct patents (Edison's) unless it is specifically proved that the same refusals which applied to Bell's one patent were also extended to Edison's three patents. Nothing of the kind has been proved; Edison's patents are not specified in the declarations and correspondence in *Bell's Case* (1), and nothing has been brought in this, *Edison's Case*, to assert and establish, as a matter of proof, that the said refusals applied to Edison's three patents on a formal demand to purchase them. In the absence of proof in any case, the legal presumption is in favor of the maintenance of the patent, and, in this case, there is more than the ordinary presumption; for it is impossible to reasonably pretend that, in the demand for telephonic

(1) Reported *ante*, p. 495.

communication, the parties formulating that demand intended to purchase all the patented instruments owned by the Bell Telephone Company, who were then proprietors of more than a dozen different patents. Reason and justice force on the conclusion that the proof adduced against Bell's patent, without mention of other patents, applies only to the patent which was on trial in the case in which that proof was produced, and cannot be accepted, in a round-about way, as sufficient to destroy the other patents because they happen to be owned by the Bell Telephone Company of Canada.

The several patents acquired by the Bell company are all for the purpose of telephonic communication, they all make use of the same elements; but they are distinct combinations, and have a right to stand as separate inventions. This is a fundamental principle in patents in all countries, there being everywhere a great many patents for combinations to an occasional one for an entirely new art or mechanism.

Therefore the avoidance of one patent for a telephone does not, by any means, entail the avoidance of another patent for a telephone; because they stand as distinct combinations. Bell's patent was declared null and void, by the Minister of Agriculture, because there was ample proof of importation, in forbidden time, having taken place to the notable detriment of home labor, and because there was sufficient proof of refusal to sell, which amounted to non-manufacture; while in this (*Edison's Case*) there is no such proof as applied to any one of the three Edison's patents.

The efforts to prove that there was not, for more than two years, any instrument made according to patent No. 8,026, that the instruments executed by Mr. Foster were not the distinct articles patented in patents 9,922 and 9,923, as well as the alleged illegal

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stamping of the articles produced, have no bearing upon the points at issue. A patentee is within the meaning of the law in regard to his obligation to manufacture, when he has kept himself ready either to furnish the patented article or to sell the right of using, though, may be, not one single specimen of the article has been produced, and he may have avoided his patent by refusal to sell, although his patent is in general use.

In this case there is absence of the proof without which no patent should be considered forfeited.

Therefore. Thomas Alva Edison's patents No. 8,026, for telephonic communication, No. 9,922, for improvements in telephones, and No. 9,923, for improvements in telephones and circuits, have not become null and void under the provisions of section 28 of *The Patent Act of* 1872.

ROBERT MITCHELL. .....PETITIONER ; 1886

AND Jan. 22.

THE HANCOCK INSPIRATOR COMPANY..... } RESPONDENTS.

Patent—New combination of known elements—Importation—The Patent Act of 1872, *sec.* 28.

A new combination of known elements is an invention and as such is patentable. The person who has devised such new combination has all the rights and privileges of an inventor even if the novelty consists in a trifling mechanical change, provided, in the latter case, some economic or other result is produced someway different from what was obtained before.

2. Where the subject of a patent is a new combination of old devices, the patentee cannot import such devices in a manufactured state and simply apply his combination to them in Canada without violating the prohibition against importation contained in section 28 of *The Patent Act of* 1872.

PETITION to the Minister of Agriculture for the avoidance of Patent No. 7011, granted to the respondents for "The Hancock Inspirator" on January 24th, 1877, on the ground of non-manufacture and illegal importation (1).

(1) The section of *The Patent Act of* 1872, with its amendments, governing this case are as follows:

28. Every patent granted under this Act shall be subject and expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall cease and determine, and the patent shall be null and void, at the end of two years from the date thereof, unless the patentee, or his assignee or assignees, shall, within that period have commenced, and shall, after such commencement, continuously carry on in Canada the construction or manufacture of the invention or discovery patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it, in Canada, and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee, or his assignee or assignees, for the whole or part of his interest in the patent, imports, or causes to be imported into Canada, the invention

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Statement of Facts.

The case was heard before the Deputy Minister of Agriculture.

The evidence consisted of Customs files, business correspondence, statutory declarations, and the oral testimony of witnesses heard before the Deputy Minister

November 17th and December 22nd, 1885.

Fleet for petitioner ;

Tait for respondents.

Fleet, in substance, argued as follows: The case practically comes before this tribunal on a reference from the Superior Court of Montreal, Mr. Mitchell, the petitioner here, having been sued by the Hancock Company for infringement of their patent, to the amount of $5,000, pleaded, besides other grounds of defence, the forfeiture of the said patent on account of illegal importation and non-manufacture in the terms of the 28th section of *The*

for which the patent is granted ; and provided always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture or his deputy, whose decision shall be final. *The Patent Act of* 1872, sec. 28.

2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the Commissioner may, at any time, not more than three months before the expiration of that period, grant to the patentee a further delay on his adducing proof to the satisfaction of the Commissioner that he was for reasons beyond his control prevented from complying with the above-mentioned condition. *The Patent Act of* 1872, as amended by 38 Vic. c. 14 s. 2.

3. The Commissioner may grant to the patentee or his assignee or assignees for the whole or any part of the patent, an extension for a further period of time, not exceeding one year beyond the twelve months limited by the first paragraph of this section, during which he may import, or cause to be imported into Canada, the invention for which the patent is granted : Provided, that the patentee or his assignee or assignees for the whole or any part of the patent, shall show cause satisfactory to the Commissioner to warrant the granting of such extension ; but no extension shall be granted, unless application be made to the Commissioner at some time within three months before the expiry of the twelve months aforesaid or any extension thereof. *The Patent Act of* 1872, as amended by 45 Vic. c. 22 s. 1.

Patent Act. This special pleading was met by a demurrer to the effect that the nullity caused by violation of the 28th section of *The Patent Act* cannot be tried by any other court than that of the Minister of Agriculture. Upon which exception Mr. Mitchell applied, to Mr. Justice Mathieu, to stay the proceedings, in order to obtain a decision from this tribunal which might be introduced into the record. The application was allowed by the judge.

We have, by the evidence produced in this case, so clearly demonstrated that large and continuous importations were made by the patentee and his legal representatives, and that the patented article was never entirely manufactured in Canada, that I have really very little to say, unless, perhaps, in replying to my learned friend on the other side. In the case of *Barter* v. *Smith* (1), and the Bell Company telephone cases (2), all the points that can possibly arise have been clearly defined. A case of this kind narrows itself down to matters of fact, and the matter of fact is whether the importations were made subsequent to the term allowed by the Act, or whether they were not. I submit that, by Mr. Patton's evidence and the correspondence between the owners of the patent and Mr. Patton, their agent, for a time, we have demonstrated that, after the expiration of the delay, extensive importation of the invention actually took place, and that there was a decided intention shown to supply the demand for the article, to any extent, by means of importations. We have, furthermore, proved that, within two years of the present time, 630 inspirators were imported in parts, to be simply put together in Canada, for the purpose of vending and selling them to the Canadian public. The affidavits produced by the respondents in the case are, virtually, an admission of the facts alleged

(1) Reported *ante*, p. 455. (2) Reported *ante*, pp. 495, 524.

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by the petitioner, facts which cannot be for a moment denied. The proof is so conclusive that it is unnecessary for me to say any more. We are willing to rely wholly on the point of illegal importation.

Tait, argued, in substance, that the patentee and his assignees had done all they could to comply with the requirements of section 28 of *The Patent Act*, and had actually kept themselves within the provisions of that section of the statute. The patent bears date the 24th January, 1877. The affidavits filed by respondents establish that James Morrison, of Toronto, commenced the manufacture of the invention in Canada on the 21st day of January, 1879, being within two years from the date of the patent, and had ever since continuously carried on in Canada the manufacture thereof according to law, in such a way that the petitioner could have obtained the article at such a reasonable price as to have been able to make a fair profit upon the resale. In the month of November, 1880, the firm of Stevens, Turner & Burns, of London, Ontario, obtained a license to manufacture, and did manufacture, the invention until December, 1882, when they abandoned their license and transferred their stock to the respondents by delivering the same to their agent at Montreal, Mr. Betton. The respondents, in 1883, made a new arrangement with Morrison, already mentioned, by which they, the respondents, agreed to purchase the patented article manufactured in Canada by Morrison at the rate of no less than 500 in every year—an arrangement which has ever since been and is now in force.

The owners of the patent have never received any demand for license to manufacture from the petitioner, nor any other person except the said Morrison, and Stevens, Turner & Burns, and they have never refused to sell the patented invention to anyone. Therefore, the pretension of the petitioner that the respondents,

patent is forfeited by reason of non-manufacture should be declared unfounded.

In considering, next, the allegation that the patent had been forfeited by reason of illegal importation, it is necessary to point out the nature of the invention. The invention in question is a combination of two old and well known sets of apparatuses. One of them is used to raise the water, and is called in the specification "the lifting injector," and is also known by the name of "ejector." Such an instrument was invented in England as far back as 1806; in the form used in the patent here in question, it was invented by Mr. Hancock, and patented in the United States under No. 86,152 in January, 1869. The other element or apparatus is used to transmit the water to the boiler, and is known under the name of "injector." This instrument was invented in France by Mr. Giffard, and patented in Europe in 1858, and in the United States in 1860. Prior to Hancock's invention, here in question, each of these elements was used by itself, or in other combinations, and both are so used to the present day. The invention of the patent No. 7011 has been accomplished by a new arrangement or combination of these two elements. To apply the combination, which is intended for stationary boilers, to locomotive boilers, a different system of valves and levers is used; those used in the Hancock locomotive inspirators, as originally constructed, were invented by Mr. Park, and patented in the United States, and those used for locomotive inspirators more recently constructed were patented, in Canada, by J. T. Hancock in 1881.

The respondents admit that they imported locomotive inspirators embodying Park's and Hancock's last mentioned invention, but they maintain that this does not entail the forfeiture of patent No. 7011; because, as established by the affidavits, the machines

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imported were not the invention patented under patent No. 7011, for the reason that if the levers and valves which constituted Park's invention (not patented in Canada) as used in the first form of the machine, were removed, there remained nothing but barrels and jets of themselves wholly inoperative for any purpose. The same can be said in relation to the Hancock's invention of 1881, patented in Canada, inasmuch as valves, connections and means of operating these elements would have to be supplied to obtain the result sought for. The patents of 1881, No. 12,934 and No. 13,087, Mr. Hancock had abandoned, and what was imported as locomotive inspirators were the old elements, Park's invention and the Hancock's inventions, patented in 1881, and not the subject-matter of patent No. 7011.

As to the stationary inspirators, three series of shipments are referred to by the petitioner. 1st, to Fairbanks & Company, through Mr. Patton; 2nd, to Stevens, Turner & Burns, and 3rd, to J. M. Betton. The shipments made to Fairbanks, after the legal delay, were of a few articles, very nearly all "locomotive injectors," and were, moreover, made for the purpose of creating a market. It is to be remarked also that the "stationary inspirators" are made in fifteen different sizes at least, requiring for each size special expensive tools. The shipments to Stevens, Turner & Burns consisted of certain parts, particularly jets and barrels made to help the manufacture of the article in Canada, inasmuch as neither these licensees nor any other person were willing to undertake the manufacture of such parts.

As to the shipments made to James M. Betton, it appears that they consisted of a number of parts which had to be worked, combined and adjusted, in order to construct a number of stationary inspirators. The respondents submit that the importation of these parts cannot entail forfeiture of patent No. 7011, inasmuch

as the parts are old and well known elements, requiring to be combined, coupled and adjusted, to become the invention of the said patentee; inasmuch as they could be used for the separate instruments known as ejector and injector; inasmuch as, all the time, Morrison was manufacturing all sizes of stationary inspirators, as did also Stevens, Turner & Burns; inasmuch as respondents never intended to injure the manufacturing interest of Canada, as is shown by them undertaking to purchase 500 of the patented articles from Morrison; inasmuch as, all through, they acted in good faith under legal advice, believing themselves to be within the purview of the law.

The case is different from the *Bell Telephone case* (1); but resembles a French case referred to in *Barter* v. *Smith*, the case of *Warlick* c. *Pecquet*, which is reported in *Dalloz* (2).

Mr. Dalloz, in his Repertoire, *verbo* "Brevets d'invention," No. 267, commenting on this *arrêt*, says:—"Il "est évident, en effet, que quand l'invention a pour "objet, non la fabrication d'un nouveau mécanisme, "mais l'application nouvelle d'un mécanisme connu, "il suffit que le breveté fasse cette application en France, "pour qu'il y exploite réellement sa découverte, et satis- "fasse ainsi au vœu de la loi, bien qu'il tire de l'étran- "ger les machines nécessaires à cette exploitation. Ce "que la loi interdit, c'est de faire fabriquer à l'étranger "des objets *semblables à ceux qui sont garantis par le* "*brevet;* or, dans l'espèce, les machines que le breveté "fait venir de l'étranger, n'étant pas l'objet du brevet, "ne sont pas *garanties* par lui; la disposition qui nous "occupe leur est donc étrangère."

I will remark in conclusion that it seems hard, after the company trying so many years to introduce this

(1) Reported *ante*, p. 495.

(2) Jurisprudence Générale, 1846, partie 2, pages 194 et 195.

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invention into the country, that the patent should be set aside, at the suggestion of somebody who has sat all the time watching the efforts of the owners of the patent until they have made it a success. The respondents, therefore, feel that they can with confidence leave their fate in the hands of this paternal tribunal.

Fleet, in reply, argued that although willing to rely on illegal importation alone, the petitioner could rely solely on the point of non-manufacture. By referring to the evidence and correspondence of Mr. Patton, it is clearly seen that up to the year 1880 he was the only representative of the patentee in Canada, and that the manufacturing which commenced shortly before that time was begun in infringement of the patent. Taking the affidavit of Mr. Howe and the deposition of Mr. Betton, together with the deposition and letters of Mr. Patton, it is clearly established that Morrison's manufacturing, up to the agreement of 1881, was a case of infringement of the patent and not a compliance, by the owners of the patent, with the requirements of the law.

A certain amount of stress was laid upon the fact that the locomotive inspirator is not, as alleged, covered by the patent; but in Mr. Patton's deposition we see that all the imported articles sold by him (Mr. Patton) were stationary inspirators; he had nothing to do with the others. Again the 630 inspirators imported in parts and put up by Mr. Betton were all stationary inspirators. The intention of the respondents, as it is clearly shown, was to supply the Canadian market to any amount they could with imported inspirators, and, as a matter of fact, they did supply the Canadian market with articles imported either in whole or in parts. It was sought to be established that the machine in question is composed of two machines known and in use for a long time. The invention in question is a new

combination and the patent is, consequently, a patent for a combination, it stands as such as covering the invention and for the performance of the functions described in the specification. As decided in the Bell Telephone case (1), the importation of the elements of the combination to serve in the combination was the importation of the patented combination.

