REPORTS

OF THE

EXCHEQUER COURT

OF

CANADA

ARNOLD W. DUCLOS, K.C.
OFFICIAL LAW REPORTER

PUBLISHED UNDER AUTHORITY BY
REGISTRAR OF THE COURT

VOL. 21

OTTAWA
F. A. ACLAND
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1923

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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE SIR WALTER G. P. CASSELS.
Appointed 2nd March, 1908.

PUISNE JUDGE:

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

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA:

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

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

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

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

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

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

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

DEPUTY LOCAL JUDGES:

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

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
THE HONOURABLE SIR LOMER GOUIN, K.C.M.G., K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
THE HONOURABLE D. D. MCKENZIE, K.C.

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MEMORANDA

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DETERMINED BY THE

EXCHEQUER COURT OF CANADA

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

1921
April 4.

AND

THE WESTERN TRUST COMPANY, THE ATTORNEY-GENERAL OF THE PROVINCE OF SASKATCHEWAN, AND HENRIETTA SHULZE..... DEFENDANTS.

Constitutional Law—Bona Vacantia—B. N. A. Act, secs. 102-109—Saskatchewan Act, sec. 3—Interpretation—Jurisdiction.

In 1916 one A. H. then domiciled in the province of Saskatchewan died leaving no heirs or other persons legally entitled to his estate. The estate consisted principally of lands in the province of Saskatchewan sold under an agreement of sale, which by equitable conversion, made it personal property. The Western Trust Company was appointed administrator and realized assets amounting to $8,123.71. Both the Dominion and the Province claimed this estate as *bona vacantia* enuring to them by right of escheat. The Dominion suggested that to settle the controversy, it should exhibit an information in this court, making the administrator and the Attorney-General of the province co-defendants, to which the latter agreed. This was done, and subsequently a defence was filed to the information claiming the *bona vacantia* in question,

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without raising therein any objection to the jurisdiction. At trial, for the first time, it was argued by the Attorney-General of the province that section 32 of the Exchequer Court Act only conferred jurisdiction in the matter of a controversy between the Dominion and the province when the latter had passed an Act agreeing thereto, and that section 31 did not apply, in view of section 32. No such Act was passed by the province, and no fiat was obtained for the purpose of taking proceedings against the province.

Held: That the agreement or consent of the Attorney-General of the province could not bind the Crown in the right of the province; that section 32 of the Exchequer Court Act did not apply; and that, on the facts, the court had no jurisdiction to hear and determine the controversy between the two governments.

That, however, the court clearly had jurisdiction in the subject matter with respect to the other defendants, both under section 31 of the Exchequer Court Act and section 2 of 9-10 Ed. VII, ch. 18.

2. That, as the Province of Saskatchewan was not at the date of its establishment, owner of the lands, mines, minerals and royalties nor had any vested rights in any duties or revenues in respect to the lands from which the province was carved, differing in this respect from the original provinces of Confederation, sections 102 and 109 of the B.N.A. Act did not apply to it, notwithstanding section 3 of the Saskatchewan Act. That in any event, said sections did not purport to transfer any "property" or rights to the provinces.

3. That the word "royalties" in section 109 of the B.N.A. Act did not embrace all kinds of royalties, but was limited in its meaning by the text to such as are connected with lands, mines and minerals; such as, *inter alia*, the right to *bona vacantia* and of escheat arising by reason of a failure of heirs, which "royalties" by section 21 of the Saskatchewan Act are reserved to the Dominion "for purposes of Canada."

That said section 21 did not purport to transfer to or vest any property in either the Dominion or the Province, but was merely declaratory of the Dominion's ownership, and was enacted with a view of removing doubt, and for greater certainty.

INFORMATION exhibited by the Attorney-General of Canada to have it declared that a certain estate for which no heirs were found belong to the Dominion Crown.

February 5th, 1921.

The case now heard before the Honourable Mr. Justice Audette, at Regina.

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F. W. Turnbull, K.C., for plaintiff.

E. S. Williams for Western Trust Company.

S. R. Curtin for Henrietta Shulze.

A. Hayworth for the Attorney-General of Saskatchewan.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (4th April, 1921), delivered judgment.

This is an information, exhibited by the Attorney-General of Canada, whereby it is sought to recover the whole estate of a person dying in the province of Saskatchewan, without any heirs. The case, furthermore, presents an interest of a high political nature, in that it involves the attribution of such estate, in the nature of *bona vacantia*, either to the Crown in the right of the Dominion or to the Crown in the right of the Province of Saskatchewan.

On the 13th November, 1916, one Augustus Heyer, being then domiciled in the said province, died intestate and unmarried, leaving no heirs or other persons lawfully entitled to his estate, and in the course of the following month letters of administration of his estate were granted by the Surrogate Court of the Judicial District of Regina, to the defendant the Western Trust Company. The latter has realized assets amounting to $8,123.71, less $364.50 paid on account of creditors' claims.

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The estate, as alleged in the information, wholly consisted at the time of his death of personal property. However, counsel at bar on behalf of the Dominion, stated that the estate consisted principally of a piece of land which had been sold under an agreement of sale, with a mortgage on the land. The sale, by equitable conversion, made the property personal property and subject to a mortgage in favour of a land company, which will have to be paid.

Counsel at bar, on behalf of the Dominion and the Province, rest their respective claim to these *bona vacantia*, both under the B.N.A. Act, 1867, and The Saskatchewan Act" (4-5 Ed. VII, ch: 42).

By sec. 3 of the Saskatchewan Act, it is provided: "3. The provisions of the British North America Acts, 1867 to 1886, shall apply to the Province of Saskatchewan in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Saskatchewan had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces."

And it is contended by the Province, that this section had the effect of introducing, in the said Act, the provisions of sections 102 and 109 of the B.N.A. Act, which provide for the distribution of the revenues between the Dominion and the four provinces therein mentioned. In other words, sec. 102 creates and establishes the source of the consolidated revenue fund of the Dominion; *excepting* therefrom what is specially reserved by section 109 of the said Act, namely: 1st, such portions thereof as are by that Act

(B.N.A. Act) reserved to the respective legislatures of the Provinces; 2nd, or are raised by them in accordance with the special powers conferred on them by the Act.

These two sections read, as follows, viz.: "102. All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one consolidated revenue fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided." "109. All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

The first question that suggests itself on the consideration of these two sections, is whether or not the position of the Province of Saskatchewan is identical to that of the four provinces which originally formed part of Confederation.

Raising this question is almost solving it.

Sec. 109 in proceeding to fix the revenues of the four provinces, prefaces by stating that "All lands, mines, minerals and royalties belonging to the several Provinces . . . at the Union . . . shall belong to the said Provinces.

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Now it is of common and elementary knowledge in Canada, that previous to the passing of the Saskatchewan Act, in 1905, that the territory out of which that Province was carved, belonged to the Dominion of Canada.

It is unnecessary to labour establishing such a question which has become a well known page of our Canadian history; but, if it is desired by any one to so acquaint himself with the details of such facts, reference may be had,—to save a long nomenclature of such facts,—to the elaborate judgment of Sir Walter Cassels, in the case of *the King* v. *the Trust and Guarantee* Co., (1) where the sequence of such events is stated in detail.

From this statement it follows that the public lands or territory taken from the lands or territory belonging to the Dominion, to form the Province of Saskatchewan in 1905, all belonged to the Dominion,—no public lands were given or passed to the province at the time of its creation and that, moreover, these public lands still at the present time remain the property of the Dominion. The very "lands and minerals and royalties incident thereto" referred to in sec. 109 of the B.N.A. Act, are by sec. 21 of the Saskatchewan Act specifically reserved to the Dominion. In 1905, at the time of the formation of the Province of Saskatchewan, this very word "royalties" in sec. 109 of the B.N.A. Act, having been already commented upon,—in enacting this section 21 the matter was made clearer in adding after the word "royalties," the other qualifying words "incident thereto,"—and these last words constitute a further argument in favour of the canon of construction of *ejusdem generis* in reading the word royalties, in sec. 109 of the B.N.A. Act.

(1) (1916) 15 Ex. C.R. 403, at pp. 407, et seq. (On appeal to Supreme Court, 54 S.C.R. 107.)

This section 21 of the Saskatchewan Act, relied upon by the Province, appears to be an enactment that owes its existence only to the consideration of "making matters clear and removing any doubt, and for greater certainty;" because it has no other effect than affirming that these "properties" belonged to the Dominion before 1905, and will continue to belong to it, notwithstanding there was not in the Saskatchewan Act any enactment declaratory of its ownership to the contrary. The section is declaratory of the Dominion's ownership in these lands, mines, minerals and royalties.

Therefore, if the Province can gain any benefit from this section 109 of the B.N.A. Act, it would have to establish that, *at the Union*, at the time the province was created, "Lands, mines, minerals and royalties," belonged to the province. These premises being obviously established in the negative, it follows necessarily that these "lands, mines, minerals and royalties" come within the ambit of sec. 102 of the B.N.A. Act, and belong to the Dominion,—and that the revenues accruing under the "royalties" mentioned in sec. 109, with respect to that Province, either as escheat, or *bona vacantia*, belong to the Dominion under the provisions of sec. 102.

Lord Watson, in delivering judgment of the Board in the St. Catherine Milling Co. case (1) referring to section 109, said: "Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion all ordinary *territorial* revenues of the Crown arising within the Province."

(1) (1889) 14 A.C. 46, at 58.

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The Province of Saskatchewan stands in quite a different position from that of the four original provinces at the Union, in respect of "lands, mines, minerals and royalties" (Sec. 109) as these belonged to the four provinces before they entered into the federal pact.

Now, the word "royalties" mentioned in sec. 109,—used as it is, must be given the meaning controlled by the text. It cannot be contended that the word "royalties" therein mentioned can or should be given its full extended and literal meaning so as to embrace all kinds of royalties. It means the royalties governed by the context, applying the common rule of construction of *ejusdem generis*. It is too obvious that all royalties, such as all droits of Admiralty and droits of the Crown, royalties accruing to the Crown from unclaimed wrecks, deodands (now abolished), waifs, (Bona waviata), bona confiscata, etc., cannot form part of the royalties mentioned in section 109. All of this leads to the irresistible conclusion that the meaning of the word "royalties" was intended to be controlled and restricted by the context of cognate matters (1).

At pages 119, 123 and 124 of Forsyth's Cases and Opinions on Constitutional Law, a similar interpretation is placed upon the word "royalties" associated with the word "land" and like descriptive words.

(1) *Cooney* v. *Covell*, 21 N.Z., L.R., 106; Maxwell on Statutes, 5th ed. 538, 539; *Ailesbury* v. *Pattison*, 1 Doug., 28. *Mercer case* (1882) 8 A.C. at p. 778; *the King* v. *Rithet*, 17 Ex. C.R. 109; *the Trusts and Guarantee Company* v. *the King*, 54 S.C.R. 107; 15 Ex. C.R. 403.

In the consideration of sec. 109 of the B.N.A. Act, both in the *Mercer case* (1) and the *St. Catherine's Milling and Lumber Co., case* (2), the Earl of Selborne and Lord Watson in the Judicial Committee of the Privy Council, speak of these royalties as *"royal territorial rights,"* and as *"territorial revenue,"*—leading to the obvious conclusion that these rights and revenues are exclusively in connection with "lands, mines and minerals" and no others.

Section 109 of the B.N.A. Act, would not, up to the present day, seem to be at all applicable to the Province of Saskatchewan, because that Province was not possessed of the ownership of the "lands, mines and minerals and royalties" either as a province, or as a portion of the North West Territories before 1905.