I submit that, by the evidence produced, under none of the administrative *régimes* during which the patented articles were supplied to Canadians, have these articles been manufactured in Canada; all the machines sold were imported either in whole or in part, under Mr. Patton's *régime*, under Messrs. Stevens, Turner & Burns' *régime*, and under Mr. Betton's *régime*, to within two years of the present time. Under the facts which have been produced, I submit that the prayer of the petition should be granted, and, moreover, I would strenuously urge that, considering the flagrant nature of the contravention of the law, the costs, which are prayed for in the petition, should be awarded against the respondents.

TACHÉ, D.M.A., now (January 22nd, 1886) rendered his decision.

In this case the question of importation is the only one which really appears to be involved. There is no proof that at any time the patentees have refused to sell or license their invention; far from it, they seem to have always been anxious that its manufacture should be carried on by somebody in Canada, under license or on payment of a fair royalty, at the same time that they have shown themselves determined to push the sale of their patented articles, even to the alternative of supplying the Canadian markets by importation. The injury to home labor, in this case, comes not

(1) Reported *ante*, p. 495.

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under the head of non-manufacture, but under the title of importation, because to the extent that imported articles have been introduced into Canada, to that extent the manufacturing industry of the country has been deprived of the advantage intended to be secured by the 28th section.

It is not necessary to sift the technical question as to whether the locomotive inspirators imported were the inventions of Hancock's patents No. 12,934 and No. 13,087, which the patentee has forsaken, or some other invention, and not the invention of patent No. 7011, the subject matter of the dispute; for the reason that the importation of the stationary inspirators, about which there could not be any such problem raised, is of sufficient importance to decide the fate of this dispute.

Patent No. 7011 was granted on the 24th January, 1877; therefore, the year during which the importation of the invention was allowed by law expired with the 24th day of January, 1878. It is clearly proved that the importation did continue after the latter day, till within two years of the present contest. At times the importation consisted of the article brought in in its complete state, in small numbers; at times it consisted of the articles introduced in parts, in some instances all the parts to be simply put up in Canada, in other instances of only some of the parts; the aggregate of such importations amounting, so far as the evidence goes, in number to many hundreds of the patented apparatus, in value to many thousand dollars' worth.

It is argued that inasmuch as the patent covers an invention which consists of a new combination of old elements, the importation of the elements in their separate state is not the importation of the invention. This is opposed to the very nature of things, as admitted in

all countries in matters of patents. A new combination of known elements is an invention to all intents and purposes, and as such is patentable and confers on the person having devised such new combination the rights and privileges of an inventor, even if the novelty consisted in a trifling mechanical change, provided, in the latter case, some economical or other result is produced someway different from what was obtained before. The combination then is the invention, and, when patented, is the essence of the patent; it must be taken as a whole, not the elements as several things to be separately discussed, and the combination another thing, but the elements as combined, one thing, to stand with all the privileges conceded by law, and, reciprocally, with all the obligations imposed on all patentees. The manufacture of a combination is the producing of the elements as combined, in the sense applied to the word manufacture; the importation of the combination is the introduction of the elements as combined, to perform the functions described in the patent and in the manner described, totally irrespective of the existence of other combinations of the same elements, whether patented or not patented. Consequently, if Nicholson's ejector of 1806, now of the public domain, if Giffard's injector of 1858, also now public, if Hancock's apparatus of 1869 or of 1881, are imported, to be used as such, they do not affect patent No. 7011; but if the elements made use of in these mechanisms are imported as constituents of the combination secured by the said patent, and to be used as such, this importation is the importation of the patented article; because, in the same way that a new combination of known elements is entitled to the protection granted by a patent, in the same way it is subject to the conditions to which all patents are subjected.

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The counsel for the respondents invokes, in support of his contention, a celebrated judgment of the Court of Appeal, in France (1), referred to in the decision in the case of *Barter* v. *Smith* (2), but it does not apply, in specie, to the present case. This judgment, on the strength of its being a *bien jugé*, has become a part of universal jurisprudence. The French patent, in the case of *Warlick c. Pecquet* (1), was not for a new combination of known mechanical elements at all; it was for a new article of manufacture, an artificial combustible made in the shape of bricks (*briquettes*), for the manufacture of which a well known machinery, described in the specification, was applied. The patentee had introduced into France a few samples of the patented article, amounting to a trifling value, and the essential parts of the machinery to proceed with the manufacture of his *briquettes*. The court of the first instance, mistaking the nature of the invention and otherwise misconstruing the whole affair, had decided that the patent had become void on account of importation after the expiration of the delay granted by the law; an appeal was interjected, and the judgment of the court of first instance was quashed, the superior tribunal deciding that the importation of a few patented articles as samples was no importation in the meaning of the law, and that the importation of the machinery to manufacture the patented article cannot affect the patent; in the translated words of Dalloz, commenting on that decision—"the "machines introduced from the outside, not being "guaranteed by the patent, the exigencies of the law "are foreign to them."

In the present case the importation of the invention itself lasted for several years of the existence of the

(1) Cited *ante*, p. 545. (2) Reported *ante*, p. 455.

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patent, till a comparatively recent date, covered a large number of the patented articles and amounted in the aggregate to a large sum, many thousands of dollars. "It seems hard," says the counsel for respondents, "after "the company trying so many years to introduce this "invention into the country, that the patent should be "set aside." It is, undoubtedly, very hard; if it were a matter of sympathy or of sentiment in all probability the patentee would continue to enjoy the privileges to which inventors are so well entitled; but it is a matter of the fulfilment of obligations and administration of the law, in a case where no legitimate doubt can come to the rescue of the patent.

As regards that part of the petition of the petitioner which asks for costs, the answer is that there is no awarding of costs to parties coming before this tribunal.

Therefore, John Theobald Hancock's patent, No. 7011 for an "Inspirator," has become null and void under the provisions of section 28 of *The Patent Act of* 1872.

1887
May 9.

J. A. WRIGHT AND W. C. HIBBARD...PETITIONERS;

AND

THE BELL TELEPHONE COMPANY OF CANADA..... } RESPONDENTS.

The Patent Act (R. S. C. c. 61 s. 37)—Construction—Importation of invention in parts.

To bring an importation by the patentee within the prohibition of section 37 of *The Patent Act* (R.S.C. c. 61) it is necessary that it consist of, or affect, the particular invention in respect of which the patent has been granted.

THIS is an application by the petitioners for a declaration that three patents for telephones hereinafter mentioned, granted to Thomas Alva Edison and now owned by the respondent company, are void, because of the importation thereof after the expiration of the twelve months from the date of the granting of such patents respectively (1).

(1) REPORTER'S NOTE. — The following are the provisions of *The Patent Act* (R.S.C. c. 61.) governing the case.

Sec. 37.—Every patent granted, under this Act, shall be subject and be expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall cease and determine, and that the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives, within that period, commence, and, after such commencement, continuously carry on in Canada the construction or manufacture of the invention patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price, at some manufactory or establishment for making or constructing it in Canada,—and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee or his legal representatives or his assignee for the whole or a part of his interest in the patent imports or causes to be imported into Canada, the invention for which the patent is granted; and if any dispute arises as to whether a patent has or has not become null and void under the provisions of this section, such dispute shall be decided by the Minister or the deputy of the Minister of Agriculture, whose decision in the matter shall be final:

Of the impeached patents, No. 8,026 was issued on the 20th of October, 1877, and Nos. 9,922 and 9,923 on the 1st May, 1879. The three patents, which, for convenience, are referred to as the Edison patents, were assigned to the Gold and Stock Telegraph Company on the 12th of November, 1880; by the latter company to the Canadian Telephone Company on the 14th December, 1880, and by the Canadian Telephone Company to the respondent company on the 5th of July, 1882.

March 2nd, 3rd and 4th, 1887.

Christie, Q.C., *Archibald*, Q.C. and *Rouf* for petitioners;

Lash, Q.C. for respondents.

The HONOURABLE JOHN CARLING, Minister of Agriculture, now (May 9th, 1887) rendered his decision.

The petition contained a charge of failing to manufacture, but petitioners' counsel in opening the case stated that they relied solely on the importation contrary to law, and no evidence of failure to manufacture was offered.

2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the commissioner may, at any time not more than three months before the expiration of that term, grant to the patentee an extension of the term of two years on his proving to the satisfaction of the commissioner that he was, for reasons beyond his control, prevented from complying with the above condition:

3. The commissioner may grant to the patentee, or to his legal representatives or assignee for the whole or any part of the patent, an extension for a further term not exceeding one year, beyond the twelve months limited by this section, during which he may import or cause to be imported into Canada the invention for which the patent is granted, if the patentee or his legal representatives, or assignee for the whole or any part of the patent, show cause, satisfactory to the commissioner, to warrant the granting of such extension; but no extension shall be granted unless application is made to the commissioner at some time within three months before the expiry of the twelve months aforesaid, or of any extension thereof. — 35 V. c. 26 s. 28;—38 V. c. 14 s. 2;—45 V. c. 22 s. 1.

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At the conclusion of the evidence submitted by the petitioners its effect was discussed by counsel for the respondent and petitioners, respectively, and I decided to consider the case as then presented on the understanding that, if I came to the conclusion that it was sufficient to justify a declaration that the impeached patents were void, I would afford the respondent company an opportunity of meeting such case by any evidence which they might desire to bring forward.

No act of importation by any person or company other than the respondent company was complained of, but, as it appeared from the evidence that the respondent company used the patents of the Canadian Telephone Company by their license and consent, such patents would be affected by acts of importation by the respondent company while the title was yet in the Canadian Telephone Company. In other words they would be affected by any such importation after the 14th of December, 1880.

There was evidence of the importation by the respondent company during the years 1880, 1881, 1882, 1883, 1884 and 1885 of Blake transmitters, carbon buttons, carbon brasses, boxwood pieces, strips for dampening springs, strips for carbon springs, german silver springs, transmitter boxes, backboards and boxes, locks, keys, screws, screw cups, normal pressure springs, gongs, castings, extension bells, batteries, zincs, braided wire, spiral cords, insulators, magneto-bells and prisms for batteries. The value of these importations in the whole amounted to many thousand dollars.

For the respondents it was contended:—

1st. That the articles imported were all articles of commerce that any one could import, and that there was, therefore, no importation contrary to law:

2nd. That the articles imported were not used in the construction of the Edison inventions but of the commercial instrument made and used by the company.

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On further consideration it appeared to me, without coming to a conclusion as to whether or not a case had been made out for avoiding the Edison patents, that it was desirable to hear what evidence the respondent company chose to offer, and to learn what their position was in respect to the relation between the commercial instrument used by them, and the Edison patents.

The parties were notified accordingly, and the hearing of the application was resumed on the sixth instant, and continued on the seventh.

The respondent company examined Mr. Lockwood, an expert, at considerable length, and from his evidence it appeared that the commercial instrument made and used by the company as a telephone does not embody, and is not an infringement of, any of the elements or claims of any one of the three Edison patents. It was clear from the evidence, and it was admitted, that the articles imported were used in the construction or manufacture of the commercial instrument used by the company, and, therefore, if a conclusion were reached that this instrument did not embody and would not, if manufactured by any one, constitute an infringement of the elements or claims of the Edison patents, it would become unnecessary to consider the question as to whether or not the importations complained of were importations of articles of commerce, or, taking them as a whole, of the commercial instrument used by the company.

Mr. Sise, the vice-president of the company, was therefore asked to state the position of the company with respect to this question, and having taken time to consider, Mr. Lash, for the company, said that the position of the company was that put forward in Mr. Lockwood's evidence, namely, that the commercial instrument which we had before us, and which was one of the telephones commonly used by the company,

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did not embody any of the elements or claims of the Edison patents, and that its manufacture or use by any one would not constitute an infringement of any one of the Edison patents, and that so far as the latter were concerned, and but for other patents held by the company, such an instrument would be free to the public.

After some consideration and discussion, the counsel for the petitioners decided not further to controvert the position taken by the company with respect to the relation of the commercial instrument or telephone to the Edison patents.

In view, therefore, of the statement made by the company by its counsel, and being myself of opinion that the weight of evidence compels me to that conclusion, I have decided, and do now decide, that the commercial instrument used by the respondent company as a telephone does not embody the elements or claims of any of the Edison patents, and that its use or manufacture by any one would not constitute an infringement of the Edison patents, which would therefore not be affected by the importations complained of, whatever view might be taken of the effect of such importations.

For these reasons and on these grounds, I dismiss the petition, and declare that, notwithstanding anything that has been shown to me on this application, the three patents for telephones hereinbefore mentioned, granted to Thomas Alva Edison, and now owned by the respondent company, are not void.

THE J. P. BUSH MANUFACTURING COMPANY..... } CLAIMANTS ; 1888 Oct. 24.

AND

ARTHUR N. HANSON AND HARRY S. McLAUGHLIN..... } RESPONDENTS.

Trade-mark—Essential elements of—Limited assignment of—Cancellation of registration in favor of prior assignee under unlimited assignment —R. S. C. c. 63, s. 11.

The essential elements of a legal trade-mark are (1) the universality of right to its use, *i. e.* the right to use it the world over as a representation of, or substitute for, the owner's signature ; (2) exclusiveness of the right to use it.

Where respondents had obtained the exclusive right to use a certain trade-mark in the Dominion of Canada only, and had registered the same, and claimants subsequently applied to register it as assignees under an unlimited assignment thereof made before the date of the instrument under which respondents claimed title, the prior registration was cancelled.

APPLICATION to cancel registration of a trade-mark under R.S.C. c. 63, s. 11 (1), on the ground that the respondents were not entitled to the exclusive use of the trade-mark as registered by them.

The case arose upon the following facts :—

(1) 11. If any person makes application to register, as his own, any trade-mark which has been already registered, and the Minister of Agriculture is not satisfied that such person is undoubtedly entitled to the exclusive use of such trade-mark, the Minister shall cause all persons interested in the matter to be notified to appear, in person or by attorney, before him, with their witnesses, for the purpose of establishing which is the rightful owner of such trade-mark ; and after having heard the said persons and their witnesses, the Minister shall order such entry or cancellation or both, to be made as he deems just ; and in the absence of the Minister, the deputy of the Minister of Agriculture may hear and determine the case and make such entry or cancellation or both, as he deems just :

2. Errors in registering trade-marks and oversights in respect of conflicting registrations of trade-marks may be corrected in a similar manner.—42 V. c. 22 s. 15.

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Argument of Counsel.

On the 21st August, 1886, a trade-mark, consisting of the words " Bush's Fluid Food Bovinine," was registered in the Department of Agriculture in the name of Messrs. Arthur N. Hanson and Harry S. McLaughlin, both of the City of Portland, Province of New Brunswick.

On the 18th day of June last an application was received in the Department from Albert Imgard, of the City of New York, U.S.A., Secretary and Treasurer of the J. P. Bush Manufacturing Company, for the registration of a specific trade-mark consisting of the word-symbol " Bovinine " as applied to the sale of beef juice in a concentrated form, used as a medicinal nourishment in all cases of debility, and especially adapted to consumptive and dyspeptic patients.

August 1st and 2nd, 1888.

The matter was heard before the Deputy Minister of Agriculture.

Pugsley, Q.C. for claimants ;

Skinner, Q.C. for respondents.

LOWE, D. M. A., now (October 24th, 1888) rendered his decision.

The investigation in this matter has taken a somewhat wide scope, and the several statements put in evidence are conflicting and complicated; but I find the following facts:—

In the first place, Messrs. Arthur N. Hanson and Harry S. McLaughlin registered in this Department on August 1st, 1886, a trade-mark consisting of the words " Bush's Fluid Food Bovinine " in their own names. This registration was made simply and without any limitation.

It appears, from a document put in evidence, that the parties named were not the original proprietors,

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but held the trade-mark in question by an assignment from Henry T. Champney, such assignment being dated June 1st, 1886, and limiting by its terms the trade-mark to the Dominion of Canada.

It further appears, from a document put in evidence, that the said Champney and I. Giles Lewis had assigned to the J. P. Bush Manufacturing Company, simply and without limitation, the same trade-mark, about one year previously, on June 25th, 1885.

Upon this statement of facts it is important to define that a trade-mark is a simple and absolute property, the same as a signature, or the name and style of a firm, without any limitation as to country, and runs everywhere throughout the domain of commerce.

In other words, the essential characteristics of a legal trade-mark are: (*a*) Universality of right to its use, that is, it is good as a representation of, or substitute for, the owner's signature all the world over; and (*b*) exclusiveness of the right to use it.

If the same trade-mark were to be used by different persons for the same species of merchandise, it would lead to inextricable confusion, its true and only legitimate purpose would be neutralized and destroyed, and it would lack the essential element of origin or ownership.

Tried by the test of these definitions, the limitation in the transfer by which Hanson & McLaughlin hold their claim to the title of the trade-mark in question renders the registration invalid.

I find, further, from the above statement of facts, in relation to the transfers affecting the trade-mark in question, that Champney after his transfer to the J. P. Bush Manufacturing Company, in 1885, had no property whatever in such trade-mark to convey to Hanson & McLaughlin in 1886, and, therefore, he could not, by his act of transfer, vest any title in his

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assignees, the respondents in this case. This is apart from any question of his inability to divide the trade-mark in order to limit its use to territory outside of the United States.

Mr. Skinner has contended that the assignment by the J. P. Bush Company, in 1884, to Champney did not give any right to the trade-mark, but only the right to manufacture, for the reason that this company was never the assignee of the James P. Bush trade-mark which was registered at Washington, in 1877. The evidence taken did not go into this point, but it is to be observed that the assignment above referred to from the company did transfer the trade-mark, whether with due authority or not; and it is further to be said that if the contention of Mr. Skinner were held to be valid, it would invalidate Hanson & McLaughlin's registration above referred to, and be at the same time a bar to the requested registration of the claimants, the J. P. Bush Manufacturing Company, for the reason that while both hold from Champney, he could not assign a title which belonged to another.

There is a further point to be noticed with respect to the limitation in the assignment of Champney to Hanson & McLaughlin, namely, that if they had represented at the time of applying for the registration that the priority of use or property in the trade-mark was vested in a company in the United States, the assignment only giving them the right to use it in Canada, the registration would have been declined by this Department, for the reason that the right to use a trade-mark must be absolute.

As regards the evidence put in by Mr. Skinner to prove sanction by the claimants of the assignment by Champney to Hanson & McLaughlin, I find much to make me believe that these men might have honest-

ly thought that they were dealing with the company through its President, without knowing that they were the victims of an unauthorized and clandestine transfer by Champney, the President, as Mr. Pugsley in effect contended, and the claimants in effect set forth. I do not wish by the conclusion which I have arrived at, as regards the right of the parties to the simple fact of registration, to prejudice any of the rights which any of these parties may have under these somewhat complicated and mixed transactions.

And I think it well still further to point out that nothing in connection with this registration affects the rights of Hanson & McLaughlin to the use of any formula, or to the manufacture of any medicinal or nourishing fluid or extract from beef, or anything else. It is only that in the circumstances stated they cannot use the particular trade-mark registered.

I, therefore, decide that the trade-mark registered in this Department, in Register 12, Folio 2733, on the 21st August, 1886, consisting of the words " Bush's Fluid Food Bovinine " must be cancelled.

And I further decide that, from the evidence so far adduced, whatever property the said Champney had in the trade-mark in question was transferred by him to the J. P. Bush Manufacturing Company, and that the claimants acquired title from him. Priority is, therefore, awarded to the J. P. Bush Manufacturing Company, and their claim of right to registration of the trade-mark consisting of the word-symbol " Bovinine " is admitted.

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Sept. 17.

JOSEPH BROOK.....PETITIONER ;

AND

ELIZABETH K. BROADHEAD.....RESPONDENT.

Patent—Manufacture of in Canada—The Patent Act (R. S. C. c. 61) s. 37 —Interpretation.

Section 37 of *The Patent Act* (R. S. C. c. 61) does not require the patentee, or his legal representatives, to personally manufacture his invention in Canada. So long as he puts it within the power of such person to obtain the invention at a reasonable price in Canada, he fulfils the requirement of the statute.

PETITION to the Minister of Agriculture, bearing date the 25th April, 1888, to have declared null and void the patent No. 6375, granted to L. W. Whipple, on the 31st July, 1876, for "improvements on machines for making napped fabrics," on the ground that the invention had not been manufactured in compliance with the 37th section of *The Patent Act* (R. S. C. c. 61.) (1).

(1) SECTION 37.—Every patent granted, under this Act, shall be subject and be expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall cease and determine, and that the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives, within that period, commence, and, after such commencement, continuously carry on in Canada the construction or manufacture of the invention patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price, at some manufactory or establishment for making or constructing it in Canada,—and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee or his legal representatives or his assignee for the whole or a part of his interest in the patent imports or causes to be imported into Canada, the invention for which the patent is granted ; and if any dispute arises as to whether a patent has or has not become null and void under the provisions of this section, such dispute shall be decided by the Minister or the deputy of the Minister of Agriculture, whose decision in the matter shall be final :

2. Whenever a patentee has been

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Statement of Facts.

In November, 1876, the patent was assigned to one Harriet T. Strong, who in March, 1882, assigned to the respondent. The machine is capable of manufacturing different classes of goods.

The respondent denied the allegations of the petition, and pleaded want of good faith on the part of the petitioner.

September 3rd, 1889.

The case was heard before the Deputy Minister of Agriculture.

Gundry and *Powell* for petitioner ;

Moffatt and *Fisher* for respondent.

The petitioner's evidence consisted of his own and other statutory declarations, and of certain letters and contracts, by which it was established that in the year 1882, by deed of agreement, the respondent, for the royalty therein specified, licensed and conveyed to the Penman Manufacturing Company of Paris, Ontario, for the term of the patent, the right to manufacture horse and bed blanketings, and agreed to supply the patented machine for this purpose, at a certain rental,

unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the commissioner may, at any time not more than three months before the expiration of that term, grant to the patentee an extension of the term of two years on his proving to the satisfaction of the commissioner that he was, for reasons beyond his control, prevented from complying with the above conditions :

3. The commissioner may grant to the patentee, or his legal representatives or assignee for the whole or any part of the patent, an extension for a further term not exceeding one year beyond the twelve months limited by this section, during which he may import or cause to be imported into Canada the invention for which the patent is granted, if the patentee or his legal representatives, or assignee for the whole or any part of the patent, show cause, satisfactory to the commissioner, to warrant the granting of such extension ; but no extension shall be granted unless application is made to the commissioner at some time within three months before the expiry of the twelve months aforesaid, or of any extension thereof.

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Statement of Facts.

the machine to remain her property and be returned to her at the expiration of the contract ; that three machines were thus supplied ; that the respondent by the deed divested herself of the right to manufacture or license others to manufacture the above class of goods. In April, 1884, another agreement, similar to the above, was entered into by the same parties, for a certain other class of goods ; it was further agreed that the Penman Manufacturing Company should not do anything to vitiate or lessen the interest of the respondent in the patent ; that in the spring of 1888, the petitioner visited the machines at the Penman Company's factory, with a view of procuring one, but found that his mill was not large enough to accommodate it ; that in March last, the petitioner wrote to Mr Broadhead, the husband and business manager of the respondent, stating that he had made some changes in his mill, and had a notion to go into the blanket business, and buy one or two of the machines, and asking the price thereof ; that Mr. Broadhead replied referring him to the contract by which the Penman Manufacturing Company had the exclusive right to manufacture these goods, and requesting him to make an arrangement with them, alleging that he would have no difficulty in doing so, as the company wanted to give up the business, as it was out of their line of trade, and that with regard to the machines, the respondent did not sell them, but would supply and lease them to him on the same terms as those made with the Penman Company ; that the petitioner stated in his declaration, that he would have used the machine in his factory, if he could have procured it.

The respondent's evidence consisted of her own and other statutory declarations, of certain letters and a telegram, and also the verbal testimony of her husband. By this evidence it was established, that before acquir-

ing the patent, the respondent had satisfied herself of its validity, and that the requirements of *The Patent Act* had been complied with ; that the invention had been manufactured in Canada within two years from the date of the patent and continuously therefrom, in the manner required by *The Patent Act ;* that immediately after the respondent acquired the patent, Mr. Broadhead canvassed the whole country trying to find a market or purchaser for it, but without success ; that there was no demand for it, until he succeeded in getting the Penman Manufacturing Company to take hold of it ; that one machine running full time would make more blankets than would be required to supply the demand of the whole Dominion, and could be made at any ordinary factory in about ten or fourteen days ; that the Penman Manufacturing Company never used more than one machine, and only occasionally, to make blankets, and they made more than the demand warranted ; that three machines supply the demand of the whole of the United States ; that the Penman Manufacturing Company, early in the present year, wanted to give up the business, and requested Mr. Broadhead to try and get some one to take it off their hands, at the same time informing him that the petitioner had declined to take it, not having room for it ; that Mr. Broadhead tried to get some one to take up the business, but without success ; that the Penman Manufacturing Company were the agents of the respondent in Canada, and had the power to sell or license to others the right to manufacture the goods upon payment of a royalty, while the respondent reserved the right to lease and supply the machines ; that she was at all times and still is ready and able to do so and never refused to supply them to anyone ; that the petitioner refused to obtain or use the machine unless he could buy it absolutely ; that the Penman Manufacturing Company having omitted to

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Argument of Counsel.

pay the royalty stipulated by the above contracts, the respondent, in the month of February last, instituted legal proceedings to recover the same and which are still pending; that the offer of the petitioner to purchase the machine was not serious nor made in good faith, but was made at the instance, and to serve the the purpose, of the Penman Manufacturing Company, in view of the pending lawsuit above referred to. This evidence is supplemented by the statutory declaration of one J. Thompson, who was the agent of Mrs. Strong while she held the patent, in which he states that the invention was manufactured in Canada within two years from the date of the patent. In the month of May last, Mr. Moffatt, the legal attorney of the respondent, wrote to the petitioner offering, on her behalf, to furnish him with a machine, at a reasonable price, if he should make a serious, *bonâ fide* and substantial proposal for it.

For the petitioner it was contended, that the allegations of the petition were fully sustained, and that Dr. Taché's ruling in *Barter* v. *Smith* (1), to the effect that the patentee was not bound to keep his invention in stock so long as he was ready to furnish it, or license the right of using it to any person desiring it, was erroneous; that, on the contrary, the patentee is bound to have it ready on hand to deliver it at any time to any one requiring it, and that the respondent had rendered herself unable either to supply or license the invention to any one by the terms of her contract with the Penman Manufacturing Company.

For the respondent it was argued, that the provisions of *The Patent Act* had been fully complied with; that the petitioner never seriously offered to purchase the machine, but his offer was the result of a conspiracy between him and the Penman Manufacturing

(1) Reported *ante*, p. 455.

Company, in the hope of defeating the respondent in the lawsuit above referred to.

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Decision of Lowe, D.M.A.

LOWE, D.M.A. now (September 17th, 1889) rendered his decision.

The main subject for the consideration of this tribunal is to ascertain whether the allegations in this petition are supported by the evidence adduced. The 37th section of *The Patent Act* does not require the patentee or his representative to manufacture the invention personally, but in such manner that any person desiring to use it may obtain it at a reasonable price. The evidence establishes that these conditions were complied with. The petitioner is the only person who is proved to have applied for it, and he could have obtained it, as he knew, from the Penman Manufacturing Company, and indeed from the respondent as well, as shewn by the letters of the company, and that of Mr. Moffatt above referred to; but he refused to have anything to do with it because he could not, as he expressed it, buy it out and out from the respondent. This was not required of the respondent by the terms of *The Patent Act*, as above stated, and as is clearly and ably shown at length by Dr. Taché in the case of *Barter* v. *Smith* (1), the ruling in which has been accepted as the settled jurisprudence on this subject.

I therefore decide that the patent, No. 6375, granted to L. W. Whipple, on the 31st of July, 1876, for "improvements in machines for making napped fabrics," has not become null and void, under the provisions of section 37 of *The Patent Act*.

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(1) Reported *ante*, p. 455.

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Oct. 3.

CHARLES R. GROFF.....CLAIMANT ;

AND

THE SNOW DRIFT BAKING POWDER COMPANY OF BRANTFORD, ONTARIO..... } RESPONDENTS.

Trade-mark—First use—Cancellation of registration in favor of prior transferee—The Trade Mark and Design Act (R. S. C. c. 63) sec. 11.

First use is the prime essential of a trade-mark, and a transferee must, at his peril, be sure of his title.

2. In the year 1885, the respondents, by their corporate title, registered a trade-mark, consisting of a label with the name "Snow Flake Baking Powder" printed thereon, in the Department of Agriculture. Some four years after such registration by respondents, the claimant applied to register the word-symbol "Snow Flake" as a trade-mark for the same class of merchandise,—stating that he knew of the respondents' registration, and alleging that it was invalid by reason of prior use by him and his predecessors in title. The evidence sustained the claimant's allegations.

Held, that the word-symbol in question had become the specific trade-mark of the claimant by virtue of first use, and that the registration by respondents must be cancelled.