The Parliament of Canada in 1910, passed *The Escheats Act,* (9-10 Ed. VII, ch. 18) whereby it is provided, by sec. 2: "Where His Majesty the King, in his right of Canada, is entitled to any land or other real or personal property by reason of the person last seised or entitled thereto having died intestate and without lawful heirs the Attorney-General of Canada may cause possession thereof to be taken in the name of His Majesty, or if possession is witheld may exhibit an information in the Exchequer Court for the recovery thereof."

This Act entitled the Crown, in the right of Canada, to *bona vacantia,*—and *a fortiori* in a province where the lands already belonged to the Dominion—and the Act further provides for the disposition of the proceeds of such escheat or *jura regalia.*

The third section of that Act provides for the distribution of the assets of such an estate, in the manner therein set forth and by the Government of the Dominion of Canada.

(1) 8 A.C. 767, at p. 778. (2) 14 A.C., 46.

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Having come to the conclusion that the right to the *bona vacantia* in question, never passed to the Province, but belong to the Crown in the right of the Dominion of Canada, I am led to the consideration of the position assumed by the defendants respectively.

THE PROVINCE.

When the question of the conflicting claims by the two governments to these *bona vacantia* arose, the Deputy Attorney-General of the Province, wrote to the plaintiff's solicitor and counsel, the following letter:

Regina, August 20th, 1919.

"Sirs:

Re Estate of Augustave Heyer, deceased.

I have the honour to acknowledge receipt of your letter of the 12th instant, and note that the Dominion Government is not willing that this estate should be turned over to the Province of Saskatchewan. I also observe your suggestion that the Attorney-General of Canada should file an information in the Exchequer Court, making the administrators of the estate and the Attorney-General of Saskatchewan parties to the information.

This course appears to be desirable in the circumstances, and I may say that it is quite satisfactory to me to have proceedings begun by the Dominion Government in the Exchequer Court as is suggested.

I have the honour to be,

Sirs,

Your obedient servant,

T. A. Colclough,

Deputy Attorney General

Messrs. Turnbull & Kinsman,
Barristers,
Regina, Sask."

Acting upon this letter, the Information was exhibited making the Attorney-General of the Province a party thereto, and the Attorney-General of the Province, by his solicitors, filed a plea to the Information, whereby he claims on behalf of the Province, the *bona vacantia* in question. However, after consenting to be so made defendant in the case, and having filed and served a defence to the action without raising therein any objection to the jurisdiction of the court, the Attorney-General of the Province, by counsel at bar, did not hesitate to argue that the court had no jurisdiction in the matter as between the two governments; that such jurisdiction could only exist, under section 32 of the Exchequer Court Act, after the Legislature of the Province of Saskatchewan had passed an Act agreeing to such jurisdiction in cases of controversies.

The Province is not, it is true, legally bound by the letter of the Deputy Attorney-General, under the decision of *DeGalindez* v. *the King* (1)—and the large jurisprudence establishing the Crown is not bound by the laches of its officers. However, the question becomes more serious when the Attorney-General, by his statement in defence, attorns to the jurisdiction and afterwards at trial, by a reflex argument, goes back on his first attitude and blows hot and cold. *Qui approbat non reprobat.* It is not within my province to pass upon the ethics of such attitude. The Crown in the right of the Dominion by courtesy advised the Province of its intention of instituting the present action; but there was no necessity to do so,—an action against the party who has the control of the assets of the deceased's estate would have been quite sufficient.

(1) Q.R. 15 K.B. 320.

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However, I have come to the conclusion to give effect to this plea of jurisdiction in respect to suing the Provincial Crown, without obtaining, as a condition precedent the issue of a *fiat*. While the Exchequer Court of Canada may not have jurisdiction to hear, under the provisions of sec. 32 of the Exchequer Court Act, the controversy between the two Governments, it has clearly jurisdiction with respect to the other two defendants to hear and determine the claim made by the Information, both under sections 31 of the Exchequer Court Act and under sec. 2 of the Escheats Act (9-10 Ed. VII, ch. 18).

The action as against the Attorney-General of the Province of Saskatchewan will stand dismissed. On the question of costs, while, under the present circumstances after attorning to the jurisdiction, there would be no justification for a condemnation for costs up to and including the trial; however, taking into consideration that the issues are between two Governments and that the question is a new one, there will be no costs to either party.

The defendant, the Western Trust Company, by their statement in defence, admit the statements in paragraphs 1, 2, 3, 4 and 7 of the information, and claim no interest in the deceased's estate, except for their costs of administration and payments made by them out of the estate on creditors' claims, but submit their right to the court to abide by its judgment.

The defendant Henrietta Shulze having, at trial, abandoned any claim under the allegation of common law wife, now rests her claim solely for wages. And I might add that when one accepts and has the benefit of the services of another and there is no reason why

these services should be given gratuituously, ordinarily no other conclusion can be reached than that there was a tacit agreement between the parties that the services should be paid for.

It would seem that at the deceased's death, his estate became vested in the Sovereign, as represented by the Dominion of Canada and that the Sovereign could not be divested of the same, only by matter of record.

1st. There will be judgment adjudging and determining that the Crown, in the right of the Dominion of Canada, do recover the *bona vacantia* in question, the proceeds of the said deceased's estate.

2nd. The action as against the defendant the Attorney-General of the Province of Saskatchewan is dismissed without costs.

3rd. The Western Trust Company is condemned and ordered to pay over and deliver to the plaintiff, the whole of the said estate and the proceeds thereof; to account for its administration, and is at liberty to file a claim with the plaintiff to be dealt with in pursuance of *The Escheats Act.*

4th. The defendant Henrietta Shulze will be at liberty to file her claim with the plaintiff, proving and establishing the same, and to be thereafter dealt with in accordance with the provisions of the Escheats Act.

Judgment accordingly.

Turnbull & Kinsman, solicitor for plaintiff.

Carruthers & Williams, solicitors for Western Trust Co.

S. R. Curtin, for Mrs. Shulze.

1921
May 19.

BETWEEN

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

AND

FRANK J. PEDRICK AND FREDERICK A. PALEN, TRADING UNDER THE FIRM, NAME AND STYLE OF PEDRICK & PALEN AND THE SAID FRANK J. PEDRICK AND FREDERICK A. PALEN..... DEFENDANTS.

Revenue—Special War Revenue Act, 1915, as amended by 10-11 George V, c. 71—Construction—Sales Tax—Custom Tailors—"Manufacturers."

Defendants carried on the business of retail merchant tailors in the City of Ottawa,—taking orders for suits or garments to be made to measure, cutting the cloth, assembling the same and turning out or delivering the garments to the consumer.

Held, that they were not "manufacturers" within the meaning of sec. 19 b.b.b. of the Special War Revenue Act, 1915, as amended by 10-11 Geo. V, c. 71, and were not liable to pay the sales tax of one per cent therein imposed upon manufacturers in respect of their sales and deliveries.

THIS was an information by the Attorney-General of Canada seeking the recovery of penalties from the defendants for neglect and refusal to pay a Sales Tax leviable upon them under the provisions of sec. 19 b.b.b. of the Special War Revenue Act, 1915, as amended by 10-11 Geo. V, c. 71. The defendants were retail merchant tailors, doing business in Ottawa at the time the information was filed.

The case was heard at Ottawa on the 6th and 10th days of May, 1921.

F. D. Hogg for the plaintiff.

T. A. Beament for the defendants.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (May 19th, 1921) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover, from the defendants, penalties, in respect of which it is alleged they are liable, for the violation and transgression of sec. 19 b.b.b. of the Special War Revenue Act, 1915, (5 Geo. V, ch. 8) as amended by 10-11 Geo. V, ch. 71, in respect of taxes on sales.

This section, 19 b.b.b., under which the present action is instituted, reads as follows:

"19 b.b.b. (1) In addition to the present duty of excise and customs a tax of one per cent shall be imposed, levied and collected on sales and deliveries by manufacturers and wholesalers, or jobbers, and on the duty paid value of importations, but in respect of sales by manufacturers to retailers or consumers, or on importations by retailers or consumers, the tax payable shall be two per cent; the purchaser shall be furnished with a written invoice of any sale, which invoice shall state separately the amount of such tax to at least the extent of one per cent but such tax must not be included in the manufacturer's or wholesaler's costs on which profit is calculated; and the tax shall be payable by the purchaser to the wholesaler or manufacturer at

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the time of such sale, and by the wholesaler or manufacturer to His Majesty in accordance with such regulations as may be prescribed, and such wholesaler or manufacturer shall be liable to a penalty not exceeding five hundred dollars, if such payments are not made, and in addition shall be liable to a penalty equal to double the amount of the excise duties unpaid." . . . . . (2). The Minister may require every manufacturer and wholesaler to take out an annual license for the purposes aforesaid, and may prescribe a fee therefor not exceeding five dollars, and the penalty for neglect or refusal shall be a sum not exceeding one thousand dollars."

This Act came into force on the 19th day of May, 1920.

The defendants are carrying on, in the City of Ottawa, the business of retail merchant tailors,—taking orders for suits or garments, cutting their cloth, assembling the same and turning out the garments to the consumer.

Treating the defendants, under the said section 19 b.b.b., as manufacturers selling to consumers, the Crown claims and avers, by sec. 2 of the Information, that they were and are "under the obligation, since May 1920, to collect a tax of two per cent on all sales made of clothing manufactured by them, from consumers to whom the said clothing was and is sold and to pay the amount of the said tax to His Majesty."

The primary question which arises on the very threshold of the controversy is whether or not, the retail merchant tailor making garments for the consumers can be considered a *manufacturer* within the meaning of the provisions of sec. 19 b.b.b. above recited.

It is an elementary rule of statutory construction that every word ought to be construed in its ordinary or primary sense, *unless a second or more limited sense, is required by the subject-matter of the context.*

What is the primary and natural meaning of the word "manufacturer"? From its etymology the word obviously means to make by hand, that is *manus*, the hand, and *facturam* a making, from *facio*, to make. Under this primary signification every human being, it must be conceded, is a manufacturer in the sense that, owing to the rigor of the punitive dispensation to which our race was condemned after the fall of Adam, he has to use his hands, be he the man that handles the pick and shovel, the plough, the pen or the sword, etc. *Labores manuum tuarum quia manducabis.* That is our fate.

Now that is not the meaning that is to be attached to this word "manufacturer" in the present issue. The object of the Act cannot be to weld into the class of manufacturer all classes of men who manufacture, who make or do any work, or part thereof, with their hands. In legislating in respect of, as well as in construing a clause of, the tariff, reference must be had to the language, understanding and usage of trade. *Dominion Bag Co.* v. *the Queen* (1).

Not only by the usage of trade, but in common parlance, the word manufacturer would seem to come within the ambit of the definitions given by the best dictionaries of the day, such as Littré and the Oxford's, under which a manufacturer in our days, is one who produces by labour on a large scale.

(1) 4 Ex. C.R. 311.

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As stated *In re the Queen* v. *Peters* (1), it may be that dictionaries are not to be definitely taken as authoritative exponents of the meaning of words used in Acts of Parliament, but it is a well known rule of courts of law that words should be taken to be used in their ordinary sense.

Apart from any legal rule of construction would it not seem to submit the word to an undue straining, to do violence to the English language to hold for instance a humble seamstress, dress-maker, making a few dresses for consumers to be a manufacturer—or, as in the present controversy, a humble merchant tailor making suits for consumers to be a manufacturer? When speaking of a manufacturing centre, one would not mean a centre where dressmakers or retail merchant tailors carry on business. If a meeting of manufacturers were called to discuss matters relating to their business, neither dressmakers nor retail merchant tailors would be expected or even allowed to attend such gathering. There is but one sane conclusion to be arrived at, if one is to be guided by common sense and that is the retailer is not a manufacturer in the general acceptance of the word.