THIS was an application to cancel the registration of a trade-mark on the ground that the persons who had made such registration were not the first to use the same in Canada, and were not entitled to its use. The application was made under *The Trade Mark and Design Act* (R.S.C. c. 63) section 11 (1).

(1). Sec. 11. If any person makes application to register, as his own, any trade-mark which has been already registered, and the Minister of Agriculture is not satisfied that such person is undoubtedly entitled to the exclusive use of such trade-mark, the Minister shall cause all persons interested in the matter to be notified to appear, in person or by attorney, before him, with their witnesses, for the purpose of establishing which is the rightful owner of such trade-mark ; and after having heard the said persons and their witnesses, the Minister shall order such entry or cancellation or both, to be made

March 22nd, 1889.

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The matter was heard before the Deputy Minister of Agriculture.

Woodward, (St. Paul, Minn.) for the claimant ;

Boultbee, for the respondents.

The facts of the case are recited in the decision.

Decision of Lowe, D.M.A.

LOWE, D.M.A. now (October 3rd, 1889) rendered his decision.

The case arose out of the facts that on the 21st of August, 1885, a trade-mark consisting of a label with the name "Snow Flake Baking Powder" printed thereon, was registered in Folio 2533, in Register No. 11, in the name of the Snow Drift Baking Powder Company, of the City of Brantford, Province of Ontario ; and that, on the 7th of September last, an application was made by Mr. Charles R. Groff, of St. Paul, Minnesota, U.S.A., for the registration of the word-symbol "Snow Flake" for the same class of merchandise, stating at the same time that he understood there was already registered a trade-mark under that name, he claiming that such registration was illegal, because of prior use by him and his predecessors, and asking that the matter be adjusted in virtue of the provisions of section 11 of *The Trade Mark and Design Act.*

In obedience to the law, all the parties were duly notified of the issue, and to appear at two o'clock on the 22nd March, 1889, with their evidence.

The hearing took place on the day named before me. Oral evidence was adduced, which was supplemented by documents subsequently received from the claim-

as he deems just ; and in the absence of the Minister, the deputy of the Minister of Agriculture may hear and determine the case and make such entry or cancellation or both, as he deems just.

2. Errors in registering trade-marks and oversights in respect of conflicting registrations of trade-marks may be corrected in a similar manner.

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ant, copies of which were communicated to Mr. Boultbee, counsel, on behalf of the respondents.

In support of the fact of prior use, Mr. Woodward has put in the original certificate granted by the United States Patent Office, at Washington, of a trade-mark in favor of C. C. Warren & Co. of Toledo, Ohio, through Charles C. Warren, a member of the said firm, under date May 1st, 1877, No. 4,598, such certificate defining that the trade-mark consists of the word-symbol "Snow Flake," applied to baking powder and that such firm had used the said trade-mark for a period of nearly, or about, ten years previously. We have here undoubted evidence of use before the date of the declaration of the Snow Drift Baking Powder Company, of Brantford, Ont., on the 19th of August, 1885, in which that company, in accordance with sections 8 and 10 of the *Trade Mark and Design Act*, stated that they "verily believed the said word-symbol "Snow Flake" was theirs on account of having been the first to make use of the same;" and it was in virtue of this declaration that the company obtained registration, in the absence of information to the contrary.

I find from documents submitted, that:—

On May 10th, 1882, the firm of C. C. Warren & Co. sold to James B. Baldy the trade-mark in question.

On July 25th, 1882, James B. Baldy gave power of attorney to Charles C. Warren to sell and convey all effects and interests of the late firm of C. C. Warren & Co.

On August 1st, 1882, James B. Baldy, by Charles C. Warren, *ès qualité* as attorney, transferred it to Alvine M. Woolson, except as respects Minnesota and Dakota.

On September 16th, 1882, Alvine M. Woolson transferred it to the Woolson Spice Company, except as respects Minnesota and Dakota.

On October 6th, 1883, the Woolson Spice Company

transferred it to Charles R. Groff, with warranty, except as to Minnesota and Dakota.

On January 21st, 1885, James B. Baldy transferred to Charles R. Groff, the right in such trade-mark in Minnesota and Dakota.

Several affidavits, made at Winnipeg, were submitted and read by Mr. Woodward, as to the prior use of the trade-mark in question in Winnipeg, by Mr. Groff, before its registration at Ottawa by the Brantford Snow Drift Baking Powder Company in 1885; but exception was taken to these documents by Mr. Boultbee on the ground that the signatures had been affixed under oath, instead of under declaration, in accordance with Chapter 141, Revised Statutes of Canada, respecting Extra Judicial Oaths. I, therefore, do not think it well to make any further reference to these documents as a ground of my decision.

There were also submitted and read three depositions made at St. Paul, Minnesota, sworn to and subscribed before Thomas E. Leedington, Notary Public, under his notarial seal.

In one, Charles R. Groff, the claimant in this case, deposed that he began making baking powder in St. Paul in 1874, under the trade-mark "Snow Flake," in his capacity of secretary and general manager of the Chemical Manufacturing Company; that the firm of Groff & Berkey sold baking powder in Winnipeg, Manitoba, under the trade-mark "Snow Flake," in 1877; and that it had been sold there every year since, until October, 1888, when he received a notice from the Snow Drift Baking Powder Company of Brantford, Ontario, to stop such sales, as they claimed to be the owners of this trade-mark as applied to baking powder in Canada.

Another of these depositions, that of William R. Spangler, clerk and book-keeper to Charles R. Groff,

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recites that he has been familiar with the details of the business of Mr. Groff; that to his personal knowledge Mr. Groff had been selling baking powder under the trade-mark "Snow Flake" since 1880; that it was his duty to keep track of shipments; that there were sales to parties in Winnipeg on the dates of the copies adduced of several invoices in February, 1882, the correctness of such copies being sworn to by him.

Another, and the third of these depositions, by Richard Forde, residing at St. Paul, Minnesota, recites that from about September, 1880, until June, 1884, he resided at Brantford, Province of Ontario; that between the dates mentioned he was employed by Jackson Forde, Grocer and Manufacturer of baking powder; that on or about the 1st of February, 1884, the "Snow Drift Baking Powder and Grocers' Company" was incorporated; that such company was the successor of the said Jackson Forde; that he (Richard Forde) was a member of such corporation from its organization until June, 1884, and held the office of manager therein; that as such he was cognizant of all the details of the business of Jackson Forde and of the said corporation; that to his certain knowledge the said Jackson Forde, or the corporation, did not, prior to June, 1884, manufacture or sell baking powder under the name of "Snow Flake;" and that to his certain knowledge it waa s matter of common report among the members of the said corporation that prior to June, 1884, baking powder was being sold in Winnipeg under the name of "Snow Flake." If this statement is accepted, it shows that the manager of the said company at least had knowledge of the prior use of the word-symbol in question by another.

The registration of the trade-mark in 1885 was asked for by the "Snow Drift Baking Powder Company," of Brantford. The deposition of Richard Forde, put in

by Mr. Woodward, describes the company as the "Snow Drift Baking Powder and Grocers' Company," of Brantford, which is the designation of a "limited" corporation in the Secretary of State's Department, of which Jackson Forde and Richard Forde were corporate members and provisional directors in 1884.

I find from the preceding recital, and particularly from the several transfers referred to, that the title of Charles R. Groff to the trade-mark "Snow Flake," as applied to baking powder, is sufficient to give him a right to ask the office for registration.

An objection by Mr Boultbee, to which I think it well to refer, was to the effect that he had seen a case reported by which it was decided that the words "Snow Flake" cannot be a trade-mark. He referred to a decision in the United States, in which the words in question were disposed of, namely, in the case of *Lawrence* v. *Lewis*, in which it was decided that the words "Snow Flake," in their common, ordinary sense, cannot be a trade-mark. Mr. Boultbee did not furnish me with a report of the case, and I have been unable to find the book in the library from the reference he gave. I do not, however, find any difficulty in this point. It is admitted at once that the words "Snow Flake" belong to the public domain. It happens that the words used as symbols in nearly all trade-marks belong also to the public domain. But it does not follow that the word-symbol "Snow Flake," as specifically applicable to baking powder, is not a fanciful designation; and, therefore, proper for registration as a specific trade-mark. I have no doubt whatever on this point, and it is simply as to the sufficiency of the words for registration, in the sense stated, that I have the responsibility of dealing. The office does not in the most remote degree entertain the idea of a right of property in the symbols constituting a trade-mark, apart from the use

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Decision of Lowe, D.M.A.

or application of them to a vendible commodity. The words in question were registered as a trade-mark by the United States Government at Washington in 1877, and in this office in 1885. It may be pointed out that if this objection of Mr. Boultbee were tenable it would invalidate the claim of his clients, as well as that of Mr. Groff.

The evidence accepted for deciding this case of registration was documentary, with the exception that Mr. Woodward declared, at the hearing, that he had purchased " Snow Flake " in 1880. Previous consent was given by the office, on account of the great expense of bringing witnesses from St. Paul and Winnipeg, to accept documentary evidence, unless it should be subsequently found that it was necessary to call witnesses, in which event an opportunity for oral evidence would be afforded.

Mr. Boultbee objected to such permission, and claimed that he should have the right to cross-examine witnesses, under oath. To this, reply was made that I had no power to administer an oath in this investigation; that it was the custom of the Department to accept documentary evidence in such cases; and further, that the reliance of the Department simply was, that those who had substantial interest in the issue would adduce the necessary evidence to sustain it. The Act simply imposes on me the duty of satisfying myself, by any means in my power, without reference to any form of procedure, as to the fact of a prior use of a trade-mark for the purpose of registration. A trade-mark is an equivalent of a commercial signature, and its imitation is held to be forgery. First use is the prime essential. A transferee, therefore, must, at his peril, be sure of his title. It follows from this position that the Department accepts as a ground for registration the declaration of an applicant,

and in the case of a transfer *primâ facie* evidence of the fact.

Mr. Boultbee did not adduce any evidence on behalf of his clients, nor even allege that they used the trade-mark in question before the date of the United States Government registration, the production of which, simply and absolutely, renders invalid the registration by his clients in 1885. I called his attention to this material point at the hearing, and asked him specifically if he could tell me when his clients first began to use the word-symbol in question as a trade-mark. He answered me that he did not know.

In view, therefore, of the facts established to my satisfaction :—

1st., I decide that the registration in favor of the "Snow Drift Baking Powder Company," of Brantford, in Folio 2533, in Register No. 11, on the 21st of August, 1885, of the trade-mark consisting of a label, with the name "Snow Flake Baking Powder" printed thereon, must be cancelled ; and

2ndly., I decide that the application of Charles R. Groff for registration of the said word-symbol as a trade-mark, applicable to baking powder, must be granted.

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Nov. 25.

THE ROYAL ELECTRIC COMPANY OF CANADA..... } PETITIONERS;

AND

THE EDISON ELECTRIC LIGHT COMPANY..... } RESPONDENTS.

NOTE.—The Honourable Sir John S. D. Thompson, Q.C., Minister of Justice, sat with the Honourable Mr. Carling, Minister of Agriculture, at the hearing of this case.

SYLLABUS OF THE OPINION OF THE MINISTER OF JUSTICE.

Patent—The Patent Act (R. S. C. c. 61) s. 37—Importation of parts—Articles of Commerce—Novelty forming part of combination patented—Penalty in section 37, how to be applied—Patentee's right to impose limitation on sale—Object of the enactment as to sale of patented invention.

If an article imported by a patentee and used by him in the construction of his invention is a common commercial article employed for many purposes, and is not specified in the patentee's claim as an essential part of his invention, such importation does not operate a forfeiture of the patent.

2. A fair test of the patentee's ability to freely import any article required in the construction of his invention is to ascertain if it is open to every person in Canada to manufacture, import, sell and use the same without thereby infringing the patent in question. If the article is thus part of the public domain, the patentee is at liberty either to import it or purchase it in Canada for the purposes of such construction.

3. Where the subject of a patent is a combination of elements and one of them is a novelty invented by the patentee, such novelty is in the same position as the other elements with respect to importation by him unless its production or manufacture is covered by the patent in question.

4. There is no express provision in the statute imposing the penalty of forfeiture for importing into Canada the various parts of the invention in respect of which the patent was granted, much less for importing one of its parts. The words of the statute are "the invention for which the patent is granted," and they ought not to be extended beyond their plain meaning. In administering the

statute, the Minister can only apply the penalty to the offence which the statute forbids. He cannot apply it to an attempt to evade the statute.

5. In imposing penalties Parliament must take its own measures to prevent evasion, and it would be most unsafe to impose, in the case of an evasion, the heavy penalty which the law has levelled at the principal offence, on the theory, which may or may not be correct, that Parliament intended by an equal penalty to forbid the doing of that which would be almost or quite an equivalent of the principal offence.
6. Where the article patented is of delicate and skilful manufacture, and one from which the patentee can only reap the reward of his labor and expenditure through its being esteemed successful by the public, it is reasonable for him, at a time when public opinion with respect to it is in suspense, to decline to sell his invention unconditionally to those who, by unsuitable use, would fail to derive benefit from it themselves, and would create an impression in the public mind that the invention was a failure. If, upon application made to him for the purchase of his invention, he imposes a limitation in respect of its use, he ought not to be held to have thereby forfeited his patent unless it appear that such limitation was imposed for the purpose of evading compliance with the provisions of the statute which require him to sell the patented invention at a reasonable price.
7. In relation to the provisions of section 37 of *The Patent Act* touching the price of the patented invention to purchasers, it would appear that the evil the statute was principally intended to prevent is the exaction of exorbitant prices under the monopoly secured by the patent.

PETITION to the Minister of Agriculture praying to have declared null and void patent No. 10654, granted to Thomas Alva Edison on the 17th November, 1879, for "new and useful improvements on electric lamps, "and in the method of manufacturing the same,—the "title whereof is the "*Edison Electric Lamp*,"—on the "ground of non-manufacture in Canada within the "time prescribed in section 37 of *The Patent Act*" (R. S. C. c. 61) (1).

(1) Section 37.—Every patent granted, under this Act, shall be subject and be expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall

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THE ROYAL ELECTRIC COMPANY OF CANADA v. THE EDISON ELECTRIC LIGHT CO.

Statement of Facts.

The respondents are assignees of the patent in question.