Approaching under a legal aspect the question of the construction of the word manufacturer as found in the statute in question, it may be said that noswithstanding the interpretation clause, under subsec. 2 of the Customs Act, which provides that customs law shall receive such liberal construction as will best insure the protection of the revenue . . . etc., in cases of doubtful interpretation, it was held by Sir William Ritchie, C.J. in the *Queen* v. *Ayer Company* (2), that its construction should be in favour of the

(1) L.R. 16 Q.B.D. 636, at 641. (2) 1 Ex. C.R. 232.

importer. However, in *Algoma Central Ry. Co.* v. *the King* (1), the Courts held that a taxing act is not to be construed differently from any other statute and that is the accepted doctrine to-day. See *Attorney-General* v. *Carlton Bank* (2); *O'Grady* v. *Wiseman* (3).

And Elmes, Law of Customs, p. 22, sec. 49, says: "Laws imposing duties on importations of goods are intended for practical use and *application by men engaged in commerce*, and hence it has become a settled rule of interpretation of Customs statutes to construe the language adopted by the legislature, and particularly in the denomination of articles, according to commercial understanding at the time."

Sitting here to interpret the statute, am I not entitled to assume that the construction and meaning attaching to the word "manufacturer" shall be what the people in the trade would take it to be, as proved at trial, and what is of public notoriety, used in common parlance and accepted by all of us, assuming also that the framers of the Act did not indicate any intention of departing from the general acceptance respecting the meaning of that word?

Then under the provisions of sec. 15 of the Interpretation Act (R.S.C. 1906, ch. 1) it is enacted that "every Act and every provision and enactment thereof, etc., . . . shall receive such *fair, large and liberal* construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its *true intent, meaning and spirit.*

(1) 32 S.C.R. 277; (1903) A.C. 478. (2) (1899) 2 Q.B. 158, at 164.
(3) Q.R. 9 K.B. 169.

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Section 19 b.b.b. states: "In addition to the present duty of excise and customs a tax of 1% shall be imposed, levied and collected on sales and deliveries by *manufacturers and wholesalers or jobbers*, and on the duty paid value of importations, but in respect of sales by *manufacturers to retailers or consumers, etc.*

It would seem obvious that when that word "manufacturer" is mentioned in the section, associated as it is with the words "wholesalers and jobbers," that it means one who manufactures and carries on business on a large scale, alike the wholesalers and jobbers, with whom he is classified. The controversy arising herein is with respect to the meaning of the word "manufacturer" appearing, two lines lower, when associated with these words "but in respect of *sales by manufacturers to retailers or consumers.*" Should the word "manufacturer" in the latter case be given a different meaning than when used a couple of lines before, associated as it is with the words wholesalers and jobbers?

Why should this word have different and distinct meaning when used in one and the same section? Why should this word "manufacturer" in the latter cases be deprived of its primary and natural meaning? Its meaning must be gathered from the whole context and the intention is to be taken and governed according to what is consonant with reason and good sense.

The words "manufacturers, wholesalers and jobbers" found at the beginning—but two lines above—must control, restrict and determine the meaning of such word as therein mentioned of cognate character and description; *noscitur ex sociis.* That is the necessary conclusion we are led to under the well known canon of construction of *ejusdem generis.* Indeed, *verba generalia restringuntur ad habilitater rei vel personæ,* as said by Lord Bacon, Hardcastle 2nd, 182.

And Maxwell, on Interpretation of Statutes, 6th Ed. 465, says: "Where an enactment may entail penal consequences, no violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language."

The section, dealing first with "manufacturers and wholesalers or jobbers," imposes a tax of 1% on sales made by them. Then, pursuing to deal with another branch of that case, linking the first branch with the second with the preposition "but" (which means excepting however when such sales made as above mentioned) are made to retailers and consumers by manufacturers to retailers and consumers a different tax is payable . . . "in respect of sales by manufacturers to retailers and consumers *or* on importations by retailers or consumers"—The word *or* then means in the alternative case. Therefore it is always the class of vendor or manufacturer who sells to a special class of purchasers, that is to retailers and consumers, and that is made doubly clear by the words which follow "or on importation by retailers and consumers." That is, what is there provided is the case where a foreign manufacturer is selling to a retailer like the defendant or to a consumer who may have the privilege of buying direct from the manufacturer, who is always a manufacturer of the class first mentioned in the section as associated therewith. In no case can the word manufacturer used in the section, be given any other meaning than it usually bears and I am gratified to be able to so find, in approaching its consideration, both from a legal and a common sense standpoint, confirming thereby the construction I have already accepted, under the well known canon of construction of *ejusdem generis* mentioned above.

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There is nothing in section 19 b.b.b. which would authorize to depart from the meaning usually attaching to the word manufacturer; but if the whole statute must be examined in order to decide whether or not it does contain anything to that effect, as decided in the case of *Harris* v. *Runnels* (1), we will find in sec. 19 b.b., in the third sub-paragraph of sub-section (b) of sec. 2 that the meaning of merchant tailor is there defined and he is not called a manufacturer. The statute there states: "Provided that on clothing covered by this item made to the order [not manufactured] and measure of such individual customer by a merchant tailor or journeyman, tailors in his employ."

Therefore it must result that such merchant tailor is not a manufacturer and he is not so called in that section 19 b.b. Section 19 b.b.b. without doubt deals exclusively with manufacturers and wholesalers or jobbers,—earmarking that very class, as distinguished from the merchant tailors defined in section 19 b.b. who cannot be at the same time a manufacturer and a merchant tailor selling to consumers, as therein provided. Section 19 b.b. would seem to put a limitation upon the word "manufacturers" in sec. 19 b.b.b., and thus remove any perplexing doubt.

William J. in *Cooney* v. *Covell* (2) said: "There is a very well known rule of construction that if a general word follows a particular and specific word of the same nature as itself, it takes its meaning from that word, and is presumed to be restricted to the same genus as that word."

Among the cases, cited in Bouvier's Law Dictionary, 3rd Ed., under verbo Manufacturer, is the case of *Cohn* v. *Parker* (3), wherein it was decided that "one

(1) 12 How. (53 U.S.) 79. (2) (1902) 21 N.Z.L.R. 106.
(3) 41 La. Ann. 894; 6 South Rep. 718.

engaged in cutting and making coats and trousers out of cloth which is already manufactured by another is not a manufacturer." See also the case of the *City of Toronto* v. *Foss* (1), which decides that a place where three or four persons make clothes for customers, etc., is not a "manufactory." *McNichol et al.* v. *Pinch* (2).

The word "manufacturer" used and associated with the words "wholesalers and jobbers" when first used in the section, retains its original, recognized and accepted meaning, nature and character when used the second time in the same section, a couple of lines lower. This interpretation is more consistent with the text of the enactment and is in accord with common sense and the meaning given to this word by the public generally.

Why, indeed, should we depart from the general and plain meaning of this specific word "manufacturer," which is of common and dominant feature, to endeavour, for the convenience of a special case, to extend to it, by doing violence to the English language, a meaning which to every one would so strain it as to nearly amount to an absurdity on its very face. Common sense alone rebels at accepting and applying to this word "manufacturer" the narrowest meaning of which it is susceptible and which is contrary to the understanding of the public, the language and usage of trade and of what is commonly and commercially known.

With the policy of Parliament on the legislation the Court has nothing to do. The duty of the Court is to construe the language used in the statute and if that construction does not fully carry out the intention

(1) 10 D.L.R. 627. (2) [1906] 2 K.B. 352.

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of Parliament (a very doubtful matter!) and if a narrower and new meaning is to be attached to the word "manufacturer" in the Customs Act, the Act can easily be amended.

In the view I take of the case, it becomes unnecessary to pass upon other questions raised at bar and more especially that stressed with respect to the nature and effect of the document filed as exhibit No. 2, and termed "Regulations" because such regulations must always be subject to the statute and could not *proprio vigore* create a tax. See *Belanger* v. *the King* (1).

I therefore find that the defendants are not liable to the penalties sued for and the action is dismissed with costs.

Judgment accordingly.

Solicitors for plaintiff: *Beament & Armstrong.*

Solicitors for defendants: *Hogg & Hogg.*

(1) 54 S.C.R. 265.

IN THE MATTER OF THE PETITION OF RIGHT OF 1921 May 19.

LUCIEN C. G. T. BACON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Officer in Military Service—Gratuity—Nature of—Right of Action—Discretion of Executive Officer—Appeal.

Held: That a gratuity to a military officer is in its very nature a matter depending entirely upon the grace and bounty of the Crown, and that no action will lie against the Crown to recover the same.

2. That the word "entitled" used in orders in council relating to such a gratuity should not be construed as setting up a contractual relation between the officer and the Crown, which would give rise to a right of action.

3. Where there is a discretion vested in an executive officer by order in council having the force of law, no appeal lies to the courts from the exercise of such discretion.

PETITION OF RIGHT seeking to recover a certain amount representing military gratuity provided for under certain orders in council for services in the Imperial Medical Corps.

April 28th, 29th and 30th, 1921.

Case heard before the Honourable Mr. Justice Audette, at Quebec.

R. Guay, K.C., and *J. C. Frémont, K.C.*, for suppliant.

J. P. A. Gravel and *H. H. Ellis*, for the Crown.

The facts are stated in the reasons for judgment.

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AUDETTE J. now (May 19th, 1921) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $1,503.75, as the amount representing the military gratuity he claims to be entitled to recover under the orders in council No. 2389 and No. 3165 respectively, filed herein as exhibits No. 6 and No. 1, for services in the Imperial Medical Corps.

After having obtained leave of absence, and having temporarily severed his connection with the Canadian Military forces, the suppliant obtained service in the Imperial forces, and as a result of such service he claims to be entitled, under the above mentioned orders in council, to a Canadian military gratuity for which he now sues.

The Crown, by its statement in defence, avers, *inter alia*, that the petition of right does not disclose a right of action; but that if it does a bonus paid to suppliant in England should be deducted therefrom and moreover calls upon him to account for deficiences in accoutrement and equipment under his control during service in his Canadian brigade. The Attorney-General furthermore, by way of set off and counterclaim, asks that before any moneys be paid, if any should be found due by the suppliant, that an account be taken of the moneys received by the suppliant between the 15th April, 1915, and the 10th September, 1915—that is before he left to take service in the Imperial Force—being canteen funds of the 41st Battalion, Canadian Expeditionary Force, amounting to $19,948.70.

The all important question which is met with *in limine* is whether or not a right of action exists for the recovery of a military gratuity under the orders in council, exhibits 1 and 6.

As a prelude, it might be said it would seem that the payment of such gratuity is absolutely discretionary,—that it is left entirely to the discretion of the executive or of the officer charged with the administration of the matter. The 4th paragraph of the order in council, exhibit 6, reads: "It is further recommended when application for gratuity is *approved.*" . . . It is therefore not paid *de plano.* That is, it is subject to approval by the officer in charge, the Paymaster General, Militia and Defence, as defined in clause 15 of the order in council, exhibit No. 1, which also contains by itself another discretionary clause.—The application for the recovery of such gratuities would therefore appear to be subject to approval, involving a discretion to be exercised and under clause 15, there is a particular person (*persona designata*) who is charged with exercising that discretion. If the Crown, by its proper officer, has thus exercised a discretion, the Court would have no jurisdiction to sit on appeal or in review from the exercise of such discretion. Before the suppliant could recover any gratuity, must not his application receive approval, under order in council exhibit No. 6?

It was contended at bar that the word "entitled" made use of in the orders in council gave a right of action, but this word by itself should not be construed as setting up a contractual relation between the officer and the Crown, which would give rise to a right of action. *Matton* v. *the King* (1); *the King* v. *Halifax Graving Dock Co., Ltd.* (2), and cases therein cited.