The petition alleged, in substance, that the patentee and his assignees had not manufactured the invention within the two years prescribed by law, and that the alleged extension of three months within which to do so had been obtained by false and wilful misrepresentation; that the patentee and his assignee had imported the invention into Canada after the twelve months allowed by law, and prayed, for these reasons, that the patent

cease and determine, and that the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives, within that period, commence, and, after such commencement, continuously carry on in Canada the construction or manufacture of the invention patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price, at some manufactory or establishment for making or constructing it in Canada,—and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee or his legal representatives or his assignee for the whole or a part of his interest in the patent imports or causes to be imported into Canada, the invention for which the patent is granted; and if any dispute arises as to whether a patent has or has not become null and void under the provisions of this section, such dispute shall be decided by the Minister or the Deputy of the Minister of Agriculture, whose decision in the matter shall be final:

2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the commissioner may, at any time not more than three months before the expiration of that term, grant to the patentee an extension of the term of two years on his proving to the satisfaction of the commissioner that he was, for reasons beyond his control, prevented from complying with the above condition:

3. The commissioner may grant to the patentee, or to his legal representatives or assignee for the whole or any part of the patent, an extension for a further term not exceeding one year, beyond the twelve months limited by this section, during which he may import or cause to be imported into Canada the invention for which the patent is granted, if the patentee or his legal representatives, or assignee for the whole or any part of the patent, show cause, satisfactory to the commissioner, to warrant the granting of such extension; but no extension shall be granted unless application is made to the commissioner at some time within three months before the expiry of the twelve months aforesaid, or any extension thereof.

be declared null and void, and the extension above mentioned set aside and cancelled.

November 13th, 1888.

Lash, Q.C., *McGibbon*, Q.C., *Curtis* (of New York) and *Kerr* (of Pittsburg, N.Y.,) for the petitioners ;

Cameron, Q.C., *Macmaster*, Q.C., and *Dyer* (of New York) for respondents.

The case now came on before the Deputy Commissioner of Patents, and evidence was taken on both sides.

December 17th, 1888.

The case was argued before the Deputy Commissioner who reserved his decision.

February 26th, 1889.

POPE, D.C.P. now rendered his decision, declaring that the patent had become null and void under the provisions of the 37th section of *The Patent Act.*

The following are the facts upon which the Deputy Commissioner based his decision :—

The evidence adduced by the petitioners established, in substance, that the patent was granted to Thomas A. Edison, on the 17th November, 1879 ; that on the 16th November, 1881, an extension of three months time within which to manufacture was granted ; that on the 12th February, 1880, Edison assigned the patent to the Edison Electric Light Company, and on the 30th December, 1886, the latter assigned to the Edison Electric Light Company—the respondents. The lamp consists of a glass globe or bulb, glass tubing, inside pieces of glass, platinum and copper wires, carbon filament, and brass bottom. All these articles were imported from the United States, from the time the patentee and his assignees began to make the lamps in Canada, and still continue to be imported. The process of making

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the lamp from these imported articles consisted of several operations, such as attaching the carbon filaments to the leading-in wires—the leading-in wires having been previously let into the glass and sealed in, the glass bulb and tube attached to it, the air exhausted from the bulb, and connection made with the brass cap or base to attach it to the socket, to connect with the circuit supplying the electric current. On the 14th November, 1881, the Edison Electric Light Company started a small factory in Montreal, worked by two men, and the outfit consisted of a small dynamo, several pumps for producing the vacuum in the globes, several small glass-blower's fires, gas fires, altogether of the value of about $2,000, and commenced the manufacture of the lamps from the materials imported from the United States, as above stated, and on the 17th had completed two lamps. The carbon filaments were put into the lamps in the condition they were brought in from the United States, and were not subjected to any further treatment or process of carbonization after their arrival in the factory in Montreal. The carbon filaments are made of bamboo, imported into the United States from Japan, in the crude or natural state, in strips, and on arrival at the factory in the United States, they were further split into smaller strips, the pith removed, and then, by knives or dies, further reduced to the proper size of the filament. These filaments were then put on a block or mould packed with carbon, then put into a furnace and baked or carbonized. This process requires great skill and labor, and is very difficult, and can only be done by skilled workmen. They tried to carbonize the filaments in Montreal but could not succeed, as the men were not skilled in the work. The glass bulbs were made in the United States from pot glass, the glass-blowers there blowing them by several processes into

the size and shape required. These bulbs were made expressly for use on the incandescent lamps, and must have the same expansion as the platinum. The glass tubing also must be made from the same quality of pot glass as the bulbs, so as to have the same expansion ; the platinum wire also was specially prepared in the United States for use in the lamps. The employees were instructed not to sell the lamps to any who did not use the Edison dynamos or plant, and they accordingly did not sell them, and refused to sell to any not using the Edison plant; it being the policy of the respondents to do this, as the sale of the plant was more profitable than the sale of the lamps, the proportion being that where 800 lights were installed, the total price was $12,000, while the cost of the lamps at $1 each was only $800, and this had, practically, the effect of creating a monopoly for the Edison plant. The first sale of lamps in Canada was made to the Canada Cotton Company at Montreal, in December, 1882. The capital stock of the Edison Electric Light Company in November, 1881, was $720,000 or $780,000, the par value of the shares being $100, but they were then quoted and selling at from $1,000 to $1,200 per share, or a premium of $1,000 to $1,100 above par. In January, 1883, the factory in Montreal was closed, and the business transferred to Hamilton, and there increased and more men were employed, but there was no change in the manner of getting out the lamps; the same articles were imported, but in larger quantities, the same steps of assembling all the parts and putting them together to complete the lamp were gone through at Hamilton, as in Montreal. At this time there were about 3,800 lamps in use in Canada, and the annual output was from 8,000 to 10,000 lamps, and was gradually increasing. The proportionate cost of labor bestowed in the United States on the articles sent into Canada, to be used in the making

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of the lamps, is $32.50 on every 100 lamps made; while the proportion of the cost of labor bestowed on the lamps in Canada, after the importation of the articles composing it, is $21.80 per $100 worth of lamps made.

The respondents admitted the importation of the glass bulbs, the glass tubing, the plantinum and copper wires, and the carbon filament, and that the importation continues still, and the evidence they adduced went to show that these were all raw material; that they were all ordinary articles of commerce, and could be used for any other purpose besides incandescent lamps; that the carbon filaments, as imported, were only partly manufactured in the United States, and the carbonization was completed in the Canadian factory by the passing of an electric current through them while a high vacuum was maintained in the lamp bulbs, thereby reducing them to a pure carbon; and that this process of final carbonization was necessary to make a serviceable commercial lamp; that the glass bulbs and tubes, after they were imported, passed through several processes in the factory in Canada to render them fit for use in the lamp; that the platinum was obtained in the United States, and, before being sent into Canada for use in the lamps was remelted from the crude material, and then drawn out into wire and slightly alloyed with iridium, so as to make it a little harder,—the wire being attached to the carbon and fitted into the glass bulbs in Canada; that if the respondents had been compelled to manufacture the carbons in Canada, it would have ruined the business in Canada; that the platinum wire would have cost two hundredfold more in Canada, as it requires a special furnace to prepare it; that the cost of material in the United States as imported into Canada would be the proportion of one-third, and the labor in Canada two-thirds.

A doubt having arisen as to the jurisdiction of the Deputy Commissioner of Patents under the provisions of the 37th section of *The Patent Act*, on further petition of the Royal Electric Company of Canada, the case was reopened by the Minister of Agriculture and heard by him *de novo*.

July 23rd, 1889.

Lash, Q.C., *McGibbon*, Q.C., *Curtis* (of New York) and *Kerr* (of Pittsburg, N.Y.), for petitioners;

Cameron, Q.C., *Osler*, Q.C., *Macmaster*, Q.C., and *Lowrey* (of New York), for respondents.

The evidence taken at the previous hearing before the Deputy Commissioner of Patents was accepted by both the petitioners and the respondents, and some additional evidence was taken. Counsel then argued the case anew.

The HONOURABLE Sir JOHN S. D. THOMPSON, Q.C., Minister of Justice, sat with the Minister of Agriculture at this hearing, and delivered a written opinion, addressed to the latter, as follows :—

The nature of the petition, and the various proceedings taken under it, down to the time when it was heard by Mr. Richard Pope, Deputy Commissioner of Patents, are recited in the decision which was rendered in this case on the 26th of February, last, by that gentleman. I need not detail these matters again, because the narration by Mr. Pope indicates them sufficiently, although it will be seen that I do not concur in his conclusions as to what was established by the evidence in regard to many important points, but arrive at conclusions almost directly opposite. In order that the explanation of the fact that the case subsequently came before us may appear in the record, I may remind you that after the decision of Mr. Pope

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was pronounced the respondents made application to the Governor-General in Council, praying, on various grounds, that effect should not be given to that decision. The application was then referred to you and myself, by His Excellency in Council, for report, and on the examination of the subject which ensued it seemed to be, at least, doubtful that Mr. Pope, as Deputy Commissioner of Patents, possessed the necessary jurisdiction to hear and decide on such a petition, or to pronounce judgment upon it.

It was, accordingly, deemed best that the whole matter should be reheard before yourself as Minister of Agriculture; and you having desired my assistance at the hearing, I had the pleasure of hearing this most important subject very ably discussed. It was agreed at that time (subject to certain reservations which are not important now) that all the evidence, proceedings and arguments which had taken place before Mr. Pope should be considered as re-taken before yourself, and should be used to the same extent as if you had heard them. This evidence, and the report of the arguments which had taken place before Mr. Pope, together with the arguments which we heard, and the briefs which were subsequently handed to us, contain the material on which I am now to give you my opinion.

I have considered the subject carefully, and have delayed somewhat the expression of my opinion in consequence of finding myself unable to arrive at the same conclusion as that expressed in the decision of Mr. Pope, who truly says in his decision that he had bestowed upon it "all the care, study and consideration which his time and ability admitted, in endeavoring to arrive at a sound, just and equitable conclusion," and who, I know, possesses in a very high degree the ability to consider such matters in the way in which

they should be considered by a person exercising judicial functions in regard to them.

I first put out of consideration the contention made by the petitioners that the extension, which was obtained by the patentee on the 16th of November, 1881, (for three months) of the time to begin the manufacture of the patented article in Canada, was obtained by fraud. The extension was made on an *ex parte* application, no doubt. The law contemplates the application being *ex parte*. It empowers the Commissioner of Patents to decide on the proof which may be thus submitted to him. The Commissioner did decide in favor of the application. Without disputing the proposition that "fraud invalidates everything," and, although it may be that if the concession then made by the Commissioner were obtained by fraud it might be treated as null, I see no ground for sustaining the contention that it was obtained by fraud. The proof on which the application was based may perhaps have been exaggerated. It may perhaps have been untrue. I am far from saying that it was either exaggerated or untrue. The evidence on that point offered by the petitioners was, to my mind, very inconclusive. It has not made the impression on my mind which it has made on that of counsel for the petitioners, who argued that the company which had obtained the extension was shown to have been "one of the wealthiest companies in the United States," although its capital for the operations in the United States and Canada was under $800,000.

He was led to that conclusion by the fact that the shares of the company advanced in price very much above par, forgetting, apparently, that the profit on sales of shares is the profit of the owner of the shares—not of the company—and that the advance was evidently due to the speculative anticipations formed as to the company's future.

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Assuming, for the sake of the argument, however, that the proof was untrue,—that certainly would not render the decision of the Minister null.

The decision or judgment of a tribunal cannot be treated as null simply because the person in whose favor it was obtained put forward false testimony. The extension of time was actually made by the Minister. No application has ever been made to rescind the Minister's order, and therefore the time within which the patentee was bound to cease importing the patented article, and to begin the manufacture of it in Canada, was the 17th of February, 1882.

In the view that I take of this case it will be unnecessary for me to express my opinion as to whether the jurisdiction possessed by the Minister of Agriculture or his deputy, is exclusive, as contended for by the petitioners, or conclusive, when exercised, as contended for by the respondents.

I think we may also put out of the case the points taken in the particulars as to the importation of completed lamps. These points were probably based on a misapprehension of fact. It appears that four completed lamps were actually imported.

It is said that they were returned, or destroyed, and that the importation had been made by mistake.

The excuse, however, is not material. They were never sold in Canada, nor offered for sale, nor intended to be sold, but were merely intended to be used as samples, or models, of the article which it was intended should be manufactured within the Dominion.

Another item of this charge was the importation of lamps for the Lachine Canal; but it seems from the evidence that what were called lamps were only lamp fittings.

In fact, these points were not presented for our consideration as grounds on which the petitioners expected

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a favorable decision. We may fairly treat them as having been abandoned.

The application of the petitioners, therefore, rests on the set of facts following :

The patentee has made his lamps out of glass bulbs and glass tubes made in the United States and imported from there into Canada; with platinum wires produced from platinum, mined in Russia, manufactured into wire in the United States and imported into Canada from there; with filaments of bamboo grown in Japan, imported thence to the United States, carbonized partly in furnaces there, and imported thence into Canada, with brass bottoms made in the United States to fit into lamp sockets, and imported into Canada; also with copper wire which has come from the United States.

The glass bulbs and tubes are the first articles to be considered. It is admitted that they are articles of commerce in the United States, in Canada, and in almost every other country, and were so for many years before the patent.

It is clear that bulbs and tubes of that description are used for other purposes than for electric lamps, the bulb being the simplest form the glass takes in the process of blowing, and the tubing being made and used for a great variety of purposes.

While the hearing was going on in your office you may remember that it was pointed out that a number of such bulbs were standing on your desk for the purpose of exhibiting various kinds of seeds.

A description of the patented lamp does not mention the glass bulb as being an essential part of the lamp. A transparent chamber of any shape, or of several parts joined, capable of affording a vacuum, would suffice. Therefore, the bulbs and tubes are not

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used exclusively for this purpose and are not even essential to the invention, strictly speaking.

There is some evidence as to the glass bulbs and tubes being manufactured expressly for the respondents, that is, manufactured to their order, and there seems to be no doubt that each electric light company gives an order in advance for the number of bulbs which it will require, by a given time, as well as for the amount of tubing which may be required. This is not, by any means, because the manufacture of bulbs and tubes is confined to electric lamp purposes, but because it is necessary that they should be carefully made, more free from flaws than would be insisted on if they were used for some other purposes, and because it is necessary that the tubing, which has to be connected with the bulbs in the process of making the lamp, should be of the same melting, and the same description of glass as the glass of which the bulb is formed. Some companies also desire that their bulbs should have a distinctive form which is very easily given by the blower, and seems to be merely a matter of fancy. All this does not, in my opinion, make any essential difference; it is simply a precaution for care and accuracy in the making of a very common article of merchandise which is to be used in the construction of a patented article.

It cannot, certainly, be urged that the respondents might use bulbs and tubes carelessly made and ill-matched without forfeiture of the patent, but that they must lose their patent by reason of the pains that they take to avoid defects and flaws.

These bulbs and tubes, as I have said, are not a part of the claim in the patent. In fact, it is quite possible to conceive of the patented article being made without them—made, for instance, in some other shape. However this may be, they are articles of commerce, which

any one may import, manufacture, sell or use without infringing the patent. They were in use long before electric lamps were invented, are used for other kinds of electric lamps, and I cannot come to the conclusion that the importation of these into Canada incurred the forfeiture of the patent.