However that may be, the controlling question to be here determined is whether an action at law will lie against the Crown to recover such a military gratuity.

(1) 5 Ex. C.R. 401 at 407. (2) 20 Ex. C.R. 45.

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Does not the word "gratuity" contain in itself its very meaning and definition and primarily denote a grant of money *ex gratia*? It implies an act of generosity, beneficence, munificence, a gift out of kindness, free from any valuable or legal consideration. It is a voluntary gift or beneficium,—the donation of it being absolutely unilateral and depending entirely upon the inclination or will of the giver. It would seem of the very essence and character of a gratuity not to be bilateral; otherwise it would cease to be a gratuity.

A military gratuity is in its very nature a bounty or a gift. That is its accepted meaning in the dictionaries. See Bouvier, Law Dictionary, 3rd Ed. Verbo Gratuity-Bounty, and cases therein cited. If it be a bounty, it is therefore depending entirely upon the grace and benevolence of the Crown, for its recovery and an action at law will not lie for the recovery of the same.

The whole question involving the right of a military officer to recover money from the Crown in respect of his pay, half-pay, or pension is very fully discussed in the case of *Grant* v. *Secretary of State for India* (1). The result of that case, which was an action by a military officer serving in the Indian Forces, against the Secretary of State for India, representing the Crown, in which he claimed that he was improperly retired from the service, without being paid the proper pension due to him at the time of his retirement, is that in the opinion of the Court, the Crown has a general power of dismissing a military officer at its will and pleasure, and that the defendant "Secretary of State for India" could not make a contract with a military officer in derogation of the prerogative in such a case exercisable

(1) [1877] 2 C.P.B. 445 at pp. 455 et seq.

by the Crown. Furthermore, the case decided that any military customs, or regulations, must be taken to be always subject to this prerogative right of the Crown to dismiss at its will and pleasure.

There is another important case, namely, *In re Tufnell* (1), reported in 1876. That was a Petition of Right by an army surgeon claiming compensation from the Crown, not for dismissal from any office, but for being put on half-pay instead of continuing to hold his office, owing to alterations in the establishment. Malins, V. C., pointed out that although the Crown might order an officer to retire on half-pay, and prescribe that the half-pay should be of a certain amount, as the Crown thought fit to withold that half-pay, it was absolutely impossible to recover it. The doctrine laid down in that case may be summarized as follows:—"Every officer in the army is subject to the will of the Crown, and can be removed and put on half-pay or dealt with as the Crown, with a view to the public convenience, thinks best. It is a power which is always considered to lie in the Crown, a rule which has never been departed from."

In the case of *De Dohse* v. *the Queen* (2) which was a Petition of Right by an ex-captain of the British German Legion formed during the Crimean war, alleging that after the disbanding of the Legion, the Government had promised him other employment but has not provided him with any. The case was carried to the House of Lords, the Crown having succeeded in the courts below on demurrer. Lord Halsbury, L.C., was of the opinion that, even had there been such a contract it must have been subject to a reserve of the right of the Crown's prerogative to

(1) [1876] 3 Ch. D. 164. (2) [1886] 3 T.L.R. 114.

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dismiss the officer at pleasure and that a contract which purported to override that prerogative would be unconstitutional and contrary to the public policy.

In *Mitchell* v. *the Queen* (1) it was held by Fry, L.J.: "I am clearly of opinion that no engagement between the Crown and any of its military or naval officers in respect of services either present, past or future can be enforced in any court of law." And per Lord Esher in the same case: "I agree with Mathew J. that the law is as clear as it can be and that it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the Crown and the Crown are voluntary on the part of the Crown and give no occasion for an action in respect of any alleged contract."

In Scotland a similar result was arrived at in the case of *Smith* v. *Lord Advocate* (2); it was held there that no action would lie against the Lord Advocate representing the Crown, for the recovery of military pay. Summing up the result of several Acts relating to pensions to civil servants and military officers, in which the term "shall" occurs, but differing very importantly from Canadian legislation in such matters by having a distinct provision that the decision in any case of the Executive authority would be final. Malins, V. C., in *Cooper* v. *the Queen* (3), says: "The Crown in fact, says, 'This is what we intend to give you, but as a matter of bounty only, and you shall have no legal right whatever, and it is not intended to give any person an absolute right of compensation for past services or for allowances under this Act.' He must therefore depend upon the bounty of the Crown whether he is to have the whole amount or any part which the Commissioners may think fit."

(1) [1896] 1 Q.B. 121, n. (2) [1897] 25 R. Scotch Sess. Cases, 4th Seg., 112.
(3) [1880] 14 Ch. D. 311 at p. 315.

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Then we have the recent decision of *Leaman* v. *the King* (1), where, under a well argued and well considered judgment, it was held that the rule that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, applies as well to private soldiers as to officers and that a petition of right will not lie for military pay.

Under sec. 18, ch. 10 of the Imperial "Manual of Military Law" it is enacted that "The enlistment of the soldier is a species of contract between the Sovereign and the soldier." Commenting upon the nature and character of this engagement or enlistment, the case of *Leaman* v. *the King* (ubi supra) decided that the nature of the engagement or enlistment is the same in the case of officers as well as of soldiers.

The expression "contract" used in this Manual has been qualified as a loose expression which is not to be construed too literally,—much more so now since it has been held in the *Leaman case* that it could not give a legal right of action.

Should the same view be taken with respect to the engagement of officers and soldiers in the Canadian forces? The King's Regulations and Orders for the Canadian Militia does not appear to contain a similar enactment to sec. 18 above referred to of the Imperial Manual of Military Law; however, among the several sections thereof dealing with Enlistment,—from paragraph 288 et seq.—it is found under par. 307 that "When a man is enlisted, etc., etc., he will after passing the medical examination be *attested* by the officer commanding the unit. Attestation will be recorded in duplicate on Form B. 235, etc." Item 12 of this

(1) [1920] 3 K.B. 663.

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attestation paper contains the question: "12. Are you willing to be attested in the Permanent Military Forces of Canada?" And in form M.F.W. 51, used with respect to the attestation of officer, item 10 contains this question: "10. Are you willing to serve in the Canadian Over-seas Expeditionary Force?" These are the only two clauses under which an engagement could be derived.

Would it not appear therefore that these attestation papers, read in the light of sec. 10 of the Militia Act which says that "all the male inhabitants of Canada, of the age of 18 years and upward, and under 60, not exempt or disqualified by law, and being British subjects, shall be liable to serve in the Militia,"— cannot any more under the Canadian law and regulation than under the Imperial enlistment create a right of action for the recovery of pay, pension, etc.? If so, then the *Leaman* case would conclude all actions in Canada in respect to similar matters.

If a petition of right will not lie for the recovery of the pay of an officer, *a fortiori* will it not lie for the payment of a gratuity.

See also *Gibson* v. *East India* (1); Robertson, Civil Proceedings (2); *Dunn* v. *The Queen* (3); *Balderson* v. *The Queen* (4); *Gould* v. *Stuart* (5); *Yorke* v. *The King* (6).

I have come to the conclusion that a petition of right will not lie to recover the military gratuity mentioned in this case.

(1) 5 Bing. N.S. 262.
(2) pp. 611, 359, 35, 643.
(3) [1896] 1 Q.B.D. 116
(4) 28 S.C.R. 261.
(5) [1896] A.C. 575.
(6) 31 T.L.R. 220; 84 L.J.K.B. 947; [1915] 1 K.B. 852.

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I am relieved from labouring the other questions raised by the pleading and at trial, counsel at bar for the Crown having stated that if it were found that the petition of right would not lie at law, that the Crown would not ask any pronouncement upon the counter-claim.

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

Judgment accordingly.

Solicitors for suppliant: *Guay & Frémont.*

Solicitor for respondent: *H. H. Ellis.*

1921
May 12.

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

AND

THE GLOBE INDEMNITY COMPANY OF CANADA, AND E. T. HINCHLIFFE..... DEFENDANTS.

AND

W. H. BARBER, P. WARMKE, WILLIAM GWILLIM, D. MACPHEAT, G. W. DRAKE, AND THOMAS HASLETT..... THIRD PARTIES.

Canada Grain Act—Conversion—Collateral Bonds—Third Party notice.

In compliance with the provisions of the Canada Grain Act, H. filed with the Board of Grain Commissioners a bond of the defendant company to obtain a license to operate a country elevator for the crop year of 1915-16. Various persons stored their grain in his elevator, to whom he issued receipts therefor pursuant to the Act. Subsequently without instructions from the owners and without obtaining the return of the storage certificates he disposed of the grain, keeping part of the proceeds thereof.

Held: On the facts that H. had failed to comply with the provisions of the Act and that the defendant Company was liable to plaintiff under its bond.

2. That, the fact of the owners on discovering their grain gone, making a demand for payment thereof from H. could not be construed into a waiver of the old or the making of a new contract between them and H. so as to relieve him of his statutory duties, or to exonerate the company from liability under their bond.

3. That where there is conversion as aforesaid, the damages should be measured by the actual loss, depending upon the price prevailing at that time.

4. At the time it gave its said bond, the company required H. to furnish collateral bonds securing them; and the third-parties herein gave these bonds.

Held: That, as the Company's right to indemnity as against the third-parties was an independent right not depending upon the bonds themselves, but upon other and separate agreements than those forming the basis of the information herein, and that the third-parties were admittedly liable upon the showing of vouchers or other evidence of payment by the Company under the bonds,—the rule of third-party notice, the object of which is to give them an opportunity of contesting plaintiff's right and that he may be bound by the judgment obtained by the plaintiff, was not applicable and therefore this court had no jurisdiction to decide this issue as between subject and subject, which is entirely foreign to the main issue.

INFORMATION exhibited by the Attorney-General for Canada seeking to recover against the Indemnity Company for the bonds furnished in connection with the operating of country elevator and of track buyers operations.

Trial was begun at Regina on the 28th September, 1918, before the Honourable Mr. Justice Audette and was later, on the 3rd February, 1921, resumed and concluded before the same judge.

E. L. Taylor, K.C. and *T. Sweatmen, K.C.*, for the Crown.

Coyne, K.C., for the Globe Indemnity Co.

L. A. Sellers for Thomas Ashton, Third Party.

J. A. Frame, K.C., for the other third-parties.

No one appearing for defendant Hinchliffe.

The facts are stated in the reasons for judgment.

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Reasons for Judgment.

Audette J.

AUDETTE J. now (May 12th, 1921) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover against each of the said defendants, the sum of $6,600, being the full amount of a country elevator bond, together with the further sum of $6,000, or such portion thereof as may be considered just,—being the amount of a track-buyer's bond,—both bonds being given, under the provisions of the Canada Grain Act, 2 Geo. V, ch. 27 (1912).

The defendant Hinchliffe, although duly served with notice of trial, after having filed a statement of defence, did not appear at trial,—the other defendant, the Globe Indemnity Company of Canada and the third-parties, being, however, duly represented by counsel.

The following admissions, subscribed to by all parties hereto, excepting the defendant Hinchliffe, were duly filed at the opening, and read as follows, viz.:

"Admissions:—For the purposes of this case it is agreed between His Majesty and the defendants:

"1. That on the 28th and 29th June, 1916, the Board of Grain Commissioners held sessions at Strassburg, in the Province of Saskatchewan, pursuant to the statute, for the purpose of fully investigating all matters in connection with the alleged default of the said Hinchliffe in operating the said country elevator and also as to his alleged default as a track buyer, subject to the question of relevancy.

"2. The Board wrote to the defendant company giving the date of the hearing and requesting that the Company have a representative present. The defendant company was represented by counsel at said investigation who cross-examined persons called before the Board subject to the question of relevancy.

"3. The said elevator was closed by the 1st of January, 1916, all grain having been shipped out.

"4. Early in January, 1916, the Board received complaints that Hinchliffe was not complying with the Act and asking for an investigation. A representative of the Board interviewed him in Regina. This is admitted subject to the question of relevancy.

"5. The first declarations of claim, making claims against Hinchliffe to the Grain Commission were made on the 22nd of February, 1916, and twelve of them were taken before the end of the month of February. This is admitted subject to the question of relevancy.

"6. The prices of grain during the period from September 1st, 1915, to August 31st, 1916, are correctly set out for the various days in the closing prices shown in Report of the Winnipeg Grain Exchange for the year 1916, pages 70 to 81 inclusive, which are made part of these admissions, except grain commandeered; and the value of the grain of the said claimants at the above prices is subject to deductions for freight 11.4 c. per bushel on wheat and 6½ c. per bushel on oats, storage 1¾c. per bushel and 1-30c. per bushel per day after the first fifteen days, and 1c. per bushel commission on sale, together with dockage and also to interest on advances made in respect of the grain of the various claimants.

"7. The grain prices for the contract grades for the various days in the years succeeding 1916 are correctly shown in the Winnipeg Grain Exchange Reports, which prices as well as the orders of the Wheat Board are admitted. It is also admitted that the highest price for No. 2 Feed Oats on the Winnipeg Grain Exchange since September 1st, 1915, was $1.36½ on

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June 15th and June 16th, 1920. It is also admitted that all grain from said elevator went to the Regina Grain Company and was sold by them, with the exception of the 1976 bushels 40 pounds of wheat and oats mentioned in paragraph 1 of the particulars.

"8. During the grain year 1915-16, it is the price of No. 1 Northern Wheat which is shown by the Winnipeg Grain Exchange prices above. During the same period it is the price of No. 2 C.W. Oats which is shown by the Winnipeg Grain Exchange prices above.

"9. The claim in paragraph 8 of the Particulars is withdrawn.

"10. The amount of the claim in paragraph 10 of the Particulars is fixed at $110. This claim is the only one under the Track Bond.

"11. The only cars commandeered by the Government on November 28th, 1915, are Nos. 209390, 146660, 208878, 102930, all No. 1 Northern."

(This admission is signed by counsel on behalf of plaintiff, defendant company and third-parties).

The defendant, the Globe Indemnity Company of Canada, by counsel, at the opening of the trial admitted liability to the extent of $110 under the $6,000 bond above referred to, in respect of the track buyer's license, and the Crown's counsel declared himself satisfied, limiting his claim to that amount in respect to the track-buyer bond.

That leaves me to deal with the bond of $6,600 in respect of the Country Elevator license.

Counsel for the Crown, upon application, was also allowed to amend his particulars of claim to the effect that the price or prices or value at which the various classes of grain should be estimated in this action for the purpose of fixing damages should be the highest

market price (according to the reports of the Winnipeg Grain Exchange) prevailing between the date of storing the grain in each case and the date of the trial. This question will be hereinafter referred to.

The statement of defence by the Globe Indemnity Company of Canada was also amended, upon leave granted at trial, by striking out thereof the whole of paragraphs 7 and 8 and sub-paragraphs (b), (c), (d), (e), and (f) of par. 9.

The defendant Hinchliffe, as averred by the pleading, in compliance with the Canada Grain Act, filed with the Board of Grain Commissioners the bond in question for $6,600 to obtain a country elevator license for operating the crop year of 1915-1916.

Evidence was adduced on behalf of the Crown in respect of some of the claims set out in the particulars and those set out in the statement of defence by the Globe Indemnity Company of Canada, namely: The claim of George Dueringer, William Schwandt, Frank Staffen, William Hinchliffe, John Flavelle, Edward Shepherd, Albert Revoy, Fentwick & Rowe, Aaron Kerr, George F. Sculpholm, one Fenwick for Mrs. Moeller, and George Staffen.

The defence offered no *viva voce* evidence at trial.

The details of the several transactions of these claimants with the country elevator operated by defendant Hinchliffe are set forth both in the particulars and in the evidence; but in the view I take of the case I find it unnecessary to undertake any minute analysis of the same, because I have come to the conclusion that the defendant Hinchliffe has made default in the operation of his country elevator and that he has transgressed the law or rules for operating such an elevator as laid down in the statute.

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Having received from the farmer their grain for storage in the elevator, Hinchliffe, pursuant to sec. 157 of the Grain Act, and at the time of delivery of such grain, issued, in the form prescribed by the Act, to the person delivering the grain, warehouse storage receipts and under secs. 159 and 166, he became liable to account for the same.

The claim made herein, under the bond, is for the wheat so stored by the farmer and which Hinchliffe disposed of without instructions from them, with the result that when the farmers came to ship their wheat or grain, they found the elevator empty and closed, and Hinchliffe gone. The farmers thereby suffered heavy losses for which it is sought here to compensate them out of the proceeds of the bond.

Hinchliffe had no right, of his own volition and without an order, to dispose of and sell the grain stored in his country elevator, except under the special circumstances mentioned in the statute, which are not in issue herein. Hinchliffe having given storage certificates, the grain could not leave the elevator without the return of these certificates, as required by the statute; and he was moreover under contract with the farmer to keep his grain in the elevator.

It is true Hinchliffe made advances in money to several of the farmers storing grain in his elevator, but that did not change the nature of the statutory contract he was working under. He was quite free, at common law, to make these advances, but he had no legal lien upon the stored grain, especially as against a third party holding the storage certificates. He took his chance, and he had the advantage of having in his hands grain representing more than the amount advanced and that was all.

Moreover, the conversion, with regard to all these claims, of the farmers' grain cannot now be sought to be construed into a new contract as between the farmers and Hinchliffe from the manner and the language used when the farmer, seeing his grain gone, asked for his money, and the demand for money or payment, under the circumstances, cannot be made referable to a new contract as between the warehouseman and the farmer, with the object or view of avoiding the statutory duties cast upon the elevator man.

It is not, indeed, what the swindled farmers said or had to say when they realized their grain had gone, that is now under consideration in the present controversy—but the consideration is what the farmers have a right to exact from Hinchliffe under the circumstances which form the gravamen of the case. Hinchliffe having violated his statutory duties and converted the grain to his own use, is estopped from setting up afterward, thereby invoking his own turpitude, what the farmers said when they found their grain gone and endeavour to construe it into a new contract which would release him of any liability. It is not in the mouth of Hinchliffe to say—as was said at bar—the farmers ratified the sale I made of their grain by asking for their money, the proceeds of the sale of such grain. He who seeks equity must come into court with clean hands.

When some of the farmers realized their loss and went to Hinchliffe and asked for their money, the elevator being closed and the wheat gone, they were trying to make the best of a bad job, if I may use that expression. And, indeed, whatever they did say to get the proceeds of their disappeared grain cannot now be sought to be made referable to a new class of contract which would let out Hinchliffe from his statutory duties.

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The farmers were shamefully swindled. They dealt in the regular manner, as provided by the statute, with the person operating the elevator, who proved himself false and the damages flowing from his violating the statute and his being obviously derelict in his conduct would appear to be only partially guaranteed by the bond of the Globe Indemnity Company of Canada, and I find the company are liable under their bond and must pay.

The farmers are not parties to the bond, but they have a claim for damages and compensation against the defendant Hinchliffe, whose action in respect of the administration of his country elevator is bonded and guaranteed. The compensation for damages in a case of conversion should be complete and the converter must not be allowed to take or make any profit out of his wrongful act. The damages should be measured by the actual loss and the claimants would have sold their grain during that season and they would have been paid the price prevailing at that time.

The damages therefore should be ascertained upon the basis of the price of the wheat, oats or grain prevailing between Christmas, 1915, and the 1st February, 1916, and making the usual and proper deduction or allowance for freight, transportation, storage, warehouse charge, etc. The elevator as admitted, was closed by the 1st January, 1916. But in no case should a farmer receive a higher price at which he testified he was holding for sale.

The plaintiff having omitted to ask for interest by the information, moved at trial to amend accordingly and the pronouncement upon that application had been reserved to the merits. Interest should be allowed in a matter like the present one, and moreover, in view of the long delay since the institution

of the action, the greater part of which resulting from an adjournment which was granted at the request of the Globe Indemnity Company, I think the plaintiff is undoubtedly entitled thereto. I have no hesitation in allowing the amendment and direct that interest should run upon the amount of damages duly ascertained from the 1st March, 1916. The whole in full accord with the basic consideration that the farmer should be compensated by the converter to the full amount of his loss.

The costs of the adjournment above referred to having been reserved, I hereby adjudge the plaintiff is entitled to recover the same against the said The Globe Indemnity Company of Canada in any event.

Dealing now with the amount of damages or the amount which should be paid to the respective claimants mentioned herein, I will accept the suggestion at trial and I will direct counsel to adjust the same upon the basis above mentioned. Failing, however, counsel to be able to arrive at a satisfactory adjustment, leave is hereby given to apply for further direction in respect of the same.

The claimants will be entitled to the value of their lost grain, at the prices prevailing between Christmas, 1915, and the 1st February, 1916, with interest thereon from the 1st March, 1916, they being entitled to full compensation in a case of conversion. All due deduction to be duly made respecting advances, costs of transportation, storage, etc., etc., all such charges being familiar to counsel herein, as clearly appeared at bar.

There will be judgment as follows, on the main issue, viz.:

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1°. The plaintiff is ordered and adjudged to recover against the said defendants, in respect of the operation under the track-buyer bond for $6,000, the sum of $110, as admitted and agreed upon at bar.

2°. The plaintiff is further ordered and adjudged to recover against the defendants all such damages and compensation as may be arrived under adjustment by counsel aforesaid, allowing for each of the said farmers his claim under the prices prevailing between Christmas, 1915, and the 1st February, 1916, with interest thereon, from the 1st March, 1916, the whole, however, only up to the total amount of the bond of $6,600 if the added sums representing the damage amount to that, and less if the deficiency amounts to less. If the several amounts of the individual loss of the farmers, ascertained in the manner above set forth, and if the condemnation becomes to be for $6,600—the total amount of the bond—against the Globe Indemnity Company, interest upon that sum should only run against that company from the date of demand upon them which may be taken to be the date of the investigation by the Board of Grain Commissioners, which is to be found in the information as the 28th June, 1916.

3°. The plaintiff is further ordered and adjudged to recover against the said defendants the costs of this action, together with and including the costs of the adjournment, in any event, and which stood under reserve up to date.

4°. Failing the parties to adjust the claim, as mentioned above, leave is hereby reserved to apply for further direction.

THIRD PARTIES ISSUE.

One of the defendants, the Globe Indemnity Company of Canada, having claimed to be entitled to indemnity over against the third parties above mentioned, obtained leave to serve third-party notice upon them and after the pleadings had been respectively filed and delivered, the matter came up for hearing at the same time as the hearing upon the issue as between the plaintiff and the defendants.

I have heard both issues at Regina, on the 3rd February, 1921, and following days, and allowed counsel for the defendant company on account of his having taken ill at trial to offer his argument in writing by the 14th February, 1921. A further extension was also allowed; but as the written argument is not at this late date forthcoming, about three months after the argument, I now proceed to render judgment.

The Globe Indemnity Company gave the two bonds above mentioned and required the defendant Hinchliffe to procure collateral in the nature of exhibits A. 12 and A. 26. The third-parties who signed these documents contend, among other things, that they signed the same upon misrepresentation on the part of Hinchliffe, who told them it was a recommendation touching his capacity to run an elevator, under the provisions of the Grain Act; to some of them he even said it was a bond or security, but that they would never be asked to pay out any money. In one case there was no seal affixed upon the document and in the other the seals appeared to have been affixed after the parties had signed.