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What I say on this point may be taken as said of many other articles which go into the composition of the lamp, and which will be referred to hereafter. I do not see how it can be reasonably contended that these articles may be imported freely into the country, may be sold in all our shops and warehouses, may be used for any other purpose which a purchaser pleases (even for the manufacture of electric lamps), and the purchaser be liable to no penalty; while, if the patentee buy them and use them in making his lamps, he is to incur the enormous penalty of forfeiture of all his patent rights. If he may buy them here and use them for his lamps, he may certainly import them and use them.

It does not seem reasonable that a person who has been placed expressly under the protection of the patent law, as a reward for inventive genius and for expenditure of labor and capital in devising a patented article, should be subjected to enormous penalties for doing what everybody else may do, and I do not think that such would be a correct construction of the law.

The platinum wire is imported from the United States wound on spools. It is not denied that this is an article of commerce, useful for many purposes. It is not pretended that its production is covered by any claim in the patent which makes its manufacture the sole property of the patentee.

Is it a thing, therefore, which he is bound to produce and manufacture in Canada? On the contrary, it is a

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general article of commerce, as much as so valuable a material can be, and the only difference between the platinum wire of general commerce and the platinum wire used by electric lamp manufacturers is that the latter is desired to be free from flaws and defects, which sometimes may be tolerated in the former. In other words, the patentees are not to be permitted, it is virtually contended, to import platinum wire for use in their lamps unless it is irregularly and defectively made; but if roughly and badly made the law is not violated and the patent is not to be cancelled. There was evidence that the platinum wire is sometimes alloyed with iridium to stiffen it, and make it hold up the lamp better than it otherwise would; but this is also true of the platinum wire used for many other purposes, and the alloy is nothing new, is not covered by the patent and is by no means essential. The platinum wire, even with the alloy, was in use long before the electric lamp was invented. The copper wire is imported from the United States in small coils.

It is a common commercial article used for many purposes, and not an essential part of the lamp which was patented by the patent under consideration.

All that the claims in the patent say in regard to the wires is that the filament shall be "secured to metallic wires," and that "metal wires" shall pass through "a receiver made entirely of glass," and the "securing of platina contact wires" to a carbon filament. The copper wire used is the copper wire imported and used for all electrical purposes.

As to the brass bottom pieces, it is stated in the testimony that these are two brass pieces separated or held together by means of plaster, and that the two brass pieces are imported into Canada from the United States and are put together and set in plaster in Canada

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and attached to the lamp. It does not appear that these brass pieces are an essential part of the lamp, or in any way covered by the patent claim, or by the patent itself. The pieces may be of any other material which will serve the purpose, and may be of any shape, size or quality which fancy can design. They are, in one form or another, common to all electric lamps. The expert called by the petitioners says concerning the brass shells : "There is absolutely noth- "ing said about it in the patent, so I should regard it "as a subsequent improvement or attachment."

It is clear, to my mind, that in respect of all these articles (and only one remains to be considered), every one of them is of the public domain, free to every person in Canada to manufacture, import, sell and use without thereby infringing the patent under consideration, and that in respect of their use, the respondents incur no greater liability or penalty than they incur by importing, and not manufacturing, the plaster with which they seal the lamps, or any of the common appliances of the workshop which may be used in the manufacture.

The carbon filament remains to be considered.

This is described in the patent claim as "a filament of carbon of high resistance, made as described, and secured to metalic wires as set forth," &c.

The strips of bamboo, out of which filaments are made, are imported from Japan, as I have said, are split into threads in the United States, baked into a partly carbonized condition there, and sent from there into Canada. As a matter of fact, it seems that the carbonizing of the filament is a very difficult work, requiring great experience and skill. It has been principally done by Mr. Edison himself, and although, perhaps, sometimes done by others, has so often failed in the hands of others, even of those who had temporarily

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succeeded, that the work is practically reserved for Mr. Edison's factory in New Jersey, or was so at the time under consideration.

This was the case as to filaments for use in Europe as well as for use in Canada.

It may be also observed in this connection (although it may not have an important bearing on the legal view of the question) that the filament is of a very trifling value, even after it has been carbonized, and of very trifling cost.

After being brought into Canada it is attached to the leading wires and, during the process of exhausting the air from the glass bulb, is subjected to an electric current for the greater portion of half a day. The carbonizing which it receives in the United States and the treatment by electric current after it arrives in Canada, before the final completion of the lamp, are what make the filament a filament of high resistance and fully carbonized. It could hardly be said to be fully carbonized until the treatment which is given in Canada has been applied. Before that the filament is a partly carbonized filament, which would emit light when the current was applied, but not efficiently; because, not being completely carbonized, it would be of short duration, comparatively, and would impair the vacuum. It would be a carbonized filament, but not "a filament of carbon."

I must observe of the filament, as of the other articles which I have enumerated above, that the production or manufacture of this article is not covered by the patent claim or by the patent. True, it is a most essential part of the patented invention. It may, perhaps, be said to be what Mr. Pope declares it to be, "the novelty which the inventor has contributed to the art of incandescent lighting." To my mind, however, there is a mistake, which would lead to an erroneous

conclusion on the whole subject, involved in the proposition which has been put before us in the following words: "The carbon filament, as imported by the "patentee and his representatives, the respondents, * * "is claimed in and covered by the patent; * * * "anyone who should use it without the permission or "consent of the respondents would render himself liable "to them in an action for infringement of the patent." Reading these words in connection with the statement that "the carbon filament of high resistance is the novelty which the inventor contributed to the art of incandescent lighting," one would expect, in turning to the patent, to find a patent simply for "a carbon of high resistance," because nothing but a novelty can be the subject of a patent, unless it be a new combination, and the language used in the proposition before quoted would not apply to a combination. But the carbon filament is not "the invention for which the patent is granted" (to quote the exact words of the enactment prohibiting importation, which is invoked here). On the contrary the production of the filament is not covered by the patent at all. The "invention for which the patent is granted" is a lamp in which the filament is to emit the light. The lamp was old, the filament new. The combination was patented.

The patentee might have patented the filament, it would seem, but he has chosen to patent only the lamp containing the filament—or the combination, and not the new part merely.

If the view expressed in the above quotations were sound, the patentee would have satisfied the conditions of the patent by simply making the filament of carbon in Canada, and doing no more; but it is clear that if he had done only that the petitioners would have had an unanswerable case for the forfeiture of the patent. They would have said: "True, your great

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contribution—your only contribution—to the art of electric lighting was your filament of carbon, but you have patented a lamp in which that filament would give out light, how is it that you have not made lamps in Canada, but only carbons ?"

Here is evidence from the petitioners' expert on the point:

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Q. Now, the first claim reads as follows: I claim as my invention, first, an electric lamp for giving light by incandescence, consisting of a filament of carbon of high resistance, made as described and secured to metallic wires as set forth. Will you say, what, in reference to the lamps which I have been speaking of, is covered by that first claim in this patent, construing it, as we must do, by the specifications which precede the claim ?

A. I think that claim clearly covers any form of incandescent electric lamp, having in it a filament made of carbon and having a high resistance. The word filament implies that it is a fibre or thread. It must be a carbon of high resistance, and must be connected by conducting wires.

A carbon filament, even of high resistance, or even such a filament subjected to treatment by electric current, is not a thing which the patentee has the exclusive right to produce. It can be made in Canada by any person who wishes to do so. It can even be used in Canada, for any purpose, by any person, without the charge of infringement, unless he uses it in an "electric lamp." It may be said that no person wants to use such an article for any other purpose, but I do not see that this in any way affects the argument. If the making of a filament of carbon is not patented, but only the construction of a lamp with such a filament, the patentee is bound to manufacture his lamp, with the filament in it, in Canada; but he is not, I think, bound to manufacture his filament here. The one thing which is covered by this patent, and of which the patentee has a monopoly under the patent, is to make an "electric lamp for giving light by incandescence, consisting of a filament" so made "and

secured," &c.; or stating it another way, as his claim does: "The combination of carbon filament within a receiver made entirely of glass, through which leading wires pass, and from which receiver the air is exhausted," &c.; or, stating it still in another way, his claim covers "a coiled carbon filament or strip arranged in such a manner that only a portion of the surface of such carbon conductor shall radiate light, as set forth"; or, stating it in still another way, his claim covers this,—"securing the platina contact wires to the carbon filament and carbonizing of the whole in a closed chamber," &c.

While commenting on that which has been done in connection with the filament, I may advert to one other contention on which much stress was laid, but which does not seem to me to have the importance which was attached to it, namely, that the process of further carbonizing the filament in Canada, after it is introduced into the bulb, by passing an electric current through it, is not described or claimed in the patent and forms no part of it, and cannot, therefore, be availed of to save the patent. On the contrary, it is said, "this is the subject of another patent, obtained subsequently, by the same inventor."

I do not so understand the position of the patentee. To produce the patented article he has to use, among other things, "a filament of carbon of high resistance," and, if the bamboo is completely carbonized, or even carbonized to a materially greater degree, by the process applied to it in Canada, I do not see why that treatment should be rejected as immaterial, because the process is not a patented process, or a process only patented by another patent. As well might the process of baking, gone on with in the United States, be rejected as immaterial against him because the process of baking is not the subject of this patent. The effect

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of the process not being covered by the patent is merely that the patentee can make his filament of carbon by any process which pleases him. He is entitled to credit for carbonization, however it may be done, and the effect which the subsequent patent has is to prevent other persons from making a "filament of carbon of high resistance" by enclosing it in a bulb, exhausting the air therefrom, and treating it by the electric current, as described in the subsequent patent.

If the argument presented in that objection were correct it would lead to the conclusion that none of the respondents' lamps could be said to have been made in conformity with the first patent, because the carbon filament had been treated by electricity in the manner described in the second patent. But it is admitted that they were made in conformity with the patent, and the only objection is as to certain things being done in the United States.

As I have said, we have simply to enquire, under the first patent (in so far as the filament is concerned), whether the filament of carbon of high resistance was made in Canada by any process whatever, and if the filament was made a filament of carbon of high resistance in Canada by any process whatever, I think it is impossible to say, as a matter of law, that a filament of carbon of high resistance, used in the lamps made in Canada, was made in the United States and not in Canada. It was, at least, partly made in Canada, and I think there would not be ground for cancelling the patent, even if the patentee were bound to make them here.

As I have already intimated, however, inasmuch as the making of the filament is not patented by this patent, I think that the filaments stand in the same position as all the other articles which go to form the lamp.

As to the other articles, I have already given you my views.

I am putting this as though it were necessary, before the patent could be upheld, to be satisfied that no one of the articles which go to make up the patented article was imported into Canada in the condition in which it was used in the construction of the lamp; but I am not at all satisfied that, even if what I have just said could not be affirmed, the patent could thereby be forfeited. I will discuss presently the decisions which have been given on that point; but, leaving them aside for the moment, I do not find anywhere that the statute expressly imposes the penalty of forfeiture for importing into Canada the various parts of the invention for which the patent was granted, much less for importing one of the parts. The words of the statute are, "the invention for which the patent is granted," and it does not seem that the Minister, or his deputy, in administering that law, can enlarge the statute or add any words to it, even in trying to prevent an evasion of the statute. In considering and administering such a statute the Minister or his deputy can only apply the penalty to the offence which the statute forbids. He cannot apply it to an attempt to evade the statute. In imposing penalties Parliament must take its own measures to prevent evasion, and it would be most unsafe to impose, against an evasion, the heavy penalty which the law has levelled at the principal offence, on the theory, which may or may not be correct, that Parliament intended, by an equal penalty, to forbid the doing of that which would be *almost* or quite an equivalent of the principal offence.

To apply this idea to the case in hand, it would be unsafe to apply the penalty of forfeiture to the importation of the various articles out of which the patented article is produced, on the theory that Parliament hav-

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ing prohibited under this penalty the importation of "the invention for which the patent was granted," it may likewise have intended to prohibit, under the same penalty, the importation of the various articles out of which "the invention for which the patent was granted" is made. Even if we thought the law had been violated by importing these parts, it would be better to suffer the risk of the law being infringed, for the time being, and to invite the attention of Parliament to the subject, in order to have an explicit declaration of its will.

I do not wish it to be understood, however, that I find anything in the evidence as to the importation of these articles into Canada, even of the partly carbonized filament, to justify an imputation of bad faith, such as an intent to evade the law and to evade the conditions of the patent.

There is much evidence to the contrary—much evidence to show that, during the time covered by the complaint, the lamp was introduced into Canada; that there was little or no demand for it; that the production of the lamps, for the small demand which existed, was attended with enormous expense as compared with their cost when imported, and that if the lamps, and all the component parts, had to be manufactured in Canada, it would have been utterly impracticable to have carried on the business at all.

There is evidence, also, of great practical difficulties in carbonizing the filament, and of its being a delicate work, at which skilful workmen often fail, and at which workmen, who have succeeded sometimes, fail sometimes, without being able to detect the cause of failure. This I have intimated already in another connection.

As to one piece of the evidence brought forward, by the petitioners, to establish bad faith on the part of

the respondents,—the evidence that the agents or servants of the respondents declared that they were not operating in good faith,—I shall have occasion to speak of it by and by, when I come to the question of the refusal to sell the patented article in Canada, because it was in connection with the sale of the lamps that the declaration was alleged to have been made, although I admit that it has a bearing upon all the charges brought forward.

I merely mention that piece of evidence now for the purpose of showing that I have not forgotten it, and to show that in attributing good faith to the respondents I am doing so subject to what may be said on that piece of evidence, and to what will be said of it hereafter. In this connection I must refer to the evidence of what was done in Canada, in the construction of the lamp, for the purpose of calling your attention to what I think is conclusive evidence that the lamp has not been brought into Canada in pieces, and that the manufacture of the lamp in Canada has not been merely the "assembling of the parts."

If the parts were ready for use in the construction of the lamp,—ready to be assembled, and merely requiring to be assembled in order to produce the patented invention, as seems to have been the case with regard to the Bell Telephone (1),—we should have to consider the question as to whether the invention for which the patent was granted was not really imported into the country, although imported in parts. We should then have to consider, with much doubt and difficulty as I have already suggested, whether the penalty provided by the statute should not be attached to that offence to prevent an invasion of the law; but in my view of the evidence, it is unnecessary to consider the

(1) See *ante*, p. 495, and p. 524.

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case from that point of view, and it would be improper to decide it on any such principle.