However, in the view I take of the case it becomes unnecessary for me to decide whether or not the third-parties, not being blind or illiterate, were or

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were not so grossly negligent in signing these documents without reading them or ascertaining their purport, that the plea of misrepresentation can let them out or whether the plea is *non est factum*. *Howatson* v. *Webb* (1).

It is furthermore unnecessary for me to decide whether or not the case comes under sec. 4 of the Statute of Frauds and whether in such cases seals are required upon this class of documents. Brown, on Statute of Frauds (2).

Indeed, after going over the whole case and giving this matter careful consideration, I have come to the conclusion that this is not a proper third-party issue, and further that I have no jurisdiction to entertain the claim.

This is not a claim to indemnify the defendant company over against the plaintiff's claim in the action resting on the bonds recited in the information; but the defendant company claims under an independent right, not depending upon the bond themselves, but upon other and separate deeds or agreements entirely distinct and separate from the bonds in question. The transaction between the plaintiff and the defendants in respect of the two bonds in question is complete and distinct and cannot be linked with the other collateral bond or security to be used as a right to third-party notice. Where the defendant's right against a third-party is an independent right, not depending on the defendant's own liability in the action, the rule of third-party notice is not applicable. *Wynne* v. *Tempest* (3); *Greville* v. *Hayes* (4).

(1) 4 British Rg. Cases 642.
(2) pp. 440, 441 et seq., & 582.
(3) [1897] 1 Ch. D. 110.
(4) [1894] Ir. R. 2 Q.B. & Ex. 20, at 23.

The object of the third-party notice is to bring in a third-party in the suit to give him an opportunity of contesting the plaintiff's right and furthermore that he may be bound by the judgment obtained by the plaintiff. In the present case, there would be no object in and nothing gained by bringing in the third-parties in question, because by the very terms of their bonds or collateral securities (exhibits 12 and 26), they are bound by the judgment upon the original bond, by the terms of these collateral bonds the third-parties are liable to the company for all loss, damage and costs, etc., admitting before hand, that the vouchers or other evidence of payment made by the company, etc., shall be conclusive evidence as against them of the fact and extent of their liability to the company whether such payments were made to discharge a penalty under the bond, or were incurred in the investigation of a claim therein or in adjusting a loss or claim *and whether voluntarily made or paid after suit and judgment against the company.*

The matter is very clear, this is not a case of third-party notice, it necessarily follows that I have no jurisdiction to decide this issue as between subject and subject.

I am moreover bound by the decision of this Court upon a closely analogous case *In re the Queen* v. *Finlayson et al* (1).

Therefore the claim made by the Globe Indemnity Company of Canada as against the third-parties is hereby dismissed with costs. The third-parties are dismissed from this action, which, of course, will not deprive the defendant company of such right of indemnity as may exist.

(1) 5 Ex. C.R. 387.

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The very able written argument of counsel for the defendant company was delayed in its transmission to me for reasons which I need not state. I had arrived at my conclusion in the case, as above stated, before I had an opportunity of perusing it; but I have since done so. However, after duly considering it, I see no reason to change the conclusion of my judgment in any way.

Judgment accordingly.

Solicitor for Crown: *E. L. Taylor.*

Solicitors for Globe Indemnity Company: *Coyne, Hamilton & Martin.*

Solicitors for Hinchliffe: *Thornburn, Forrester & Forrester.*

Solicitor for Third-Parties: *G. A. Colquhoon.*

IN THE MATTER OF THE PETITION OF RIGHT OF

ELIZABETH ANN OLIVER.....SUPPLIANT;

1921
May 23.

AND

HIS MAJESTY THE KING,

RESPONDENT, BY THE PETITION;

AND

GEORGE H. FUNK AND HOMER CANFIELD,

RESPONDENT (BY NOTICE) IN POSSESSION.

Constitutional Law—Exchequer Court Act—Provincial Laws affecting limitation of actions—Jurisdiction

Held: That O. having invoked legislation on her behalf, cannot escape from any obligation upon her arising out of such legislation or amendments thereto.

2. That under section 33 of the Exchequer Court Act, the provisions of the Real Property Limitation Act, of the Province of Manitoba, would apply in respect to the limitation of actions to recover land situate in the said province.

The fact that the land patents had been signed in Ottawa, would not make the law of prescription or limitation of Ontario applicable.

Quaere: Where suppliant, who alleged a claim to certain lands in Manitoba under the Manitoba Act, 33 Vict., c. 3, sec. 32, by reason of possession and occupancy of a predecessor in title in 1870, took no steps to assert her claim until some 49 years had elapsed after the last mentioned date, although in the meanwhile, namely, in 1908, the Dominion Government had issued letters-patent for portions of the said lands to other parties, must she not be held by her laches to have acquiesced in the title given by the patents issued in 1908?

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PETITION OF RIGHT seeking to have certain land patents, granted by the Crown, set aside by reason of being issued in error and inadvertently, and to have suppliant's estate converted into freehold by the Crown.

February 9th, 1921.

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

W. S. Morrisey, for suppliant.

H. M. Hanneson, for the Crown.

J. C. Freeman, for Geo. Funk.

E. D. Honeyman, for H. Canfield.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 23rd May, 1921) delivered judgment.

The suppliant, by her Petition of Right, seeks to set aside and have declared void five land patents, with respect to lots 47, 48 and 49 in the parish of St. Peter, in the province of Manitoba, alleged to have been issued, by the Crown, inadvertently and in error and improvidently; for a declaration that she is the owner in fee simple of these lands and further that she is entitled to have her title confirmed by a grant from the Crown, or to have her estate in the said lands converted into an estate of freehold by grant from the Crown.

I may state, *in limine*, that owing to the total absence of proof of occupancy, etc., with respect to lot No. 47, the suppliant fails to establish any claim to relief in respect of that lot; and add that all which is hereafter said applies to lots 48 and 49 only.

This claim is based upon an alleged occupation of the lands in question by the suppliant's predecessor in title, now over 50 years ago and rests mainly upon sec. 32 of the Manitoba Act (33 Vict., ch. 3).

With respect to documentary title, the suppliant has failed to establish the same and were it satisfactory in some respects the chain of title is not brought up to her. This view has been amply acquiesced in although not actually admitted at bar and the action undoubtedly now rests upon occupancy and possession.

Under 33 Vict., ch. 3, sec. 32, sub-sec. 3 of the Manitoba Act:—"All titles by *occupancy* with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid (1869), of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate of freehold by grant from the Crown."

Now, the utmost that the vague, meagre and unsatisfactory evidence on record—evidence that I may call inferential rather than positive—could establish is that Sinclair was in possession of or occupying some land, which might be ascribed to lots 48 and 49 in question herein at the time the soldiers came up the Red River on the occasion of the North West Rebellion. However, there is no date mentioned in evidence except such as might be derived from such a general allegation. One counsel at bar stated that would be around the 24th August, 1870. At any rate it would be in the summer of 1870.

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Therefore, upon that point it clearly results that the suppliant fails to establish any such occupancy "*up to 8th March, 1869,*" as required by the above recited section.

However, failing to succeed upon that section, suppliant relies upon the Acts of 1874 or 1875. The section of the Act of 1874, in respect to the section in question was repealed in 1875 and replaced by 38 Vict., ch. 52, sec. 1, which purports to be an amendment of the section above recited (33 Vict., ch. 3, sec. 32, sub-sec. 3) and reads as follows:

"3. Whereas it is expedient to afford facilities to parties claiming land under the 3rd and 4th subsections of the thirty-second section of the Act, 33 Vic., ch. 3, to obtain Letters Patent for the same:—

"Be it enacted, that persons satisfactorily establishing undisturbed occupancy of any land within the Province prior to, or those through whom they claim, in actual peaceable possession thereof, *on the 15th July, 1870,* shall be entitled to receive Letters Patent therefor, granting the same absolutely to them respectively in fee simple."

This amendment deals with parties claiming under the 3rd section first above referred to, which section enacts that the occupancy alleged must be one "with the sanction and under the license and authority of the Hudson's Bay Company." If such sanction, license and authority be necessary, there is not a tittle of evidence establishing the same.

It is true this Act of 1875 requires the occupancy only prior to 15th July, 1870, instead of 8th March, 1869, as provided by the original section, but it is claimed that all legislation by the Parliament of Canada in respect of the Act constituting the Province of Manitoba, subsequent to the Manitoba Act (33

Vict., ch. 33) and the Imperial Act confirming the same (34 & 35 Vict. 28), is *ultra vires* of the Parliament of Canada and illegal. It is so contended in view of the enactment, under the Manitoba Supplementary Provisions Act, ch. 99 R.S.C. 1906, sec. 22, whereby the suppliant's claim would "be barred as fully and effectually as if it had not been made, if the claimant in respect thereof did not establish his claim before the 1st November, 1886, etc." If that Act has force of law the claim is obviously prescribed and barred by this limitation.

If the suppliant accepts the legislation subsequent to the Manitoba Act extending the occupancy prior to the 15th July, 1870, she must also accept the legislation, by the same power, in respect to this limitation which is legislation dealing only with procedure, and under both views she is out of court.

Moreover, the evidence adduced, unsatisfactory as it may be, could not be regarded as establishing occupation before the 15th July, 1870—the most it could establish would be occupation somewhat around the 24th August, 1870, if it at all does establish that fact. The case has not been proved.

This action, although in respect of a claim relying upon possession and occupancy in 1870, has only been instituted in December, 1919—that is 49 years after. Would not such great laches, such delay in asserting such claim shut the door to an applicant who was content to thus sleep upon her imaginary rights until it is discovered the property has increased in value? Should a Court assist under such circumstances and is not the suppliant estopped by such laches to set up such a claim? Has the suppliant by her delay not acquiesced in the title given by the Lands Patent in 1908?

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Furthermore, the lands in question are situate in Manitoba and the laws with respect to the statute of limitation, under sec. 33 of the Exchequer Court Act, must be the laws in force in Manitoba, The fact, as contended, that the Patents were signed in Ottawa, would not make the laws of Ontario applicable when the lands are situate in Manitoba.

Under the "Real Property Limitation Act" of the Province of Manitoba (R.S.M., ch. 116, secs. 4, 5, and 17) an action to recover land is limited to ten years. The evidence in respect of the possession, adverse to the suppliant in the last ten years is not as satisfactory as might be desired, yet with the explanation given, the absence of the real owner serving in France during the war, it should under the circumstances of the case, coupled with the Patent, be accepted as sufficient on behalf of innocent third parties purchasers for value.

There were several other interesting and important questions raised at bar, and much might be spread upon record in respect of the same; but, in the view I take of the case, it becomes unnecessary to consider them here. The action must be dismissed for want of evidence. The case has not been proven and therefore fails.

There will be judgment ordering and adjudging that the suppliant is not entitled to any portion of the relief sought by her Petition of Right.

Judgment accordingly.

Solicitor for suppliant: *W. D. McKerchan.*

Solicitor for the Crown: *H. M. Hanneson.*

Solicitor for Funk: *Campbell Reid.*

Solicitors for Canfield: *McWilliams, Gunn & Co.*

HIS MAJESTY THE KING.....PLAINTIFF;

1921
May 3.

AND

J. LUDGER LAFOND.....DEFENDANT.

Expropriation—Inconvenience common to public generally—Loss of trade.

The Crown expropriated the right to flood a part of L's property, which flooding was due to the erection by the Crown, of the Quinze Lake Dam, a public work of Canada. L. claimed that besides the compensation for the easement taken on his property, he should also be compensated for damages to his trade, resulting from the decrease of population; which decrease was due to the flooding of neighboring farms and the owners being in consequence forced to move away.