There are various descriptions, in the evidence, of what was done in Canada with the articles out of which the lamp was made, in the production of the lamp, and in considering what was so done we must remember, at every step, that the patented article is not the carbon filament, merely; not the platinum wire, manufactured without irregularities, merely; not the brass bottom pieces, merely; not the glass bulb and glass tubing, merely; not the joining of a glass bulb and a glass tube of the same melting and same quality of glass; not the carbonizing of the filament; not the treating of the filament by an electric current; but it is, first, "an electric lamp,"—this lamp, to give "light by incandescence, consisting of a filament of carbon of high resistance, made as described, and secured to metallic wires," &c. The quotations are from the first claim of the patent. The second, third and fourth claims of the patent I need not repeat, because, with the exception of the third, which is practically out of the question (being for a kind of carbon filament which was not used), all the claims are included, under one set of words or another, in the description of the patented article as "an electric lamp," although calling it by some other name than a lamp,—the second claim using such words as "a receiver made of glass," and the fourth mentioning "a closed chamber."

Here, then, is the evidence of what was done in Canada to produce the patented invention :—

Henry M. Byllesby, called by the petitioners, says :—

Q. Then what was done with those parts which came from the United States in the Montreal premises? A. Well, there were several operations. In the first place, the carbon filament which had been brought in from the United States was attached to what are known as the leading-in wires, the leading-in wires having been previously

let into the lamp and properly sealed in. The glass bulb and tube attached to it had the air exhausted, the tube was sealed up, the connection completed; the bases, which had also been brought in from the United States, were then attached.

John M. Robertson, another witness called in support of the petition, is more precise. Beginning at that part of his evidence in which he describes the work done in Canada, we find the following:—

Q. What is the next step? A. The next step would be to mount that filament into the platinum wires—the electrodes that pass through the glass are shown in Figure 13, in Exhibit 13.

Q. That is, that platinum wires are attached to the ends of the carbon? A. Yes; that is the process for the carbon. Then we go back to making that inside part. We take a piece of glass, such as is indicated in Part I or B of Exhibit 13.

Q. What do you do with that? A. It is heated in the glass-blower's fire and drawn out, such as is shown in Figure 2. Then that is cut in two and broken in the centre, as shown in Figure 3.

Q. How is it cut down? A. It is drawn to a fine thread and then broken with a file or sharp instrument, as in Exhibit 3.

Q. What is the next thing done? A. The next thing done is to blow out, as in No. 5—the expansion.

Q. How is that done? A. By merely heating it and blowing the breath in. That swells it.

Q. Then? A. Then comes the cutting between the two bulbs or expansions. You can blow one as well as two. They generally blow two to save labor.

Q. Then you separate them? A. Yes; it is cut off sharp, as you see it there.

Q. While it is heated? A. Yes; it is cut off while it is heated, by scoring it with a file.

Q. How long would it take to make that cut? A. It is done in an instant.

Q. In the fraction of a second? A. Yes.

Q. Then what is the next? A. The next thing is to stick that platinum wire into the glass there. It is partly fused, as in No. 9, the platinum being stuck on while it is hot. That platinum wire, though, has had the copper brazed on it, as you see it in 8½. Then, after, it is heated further, as in No. 9, and then squeezed with a pincers.

Q. That closes it in on the platinum? A. Yes; which makes it a tight joint round on the platinum.

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Q. What is the next thing? A. The next is the pressing out of these wires into the shape of II.

Q. After the pincers had squeezed the ends of the glass together? A. They are merely spread out to get the electrodes a certain distance apart, to conform to the shape the carbon has been baked to.

Q. Up to this time the carbon has not been attached? A. No.

Q. Then after having done that, what is the next step? A. The next process is attaching the carbon to the platinum, as shown in No. 13. That is done in various ways. Some use the plastic cement put on the joint and brought to a red heat in a small gas flame. Others use the copper-plating bath. Others use the hydro-carbon bath.

Q. There are various modes of doing that? A. Yes; different companies use different processes. When you get to the stage, as shown at 13, it is ready for what we call sealing in. That brings it over to 21, I should suppose. Meantime, the bulb has been prepared for the reception of that.

Q. Now go back to the bulb? A. Fourteen, or "A," represents the first condition of the bulb as it comes from the glass works. That bulb is put in a little flame by some, and has the gas flame brought under the base of it.

Q. What you would call the apex or top? A. Yes; the gas flame is simply heated at that point, and by the rod that is brought down by hand motion that tit is formed, as shown in 16. This tit is then cut as you see in 17; then the piece of glass, as at letter "C," is melted on to make a connection with that tit, as in 19.

Q. So as to form part of the bulb itself? A. Yes.

Q. Then it is prepared for exhaustion? A. Yes; the bulb is cut off to give the proper length, and it is opened out.

Q. How is the cutting of it done? A. By the scratching away with a file.

Q. Is it heated? A. Not necessarily.

Q. Then it is heated and opened? A. It is heated and opened out, as you see in No. 20, for the reception of 13, as shown in 21; then the heating is continued, and it is sealed in, as shown in 22.

Q. What do you mean by sealed in? A. The glass, Exhibit 13, is melted while inside the globe, Exhibit 22, and they are both heated and stuck together and made air tight.

Q. The filament is inside the bulb? A. Yes; but the filament is inside. The next process necessarily will be this, No. 24, that is, cutting off the extra length of the projecting stem and set the electrodes free, so that they can be held to the proper point. A little tip of glass is put on there to hold it in position, that is, to keep it from twisting or turning. The little tip you see is simply a little dab of

melted glass. Then the lamp is ready to go to the air pumps, as represented in 25.

Q. That is, the pump is attached to that stem? A. Yes; the object of the stem is to attach it to the pump. There are pumps of various kinds. This represents part of a sprinkler pump—a mercury pump, in which a drop of mercury carries the air down with it. After that is done the stem is melted, as shown in 26.

Q. That is, the stem through which the air has been exhausted is melted off and sealed by being brought together? A. Yes.

Q. That leaves the bulb a vacuum? A. Yes; that point could be finished off a little better, so that there would be no danger of its breaking. That is a matter done differently by different parties.

Q. What is the next step in connection with making it useful? A. The next step is to put on the brass base, called a bottom, shell or base, by different companies.

Q. That is done by either cement or plaster of Paris, or other similar substance? A. By some plastic material.

Q. The lamp is then ready for use? A. Yes; it is a finished lamp.

This lamp being the invention for which the patent was granted, the one point which you have to decide, under the charge of importing into Canada, is whether that electric lamp was imported into Canada, and not manufactured in Canada. I think it cannot by any possibility be said to have been imported into Canada and not manufactured in Canada.

Considering, however, some of the views which have been entertained and put forward, as to the effect, on a patent, of the importation of the parts of the invention for which the patent was granted, and as to the effect of the assembling of the parts in Canada, we can safely go a step further than I have gone. We can safely enquire whether it can be truly affirmed that the introduction of bulbs, tubes, wires and filaments were the introduction of parts of the lamp. Certainly, portions of the bulb, as imported, were used in the lamp; portions of the tube, portions of the wires and the filament, after being otherwise treated in Canada; but it is impossible to say of any of these articles, excepting the filament, that, when they came into

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Canada, they were parts of Edison's electric lamp. They were simply the materials out of which the lamp was to be made.

The bulbs and tubes were cut off to the required sizes and were used in forming a chamber from which the air was exhausted in order to form a vacuum in which the light was to be given forth, but they were not necessarily, when introduced, to be considered as parts of the electric lamp. They were useful, as I have said, for other purposes, and were even used in the manufacture of other lamps than those of Edison.

To describe the wire which was brought in, on spools and in coils, as parts of an electric lamp, would be a misrepresentation altogether out of the range of the accuracy which is necessary in dealing with a legal question; and although it appears, as regards the filament, that it is not used for any other purpose, it may be so used for anything for which it is or may become capable of being used, or for which it may be hereafter adapted; and, so far as this patent is concerned, the patentee had no monopoly as to the production or use of the filament, as I have elsewhere shown.

This seems to show conclusively to my mind, 1st., that the invention for which the patent was granted was not imported, but was manufactured in Canada; and 2ndly., that the invention for which the patent was granted was not imported in parts.

There remains to be considered the charge that the patented article was not manufactured in such a manner that any person who desired to use it could obtain it at a reasonable price. There is much evidence on this point. There is evidence that the respondents, at one time, refused to sell the lamps to persons who did not intend to use them with the Edison plant.

It seems that the Edison plant is simply a description of dynamo which Mr. Edison uses. It is not a

machine of which he has the patent or any monopoly. The dynamos which are called the Edison plant can be purchased in Canada and the United States. The explanation made in the evidence is that the electric lighting business was then in its initiatory stages, and that it was deemed by the Edison Company most important that the success of the lamp should not be prejudiced in the public estimation by its being used in connection with plant which they believed it could not be used with successfully.

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Under the charge of refusing to sell at a reasonable price, and as to the evidence of a refusal to sell, except for use on the Edison plant, the questions to be determined are:—

Is the evidence to be relied on which declares that this was the only limitation to the sale? and—

Was the limitation made in good faith, in order to prevent the success of the lamp being destroyed and to prevent public opinion being prejudiced against it at a critical stage of the electric light business?

Was it reasonable?

Or, was the whole business carried on merely as a sham to avoid the forfeiture of the patent, while the company had no intention of really doing business in Canada?

One witness, who at the time in question was a lad employed in the factory, says that he heard one of the officers of the establishment say to another that they were not making lamps to sell, but were only "fooling the Canadians." The persons between whom this conversation is alleged to have taken place do not remember it, but they and several others testify that there was no refusal to sell, except by some one or more persons who had duties to perform besides selling, which was entrusted to others in the establish-

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ment, and that the only qualification ever imposed was as to the use of the Edison plant.

I am inclined to think that the evidence on this point, in exoneration of the respondents from the imputation of bad faith, should be accepted. The burden of proof was on the petitioners to make good the charge of bad faith and of refusal to sell; and, in view of the explanations which some of their officers have made on this point, I see no good reason to doubt that the company were manufacturing lamps to sell, and intending to do so in good faith.

I think that the removal of their factory from Montreal to Hamilton, where greater facilities were expected and obtained, the enlargement of their business there, the contracts which the company entered into and fulfilled for lighting at Cornwall, in 1882, and afterwards, and the engagement of a person supposed to have a wide acquaintance in Canada, and therefore able to introduce the lamps into the different parts of the Dominion, the employment of travellers, and the number of lamps produced, are all indications of good faith.

At Hamilton the business has steadily progressed, as the following figures will show :—

	Lamps Made.
From February, 1884, to August, 1886.....	23,189
do. August, 1886, to February, 1887.....	6,613
do. February, 1887, to August, 1887.....	9,447
do. August, 1887, to February, 1888.....	12,718
do. February, 1888, to August, 1888.....	9,893
do. August, 1888, to November, 1888.....	4,650
Total.....	66,510

As to the second question, I see no reason to doubt the good faith of the company in wishing to sell only to those who would use the Edison dynamo. There is

evidence that in the opinion of the respondents' officers the lamps would not work successfully on other plant. Here is their explanation :—

Q. It has been said that general instructions were given, and that it was against the policy of the Edison Company to sell lamps to be used on any plant except their own. Now, what have you to say upon that point? Were there any such instructions given to your Canadian agents?

A. I never heard of any such instructions. I know lamps were sold to be used on all sorts of plants. There is one feature peculiar to the business. We sell a lamp, and it burns a certain number of hours under normal conditions ; but if that lamp is not under normal conditions it may burn a very materially shorter number of hours. The addition of three candles on a sixteen-candle power lamp will either double or half its life. The eye of most people could not detect the addition of three candles in a lamp. My judgment is that much more than that to one coming out of the darkness into the light, of three and even six candles additional, the distinction would be hard to make. The result is that lamps live a short or long life, according as they are used, and the Edison Company determined to see that their lamps were properly used. The lamps being run badly they break rapidly, and the Edison Company would receive a bad reputation in consequence. We had an experience of this kind in Philadelphia. We sold the Accumulator Company our lamps, and they broke rapidly. The plant was badly run. The lamps were of perfectly good quality, but the result was that the Pennsylvania officials said that the Edison lamps were no good, and this affected negotiations for the formation of a company in Philadelphia. They were out of our power, and we could not defend ourselves. It was for this reason that the Edison Company always insisted on knowing to whom they were sold. I think in Canada they have sold repeatedly to outside companies.

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The petitioners endeavor to support their charge of bad faith by evidence that the expenditure in putting up the plant was very heavy, as compared with what was spent in putting up the lamps to be worked by the plant, and that there was more profit on the sale of the plant than on the sale of the lamps. The petitioners have failed, however, to show that any stipulation was made, or attempted to be made, by the agents of the respondents, that persons who were negotiating for lamps

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should be supplied by them with the Edison plant. On the contrary the single limitation sought to be imposed was that the lamps should be used on Edison plant, and this was withdrawn, subsequently, as the petitioners allege, because the respondents became alarmed, by learning from the decision in the *Bell Telephone Case* (1) the effect of a refusal to sell a patented invention; or, as the respondents allege, because the merits of the invention had become better known and there was not so much reason to fear a prejudice in the public mind.

It was urged by counsel for the petitioners that in view of the provisions of *The Patent Act* as to the invention being produced "in such a way that it can be sold to any person desiring to purchase the same," the patentee can impose no limitations, but must sell at a reasonable price to all comers.

I think that to lay down the rule thus broadly would be going too far. Admitting what was urged by counsel for the petitioners, that a purchaser has the right to buy the patented invention and then destroy it if he please, I do not think it unreasonable that the patentee of an article of delicate and skilful manufacture, from which he can only reap the reward of his labor and expenditure by its being esteemed successful by the public, is bound to sell his invention to those who, by unsuitable uses, would fail to derive benefit from it themselves, and would create the impression, in the public mind, that the invention was a failure, at a time when public opinion was in suspense. When any such case arises, and we find the patentee attaching a limitation, honestly, with that view, I do not think it would be right to punish him by forfeiting his patent. We should in every case ascertain, as carefully as possible, whether good faith

(1) Reported *ante*, p. 495.

exists, and we should not punish, by forfeiture of the patent, the limitation so imposed, unless we think the limitation was imposed by the patentee really for the purpose of evading compliance with the statute which requires him to sell the patented invention at a reasonable price. Probably the evil which that part of the statute was principally intended to prevent was the exaction of exorbitant prices under the monopoly secured by the patent. The respondents had much to fear from the lamps appearing to be a failure. The plan on which they relied was to set a company on foot to work the patent in Canada. The business was in its infancy; the public had not yet acquired confidence in the light, and competitors were in the field—interested in depreciating the Edison lamp,—competitors who were not hampered by any condition as to manufacturing in Canada, but who relied for their supplies on the factories in the United States.

To support the charge of refusing to sell, there was evidence that the respondents asked, in some cases, as high as three dollars or four dollars per lamp, to persons who would not use the Edison plant; but the more settled rule was to ask $1.25 in such instances, while the price to persons who used the Edison plant was $1.00, with a guarantee of the duration of the lamp. It is said that these higher prices were unreasonable. They were not unreasonable if the condition which they were intended to enforce was not unreasonable. On that point I have already stated my view; but, in justice to the respondents, I must add that none of these prices reached the actual cost of producing the lamps in Canada. All this was very different from the *Bell Telephone Case* (1), where there was a distinct

(1) Reported *ante*, p. 495.