Held: That no claim could arise in respect of an inconvenience common to the public generally. The general depreciation of property resulting from being in the vicinage of a public work does not give rise to a claim by any particular owner; and more particularly when the claim was for the loss of trade or business resulting from the said cause, and that therefore L. was not entitled to compensation on the above claim. *The King* v. *MacArthur* (1).

INFORMATION exhibited by the Attorney-General for Canada to have the easement and right to flood certain lands expropriated under the Expropriation Act valued by the Court.

March 23rd, 1921.

Case was begun before the Honourable Mr. Justice Audette, at Haileybury, and on April 22nd, 1921, was concluded at the city of Ottawa.

R. V. Sinclair, K.C., & Louis Cousineau, for plaintiff.

E. B. Devlin, K.C., & J. W. Ste Marie, K.C., for defendant.

(1) 34 S.C.R. 570 referred to.

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Reasons for Judgment.

Audette J.

The facts are stated in the reasons for judgment.

AUDETTE J. now (May 3rd, 1921) delivered judgment.

This is an Information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the right to flood the land described in the information and belonging to the defendant was, under the provisions of the Expropriation Act, taken and expropriated, for the purposes of the construction and operation of the Quinze Lake Dam and Reservoir, a public work of Canada, by depositing, both on the 26th October, 1917, and the 26th March, 1920, plans and descriptions, of the said lands, in the office of the Registrar of Deeds for the County or Registration Division of the County of Temiscaming.

The reason of the deposit of the amended plan and description of the said lands on the 26th March, 1920, was, as stated at bar, because the description deposited in 1917 was not considered sufficient to comply with the requirements of the Expropriation Act. The two plans are identical.

The date of expropriation will be taken, for all purposes, to be the 26th October, 1917.

The Crown has tendered and by the Information offers the sum of $66.00 as compensation for the expropriation of this right to flood the said land and for all damages resulting from the same.

The defendant by his statement in defence claims the sum of $6,500.00.

The defendant's title is admitted.

After the conclusion of the hearing of the cases of *The King* v. *A. Carufel*, under No. 3606, and *The King* v. *A. Grignon*, under No. 3609, counsel at bar, in the present case, agreed to the following admission, reading as follows, viz.:

Admission—It is hereby admitted by the defendant that all the general evidence as to value of the different classes of land in the locality in question, as testified to in the two cases (viz., No. 3606, *The King* v. *Carufel*, and No. 3609, *The King* v. *A. Grignon*) shall be common to this case.

And it is admitted by the Crown that all the evidence of a similar nature adduced on its behalf in the two above mentioned cases, shall be common to the present case, the Crown, however, undertaking to file a statement showing the particulars of how their expert witnesses have arrived at the amount of their valuation.

It is further admitted that the plan Exhibit No. 5 herein, which is the particular plan applicable to this case, will be admitted without further evidence and taken as proved.

It is also agreed between counsel for the respective parties that the evidence of Henry H. Robertson given in these two previous cases mentioned under Nos. 3606 and 3609 will be taken as also given in this case, that is according to his own view, of what would be the area of the land flooded.

To avoid unnecessary repetition, the reasons for judgment given this day by me in the case of *The King* v. *Adelard Carufel*, under No. 3606, are hereby made part hereof and more especially in respect to the general observation respecting the nature of the expropriation, the area taken and the compensation so far as applicable.

The expropriated easement in this case is in respect to .90 acre which I would allow at $50 an acre, namely, $45.00, and for the area of .75 acre I would allow as in the other cases at $5.00 an acre, namely, the sum of $3.75, making in all the sum of $48.75. The small piece of bush land affected is at the north east boundary and does not affect the farm in any way. The other

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piece of 0.90 acre affected thereby is in stump and in a deep ravine which witnesses Chester and Coutts say could not be cultivated. However, there is the other question of a small bridge over the ravine or that expropriated part, which would have to be slightly larger than before. At the northern end the bridge would be small and there is also the consideration that the northern part of lot 6 abuts on the highway. I think the additional sum of $40 should be allowed in respect of the higher degree of difficulty in communicating over these 0.90 acres, from east to west of lot 6, making in all, $88.75. The actual damage caused to the farm as a farm, the defendant has qualified as *"une bagatelle insignifiante,"* and this sum of $88.75 a very liberal compensation.

However, the substantial part of the defendant's claim is in respect to the damage to his trade and business, resulting, as he contends, from the flooding of all the neighboring farms, which has had the effect of sending the people away from that locality, injuring thereby his trade and business. The damages result in the decrease of population occasioned, as alleged, by the expropriation.

The evidence adduced discloses the opinion of witnesses that, had it not been for the flood, resulting from the dam, and sending the settlers away, the locality had quite a potential future. That, within a comparatively short time, the locality would have become quite a centre, with a church, a post office, with the result of prosperity and increase in value of property.

However, for such damage, if any suffered, the law does not recognize a right of recovery. No claim can arise in respect of an inconvenience common to the public generally. The general depreciation of property resulting from the vicinage of a public work does not

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give rise to a claim by any particular owner and much less for loss of trade or business resulting from the same cause. *The King* v. *MacArthur* (1). A number of authorities will be found in this *MacArthur case* in support of this proposition which is too well known and recognized to labour any more upon the same. See also *Cowper Essex* v. *Local Board of Acton* (2).

The defendant recovers, it is true, a somewhat larger sum than the one offered, but he fails on the main issue, on the principal element of compensation upon which the plaintiff succeeds, which is the more important claim; however, this being the case when the subject's property is taken against his will, I will set off the cost by denying costs to either party. See also *McLeod* v. *the Queen* (3).

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

1°. The right to flood the lands in question is declared vested in the Crown as of the 26th October, 1917.

2°. The compensation for the right to so flood the defendant's lands and for all damages whatsoever resulting from the said expropriation is hereby fixed at the sum of $88.75 with interest thereon from the 26th October, 1917, to the date hereof.

3°. The defendant, upon giving to the Crown a good and satisfactory title, free from all hypothecs, mortgages, and incumbrances whatsoever, is entitled to recover from and be paid by the plaintiff the said sum of $88.75 with interest as above mentioned and without costs to either party.

Judgment accordingly.

(1) 34 S.C.R., 570.
(2) 14 A.C., 153 at 161.
(3) 2 Ex. C.R., 106.

1921
June 2.

IN THE MATTER OF THE PETITION OF RIGHT OF CHARLES J. SAXE AND JOHN S. ARCHIBALD..... SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Contract — Construction — Public Buildings — Plans — Competition of Architects—Order in Council authorizing same—Board of Assessors—Power of same to alter conditions.

The Dominion Government, having need of additional departmental buildings at Ottawa, by order in council proposed a competition for architects involving the submission of preliminary designs for certain of such buildings, "the prizes being the selection of say five of the most successful competitors who would be invited to complete working plans of such of the buildings as the Minister of Public Works may prescribe, for which they would be paid each $3,000. Of these latter, the architect submitting the best working plans would be employed to carry out this work at a commission to be arranged." The order in council also provided for the appointment of three assessors to judge the preliminary designs and select the five prize-winners to prepare the working plans as above mentioned, and to ask the most successful of such competitors to prepare the working plans. The award of the assessors in both cases was to be subject to the approval of the Minister under the order in council. Advertisements were then published inviting architects to enter such competition and, assessors having been appointed, conditions were published by them for the guidance of architects in preparing their competitive designs. By these conditions the number of competitors was increased to 6 instead of 5, as provided by the order in council, and each of the five unsuccessful competitors who submitted plans was to receive an honorarium of $3,000. Plans were submitted by the suppliants, which were among the 6 sets selected. There was no approval of these plans by the Minister, and there was no competition as to final plans. The buildings were not proceeded with by the Government, owing to the breaking out of war and other reasons. Suppliants claim 1% on an estimated cost of $10,000,000 for buildings constructed on their plans.

Held, that the Crown was justified under the circumstances in not proceeding with the erection of the buildings; and that even if a contractual relationship existed the delay in proceeding did not constitute a breach thereof.

2. That the approval of the Minister of the plans was a condition precedent to the right of the suppliants to recover even the honorarium of $3,000; and that all the circumstances negatived the existence of a contract between the suppliants and the Crown to pay the percentage claimed.
3. That no action would lie against the Crown on account of the failure of the Minister to approve of the suppliants' plans, the matter being one of executive discretion.
4. As between a reasonable construction of the intention of the parties to a contract and an absurd one, the Court should be zealous to find reasons to adopt the former.
5. That the portion of the conditions prepared by the assessors which purported to change the conditions embodied in the order in council were ultra vires and void.

PETITION OF RIGHT seeking to recover $100,200.00 damages by reason of an alleged breach of contract between suppliants and the Crown.

23rd, 24th and 25th days of May, 1921.

The case was heard before the Honourable Mr. Justice Audette at Ottawa.

Eugene Lafleur, K.C., Rinfret, K.C., and *Barclay* for suppliants.

F. H. Chrysler, K.C., and *P. Chrysler,* for the Crown.

The facts are stated in the reasons for judgment.

AUDETTE J., now (June 2nd, 1921) delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of $100,200.00 as damages resulting from an alleged breach of contract between themselves and the Crown, under the circumstances hereinafter set forth.

The Crown having realized the desirability and urgent need of additional departmental buildings, in the City of Ottawa, decided, as mentioned in the order in council of the 27th February, 1912 (exhibit No. 1) to expropriate on Wellington Street for such purposes.

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After having obtained the report and plans of landscape architects with respect to laying out the grounds and indicating the position and size of the various buildings, it was decided to call, under the provisions of the order in council of the 14th April, 1913 (exhibit No. 2), a *preliminary* competition open to "architects of Great Britain and of her colonies for preliminary designs of the proposed buildings, the prizes being the selection of say five of the most successful competitors who would be invited to complete working plans of such of the buildings as the *Minister may prescribe*, for which they would be paid each $3,000. Of these latter, the architect submitting the *best working plan* would be employed to carry out the work at a commission to be arranged."

The order in council further proceeds to provide, for three assessors to judge the *preliminary designs* and select the five prize winners, who will be asked to prepare working plans from which the most meritorious would be chosen.

The award of the assessors, in both cases, is subject to the *approval of the Minister* of Public Works, as provided by the latter order-in-council and the conditions hereinafter mentioned.

Advertisements, under the signature of the Secretary of the Department of Public Works, were then issued and published inviting architects to submit sketch designs in a *preliminary competition* for the erection of departmental and courts buildings. Copies of these advertisements are filed as exhibits 3, 4, and 5, whereby, by the latter, the time for the reception of the designs in the first competition in question is extended to *April 2nd, 1914*.

The assessors then published the "General conditions for the guidance of architects in preparing competition designs," and a copy thereof is filed as exhibit No. 6 to which reference will be made in respect of several of its provisions.

It is well to lay down as a guiding principle that the assessors had in no case the right to formulate conditions beyond the scope of, or varying, the order-in-council of the 14th April, 1913, appointing them and defining their powers.

It may be well to state here that whilst the order in council provides for the selection of *five* of the most successful competitors, the conditions (item 6, exhibit No. 6) provide for *six*.

Counsel at bar for the Crown admitted that the figure six had been mentioned in the conditions and that he did not intend taking any objection to it. However that may be that admission cannot have reference to any change in the order in council, which must be held to be the foundation and only source from which the assessors derived their power and authority. This is to be said with more force, at this juncture, with respect to section 6 of the Conditions, which is in direct conflict with the order in council in respect to the payment to be made to the architects.