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refusal to sell on any terms, the answer being, " We do not sell telephones ; we lease them."

It only remains for me to inform you of the view which I take of the arguments pressed upon us by counsel for the petitioners with regard to the patent cases which have already been decided by your Department.

Opinion of the Minister of Justice.

The first is the case of *Barter* v. *Smith* (1). As the decision in that case was to uphold the patent, there is not much that can be relied on by the petitioners. There are many expressions which are strongly in the direction which my opinion has taken. Among others is the observation which calls attention to the unreasonableness of insisting that the patentee should be called on to produce his invention at all times and places in Canada, without any regard to the demand for the invention in the market.

The case of *The Bell Telephone* (2) is more in point. A glance at the decision will indicate to you how far (and it seems to have been very far) the patentees carried the attempt to evade the law by introducing the patented machine in pieces, with the intention of merely assembling these pieces in Canada, besides positively refusing to sell their instruments in Canada. Without saying whether I could have been able to concur in the conclusion arrived at in that case or not, I have simply to observe that the introduction of the parts in this case bears very little analogy to the introduction of the parts of the telephone, and that the process of manufacturing lamps in Canada was widely different from the assembling of the parts in constructing the Bell Telephone here.

The case of *The Hancock Inspirator* (3), decided in January, 1886, was much relied on by counsel for the

(1) Reported *ante*, p. 455. (2) Reported *ante*, p. 495.
(3) Reported *ante*, p. 539.

petitioners, as going farther than the petitioners were asking you to go to forfeit the present patent. I do not regard that as a decision in point. The one point which the Deputy Minister there decided was that when a patent was a patent of a new combination of old elements the patentee might not import the old elements, and simply apply his combination to perform the functions described in the patent. The Deputy Minister forfeited the patent because he thought the patentee was bound to manufacture, and not import, all the elements, as well as to apply the combination in Canada. The elements in that case were themselves machines, and the Deputy Minister seems to have entertained the view that the patentee was bound to manufacture the machines in Canada, although his patent was only for a combination of those machines.

While I do not think the case to be one in point, or one from which any inference can be drawn to affect this case—unless it be an inference from the fact that a very severe view was taken, at that time, by the Deputy Minister of Agriculture, of the requirement in the patent law as to the manufacture in Canada—I must add, as respects that inference, that, if the case were admitted to be one in point, I should have very great difficulty indeed in advising you that the *Hancock Inspirator Case* (1) was correctly decided, or that it should be followed.

It results from all that I have said, that, in my opinion, the petition should be dismissed and a decision pronounced that the patent in question is not void.

The HONOURABLE JOHN CARLING, Minister of Agriculture, now (November 25th, 1889) rendered his decision.

(1) Reported *ante*, p. 539.

1889

THE ROYAL ELECTRIC COMPANY OF CANADA v. THE EDISON ELECTRIC LIGHT CO.

Decision of Carling, M. A.

After a careful consideration of the evidence I decide as follows :—

(1.) I find that Thomas Alva Edison, the patentee of the patent in the proceedings mentioned, did, within two years from the date of such patent, commence, and, after such commencement, did continuously carry on, in Canada, the construction and manufacture of the invention patented, in such manner that any person desiring to use it might obtain it, or cause it to be made for him, at a reasonable price, at some manufactory or establishment for making or constructing it in Canada.

(2.) I further find that, after the expiration of twelve months from the granting of the said patent, neither the said patentee nor any person claiming or holding under him did import, or cause to be imported, into Canada, the invention for which the said patent was granted.

I do, therefore, in pursuance of the statute in that behalf, declare that the said patent has not become null and void, and I dismiss the application of the petitioners, the Royal Electric Company of Canada.

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accustomed, and still desires, to use it. (2.) In assessing compensation to be paid to a claimant whose land has been expropriated the court will look at the nature of his title as one of the criteria of value. THE QUEEN *v.* CARRIER — 36

3——*Expropriation of land*—50-51 *Vic. c.* 17—*Value for building purposes—Sales of similarly situated properties—Crossings.*] When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value. (2.) There is no legal liability upon the crown to give a claimant a crossing over any Government railway, and where the crown offered by its pleadings to construct a crossing for claimant, the court assessed damages in view of the fact that there was no means of enforcing the performance of such undertaking. [See now 52 Vic c. 38 s. 3.] (3.) Where claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in his pleadings, the court, while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses. FALCONER, *et al. v.* THE QUEEN — 82

4——*Expropriation—Matters to be considered in assessment of damages—Loss both by construction and operation of railway.*] Where lands are taken and others held therewith injuriously affected, the measure of compensation is the depreciation in value of the premises damaged assessed not only with reference to the injury occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user. THE STRAITS OF CANSEAU MARINE RAILWAY COMPANY *v.* THE QUEEN — — — 113

5——*Expropriation—Prospective capabilities of property—Value to owner—Unity of estate—Advantage accruing to projected town from railway.*] In assessing damages in cases of expropriation, regard should be had to the prospective capabilities of the property arising from its situation and character. (2.) In awarding compensation for property expropriated, the court should consider the value thereof to the owner and not to the authority expropriating the same. *Stebbing* v. *The Metropolitan Board of Works* (L. R. 6 Q. B. 37) followed. (3.) In assessing damages where land has been expropriated, the unity of the estate must be considered, and if, by the severance of one of several lots so situated that the possession and control of each give an enhanced value to them all, the remainder is depreciated in value, such depreciation is a substantive ground for compensation. (4.) The advantage resulting to the owner of a paper town from the crown making it the terminus of a Government railway and constructing within its limits a station-house and other buildings, is one that should be taken into account by way of set-off under 50-51 Vic c. 16 s. 13. PAINT *v.* THE QUEEN. — — — 149

6——*Expropriation of a railway by the crown—Special Act therefor*, 50-51 *Vic. c.* 27—*Construction—"Present value of work done"—Allowance for capital expended in railway.*] The plaintiff company had entered into an agreement with the Dominion Government to construct, in consideration of a certain subsidy per mile, a line of railway between Oxford and New Glasgow, N. S. They entered upon the construction of the railway, but when it was partially completed abandoned active work upon it for lack of funds. The Government, having previously obtained from Parliament authority to pay all claims standing against the company on account of their partial construction of the line, and to set the same off against the company's subsidy, was empowered by 50-51 Vic. c. 27 s. 1 to acquire "by purchase, surrender or expropriation the works constructed and property owned by the said company" paying therefor the amount adjudged by the court "for the present value of the work done on the said line of railway by the said company." *Held*, that the statute contemplated the taking of all the works constructed by the company and not a portion thereof; and where a portion only was taken compensation should be assessed in respect of the total value of the works. (2.) That the words "present value of the work done," as contained in section 1 of the said Act, should, in view of the preamble and surrounding circumstances, be construed to mean the value of the works constructed and the property owned by the company at the time of the passing of the Act. (3.) That the word "value" as used in the Act must be taken to mean the value of the property to the company and not to the Government; and that compensation for the taking should be assessed at the fair value of the property at the time contemplated by the Act. (4.) The company were in possession of a right of way that had been acquired by proceedings taken under certain provincial statutes not applicable to the case, and for which the County Councils of Cumberland and Colchester had, in aid of the company's undertaking, paid the proprietors whose lands were situated in such counties. *Held*, that the company were entitled to compensation therefor. (5.) *Held*, that the company were entitled to an allowance for the use of capital expended in the enterprise. THE MONTREAL AND EUROPEAN SHORT LINE RAILWAY COMPANY *v.* THE QUEEN. — — — 159.

7——*Expropriation of land—R.S.C. c.* 39.—*Assessment of damages where there had been an agreement to accept a certain sum as compensation—Specific performance.*] Defendants entered into a written agreement to sell and convey to the crown, by a good and sufficient deed, a certain quantity of land required for the purposes of the Cape Breton Railway, for the sum of $1,250. At the date of such agreement the centre line of the railway had been staked off through the

STATUTES, CONSTRUCTION OF—*Dominion Elections Act*, 1874—*Interpretation Act* (*R. S. C. c.* 1 *s.* 7 *s-s.* 46).] The crown is not bound by sections 100 and 122 of *The Dominion Elections Act*, 1874. (2.) The 46th clause of the 7th section of *The Interpretation Act*, (R. S. C. c. 1) whereby it is provided that no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, Her Heirs or Successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not limited or qualified by any exception such as that mentioned in *The Magdalen College Case* (11 Rep. 70*b*), "that the King is impliedly bound "by statutes passed for the general good * "* * or to prevent fraud, injury, "or wrong." THE QUEEN *v.* POULIOT, *et al.* 49

2——*Expropriation of a railway by the crown—Special Act therefor*, 50-51 *Vic. c.* 27—*Construction—"Present value of work done"—Allowance for capital expended in railway.*] The plaintiff company had entered into an agreement with the Dominion Government to construct, in consideration of a certain subsidy per mile, a line of railway between Oxford and New Glasgow, N.S. They entered upon the construction of the railway, but when it was partially completed abandoned active work upon it for lack of funds. The Government, having previously obtained from Parliament authority to pay all claims standing against the company on account of their partial construction of the line and to set the same off against the company's subsidy, was empowered by 50-51 Vic. c. 27 s. 1 to acquire "by purchase, surrender or expropriation the works constructed and property owned by the said company" paying therefor the amount adjudged by the court "for the present value of the work done on the said line of railway by the said company." *Held*, that the statute contemplated the taking of all the works constructed by the company and not a portion thereof, and where a portion only was taken compensation should be assessed in respect of the total value of the works. (2.) That the words "present value of the work done" as contained in section 1 of the said Act, should, in view of the preamble and surrounding circumstances, be construed to mean the value of the works constructed and the property owned by the company at the time of the passing of the Act. (3.) That the word "value" as used in the Act must be taken to mean the value of the property to the company and not to the Government; and that compensation for the taking should be assessed at the fair value of property at the time contemplated by the Act. (4.) The company were in possession of a right of way that had been acquired by proceedings taken under certain provincial statutes not applicable to the case, and for which the County Councils of Cumberland and Colchester had, in aid of the company's undertaking, paid the proprietors whose lands were situated in such counties. *Held*, that the company were entitled to compensation therefor. (5.) That the company were entitled to an allowance for the use of capital expended in the enter-

VALUATION OF PROPERTY—*Government railway—Damages from operation of railway – Expropriation—Depreciation in value of land to owner—Market value.*] It is the real value of the land to the owner at the time of the expropriation that must be taken as the basis of compensation; and where claimant sought to recover damages in respect of a portion of his farm as a gravel pit, but failed to show that it had a value *quoad hoc* at the time of the taking, the court declined to assess its value otherwise than as farm land. (2.) A portion of the claimant's property, although not damaged by the construction of the railway was injuriously affected by its operation, inasmuch as near a certain point thereon trains emerged suddenly and without warning from a snow-shed, frightening the claimant's horses and thereby interfering with the prosecution of his work. *Held*, that this was a proper subject for compensation. (3.) Where certain land remaining to the owner was not appreciably affected in respect of the value it had to him for the purposes of occupation, the damages were ascertained and assessed in respect of its depreciation in market value. Vézina *v.* The Queen — — — 11

2——*Expropriation of land for railway purposes—Value of land for building purposes.*] The crown had expropriated a certain portion of land which the claimant contended was held for sale as building lots. It was established in evidence that such land had not been laid off into lots prior to the expropriation, and that none of it had theretofore been sold for building purposes. There was evidence, however, to show that there was a remote probability that the land would become available for such purposes upon the extension of the limits of an adjoining town. *Held*, that while such remote probability added something to the value which the property would otherwise have had, compensation should not be based on any supposed value of the land for building purposes at the time of the expropriation. Kearney *v.* The Queen — — 21

3——*Appeal from award of Official Arbitrators—Expropriation of land for Government railways—Title to beach lots granted prior to Confederation—Valuation.*] Claimants' title to a water lot at Lévis, in the harbour of Quebec, was based on a grant from the Lieutenant-Governor of Quebec prior to Confederation. The grant contained, *inter alia*, a provision that upon giving the grantee twelve months' notice, and paying him a reasonable sum as indemnity for improvements, the crown might resume possession of the said water lot for the purpose of public improvement. *Held*, the property being situated in a public harbor, this power of resuming possession for the purpose of public improvement, would be exercisible by the crown as represented by the Government of Canada. *Holman* v. *Grom* (6 Can. S. C. R. 707) referred to. (2.) Inasmuch as the crown had not exercised this power, but had proceeded under the expropriation clauses of *The Government Railways Act*, the claimants were entitled to recover the fair value of the lot at the date of expropriation. That value, however, should be determined with reference to the nature of the title. Samson, *et al. v.* The Queen — — — — — 30

4——*Compensation — Valuation of property—44 Vic. c. 25, s. 16, interpretation of—Advantages derived from a public work—Nature of title.*] In assessing compensation to be paid to an owner whose land has been expropriated, the market value of the property should not be exclusively considered. Although the claimant has the right to sell his property, and should, therefore, be indemnified in respect of any loss which, in consequence of the expropriation, he might make on such sale, he is not bound to sell, and may reasonably prefer to keep his property for the purpose of his business; and in that case should be indemnified for any depreciation in its value to him for the purpose for which he has been accustomed, and still desires, to use it. (2.) Notwithstanding the generality of the terms of 44 Vic. c. 25, s. 16 (re-enacted by R.S.C., c. 40, s. 15, and 50–51 Vic. c 16, s. 31), which provides that the Official Arbitrators shall take into consideration the advantages accrued, or likely to accrue, to the claimant or his estate, as well as the injury or damage occasioned by reason of the public work, such advantages must be limited to those which are special and direct to such estate, and not construed to include the general benefit shared in common with all the neighbouring estates. (3.) In assessing compensation to be paid to a claimant whose land has been expropriated, the court will look at the nature of his title as one of the criteria of value. The Queen *v.* Carrier 36

5——*Expropriation of land—50–51 Vic. c. 17—Value for building purposes—Sales of similarly situated properties.*] When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value. Falconer, *et al. v.* The Queen — 82

6——*Expropriation of land—50–51 Vic. c. 17—Measure of compensation—Enhancement of future value of property by railway—Tender by the crown—Bare indemnity—Costs.*] Upon an expropriation of land under the provisions of 50–51 Vic. c. 17, the measure of compensation is the depreciation in the value of the premises assessed not only in reference to the damage occasioned by the construction of the railway, but also in reference to the loss which may probably result from its operation. (2.) Where there was evidence that the railway would enhance the value for manufacturing purposes of certain portions of land remaining to claimant