Indeed, the order in council provides that the *five* most successful competitors would prepare their *preliminary designs* and would be entitled to be paid $3,000 each only after completing the working plans prepared after the second competition. Then after this second competition, the best out of the five would be employed to carry out the work at a commission to be arranged. This is clearly stated and yet under clause 6 of the conditions a very material departure

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from the provisions of the order in council is readily found. This clause 6 proceeds by saying that the government has appointed the assessors "to draw up conditions, etc., . . . , and to select from the preliminary sketches, *six* designs, the authors of which are to be invited to submit final designs and each of the five unsuccessful architects submitting a design in accordance with these conditions shall receive an honorarium of $3,000."

This part of the Conditions is obviously different from the order in council which specifically provides that all the successful competitors should receive a payment of $3,000 for their preliminary designs after supplying the working plans, and furthermore that the best of them of the five, would receive his commission over and above the $3,000, thereby creating a liability of $3,000 which did not exist under the order in council.

That part which purports to change the terms of the order in council is obviously *ultra vires*, null and void, because the terms of the order in council must prevail. The provisions of the conditions varying and changing the remuneration of the successful competitor is void and inoperative, being beyond the power of both the Minister and the assessors. *The British American Fish Corporation, Ltd.*, v. *the King* (1); *The King* v. *Vancouver Lumber Company* (2); and *Belanger* v. *the King* (3).

The extended time within which the sketches might be received expired on the 2nd April, 1914. The 59 preliminary designs were submitted within the allotted time.

(1) 18 Ex. C.R. 230; 59 S.C.R. 651. (2) 17 Ex. C.R. 329; 41 D.L.R. 617; 50 D.L.R. 6.
(3) 54 S.C.R. 265.

As testified to, on the 16th April, 1914, the Minister of Public Works announced in the House of Commons that the assessors had given their decision in the first competition, while notice thereof was never given to the six successful competitors. See also exhibit No. 11 in that respect.

On the 18th April, 1914, Mr. Archibald, one of the suppliants, saw all of the 59 designs exhibited in the "East Block" at Ottawa. He at the same time saw the designs of his own firm therein exhibited, notwithstanding that clause 11 of the Conditions provided that the designs of the first competition would "be seen only by the assessors and the Honourable the Minister of Public Works and his Deputy."

While mentioning this inhibition, it might be said I am unable to realize that these successful competitors could be hurt or damaged by this publicity, because what they were to do in the final competition was to submit working plans—more matured plans—from which contractors could work, and that could be done only from the first designs respectively filed by the successful competitors.

There is no satisfactory evidence that this public exhibition would work out a disadvantage to the competitors and there is further no evidence of any protest to that step having been taken. I only mention this point casually, because I cannot see that much turns upon it, to indicate that it should not have been done, since the assessors had undertaken not to do it.

Proceeding chronologically we next find that on the 4th July, 1914, the Deputy Minister of Public Works, informs the assessor, Mr. Colcutt, in answer to inquiry, that he "understands the reason instructions were

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given to hold the matter of the new Departmental buildings competition *for the present*, is that further progress may be made by the Federal Plan Commission . . . covering Ottawa and Hull." Then, on the 20th July, 1914, Mr. Russell, one of the assessors, wrote to the Deputy, and among other things said that some of the "selected designs came from the Old Country, and that might have some bearing on the time for receiving the drawings for the final competition." In reply to that letter, the Deputy wrote, on the 6th August, 1914, stating that the designs of the six successful competitors were never returned for further development by the authors, as instructions were received to hold the matter for the present. Up to that time nothing had been done or said from which it could appear that the Crown did not intend to proceed within reasonable time with the erection of the buildings in question.

The war had then been declared.

Up to date nothing has been done in respect of the second competition, the enormous expenditure occasioned by the war having, from an indefinite time, stayed the execution of these buildings, involving the spending of several millions of dollars.

For want of proceeding with the second competition within reasonable time, the suppliants allege a breach of contract on behalf of the Crown, and claim, under the Architect's Tariff for the Province of Quebec, where they reside, for preparing and furnishing preliminary plans 1% on the estimated cost of the buildings at $10,000,000, the sum of $100,200.

If the suppliants are entitled to so recover, the other five competitors, who are in the same position, would also be entitled to recover upon the same basis. That is to say (see Exhibit 11) if the six competitors have

similar right of action, and that the cost of the building would equally be $10,000,000 and no more, that the total amount the Crown would be called upon to pay, under the advertisement calling for preliminary sketches, is the sum of $601,200 and would not at that have working plans to start the erection of the buildings in question. Can that be said to be the meaning, the spirit of the contract which resulted from such advertisement? Did that contention ever enter the head of the several contracting parties—if I may call them thus—at the time these six competitors accepted the Crown's invitation to compete?

A very large proposition indeed and a very extraordinary contention under the circumstances, which would operate harshly and unfairly.

When there is an offer of reward for the supply of a specific piece of information, the offerer clearly does not mean to pay many times over for the same thing. Anson on Contract, 3rd Ed. 67. And again at p. 65 et seq, Anson says: "The offer, by way of advertisement, of a reward for the rendering of certain services, addressed to the public at large, becomes a contract to pay the reward so soon as an individual renders the services, but not before.

"To hold that any contractual obligation exists before the services are rendered, would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or, as it has been expressed, that a man may have a contract with the whole world."

"While it is true there is a technical legal distinction between an exception and a reservation, it is also true that whether a particular clause in a deed will be considered an exception or a reservation depends, not

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so much upon the words used, as upon the nature of the right or thing excepted. In each case the equities of all parties must be considered in arriving at the intent of the deed." *Delano* v. *Luedinghans* (1).

If in the light of the evidence an absurd result would be arrived at by adopting a certain construction, the court must be zealous to reach another conclusion by a reasonable and sensible construction of the intentions of the parties to the instrument. *Yates* v. *the Queen* (2).

Under such circumstances, the Court is entitled and indeed bound, to look at the whole matter from this point of view that, if there is a reasonable and sensible construction of this alleged contract, and also an absurd one, the Court should lean to the reasonable and sensible construction apart from anything else.

I am glad to say that the solution of the controversy can be readily arrived at from a legal standpoint.

Under the order in council 14th April, 1913 (ex. No. 2)—(and its provisions must prevail against the Conditions prepared by the assessors who derived their power and authority thereunder)—all the five successful competitors are entitled to recover, as a prize, is $3,000, for their successful preliminary designs, after they have been completed, under the second competition, by working plans.

As a condition precedent to any one of the five (or six—liability be admitted to that extent) successful competitors for the preliminary designs, to become entitled to these $3,000, the award of the assessors "is subject to the approval of the Minister of Public Works," and under the case of *Vautelet* v. *the King* (3),

(1) 127 Pac. Rep. 198. (2) [1885] 14 Q.B.D. 648
(3) Audette's Ex.C. Practice 115.

it would be a bar to the action. And there is no evidence upon the record that the Minister has ever approved of the award or was ever even asked to do so by the suppliants. Only one of the five architects, however, could in the result be selected, and the suppliants cannot succeed because the assessors are not bound to accept their plans. *Walbank* v. *Protestant Hospital for the Insane* (1).

As a further condition precedent to any enforceable obligation arising in favour of the architect who submits the best preliminary plans (a matter which still remains undetermined) there must take place a final competition, which has never taken place, and the final plans must also have received the approval of the Minister of Public Works. No one of these two events have as yet happened.

There is still a third condition precedent in the way of the suppliants before they can recover and that is there are now six successful competitors; but if in the final competition the suppliants were ranked last, or 6th, they would be out of court entirely, because the order in council only provided for the first *five* competitors and not six, and the order in council must prevail over the conditions, and yet the rank of the suppliants among the candidates has never been determined and there is nothing to show where the suppliants stand. The assessors have no power to vary the order in council.

The conditions under which a right of action might arise do not seem to have so far been fulfilled.

All of these conditions are precedent to the existence to any legal obligation. The Court will not make any agreement for the parties but will ascertain what the agreement was.

(1) M.L.R. 7 Q.B. 166.

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The question now remaining to be decided is whether or not under the circumstances, there were reasonable grounds for not proceeding more expeditiously with the matter of the second competition and the erection of the buildings.

The Court has a right to take judicial notice of the great war which has created such an upheaval the world over, coupled with the Deputy Minister's evidence attributing that "all considerable works in Canada at present have been prevented on account of the war."

The rights of the parties upon the terms of the order in council and the Conditions are not ambiguous. By these terms it is stipulated that such compensation as is sought here is not to be paid until, *inter alia,* the second competition has taken place and that one of the five is given first rank. It establishes a moment, a time before the arrival of which he cannot ask for compensation and there is no evidence on the record establishing or indicating that the respondent, through any volition of its responsible Minister or officers, has failed to carry out the contract, if any.

The order in council and the Conditions in question supersede the ordinary rule that the architect has earned his commission when he has prepared the preliminary sketches called for by the said advertisements. Moreover, by clause 12 of the Conditions the final designs become the property of the Government without any further compensation than the $3,000 above referred to.

Coming to the question of impossibility of performance we must first distinguish the question of *possibility* of performance of a thing promised as a condition precedent to the duty of the promisor. When such performance is legally or physically impossible at the

time the promise is made, no duty arises, not even a liability to a duty. In such case the acceptance is an inoperative fact and we should say that no contract is formed. But when the impossibility arises subsequently to the acceptance, the existing liability (or conditional duty) is discharged. Anson, on contract, 427, 428. Pollock on Contract, 8th Ed. 437, 439, and 442.

It may be said, *en passant*, that there can be no order for specific performance against the Crown. *Clark* v. *the Queen* (1). And further, as decided in the case of *Lake Champlain* v. *the King* (2) no action will lie to compel the Crown to approve plans which had, by Parliament been made subject to such approval before works would be started, the matter being discretionary.

Counsel at bar, on behalf of the Crown, contended in effect that the suppliants had a right, after a reasonable delay of inaction, to free themselves of the obligation resulting from the Conditions of the competition, and that the Crown had the right in respect thereto, when the suppliants had done so, to consider the contract, if any enforceable, at an end. The contract would cease and be at an end without any breach and the parties would therefore be discharged from any further performance in respect thereto. He cited *Thomas* v. *the Queen* (3); *The Darley Main Colliery Company* v. *Mitchell* (4); *Windsor & Annapolis Ry. Co.* v. *the Queen* (5); *Krell* v. *Henry* (6); *Chandler* v. *Webster* (7); *Churchward* v. *the Queen* (8); *Kelly* v. *Sherlock* (9); *Metropolitan Water Board* v. *Dick et al* (10).

(1) 1 Ex. C.R. 182.
(2) 16 Ex.C.R. 125, 54 S.C.R. 461.
(3) L.R. 10 Q.B. 31.
(4) [1886] 11 A.C. 133.
(5) [1886] 11 A.C. 607.
(6) [1903] 2 K.B. 740, 756, 760, 761.
(7) [1904] 1 K.B. 493, 497, 499, 500.
(8) L.R. 1 Q.B. 173, 201 et seq.
(9) L.R. 1 Q.B. 695.
(10) [1918] A.C. 119; [1917] 2 K.B. D. 1, 3, 22.

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All of this contention would seem to be borne by the obvious jurisprudence applicable under the circumstances of this case. The law comes to the rescue of the facts.

Furthermore, the Crown sets up the defence that under the Public Works Act and the facts of the case, the Minister has not *inter alia*, so far the power to proceed with the erection of the buildings. No such authority had ever been given him and that therefore the time for the payment of a commission, as claimed, has never arisen.

While the principles of the English law of contracts which had become so clearly settled during the last century as the result of enlightened judicial decision and scholarly research on the part of text-writers, bringing, may I say, those principles more and more in harmony with the civil law—have been necessarily strained by the extraordinary economic and industrial conditions growing out of the great war of 1914-1918, yet it is a matter of gratification to those who have an abiding faith in the stability of the law as a means of safe-guarding the State to recognize that there has been no real unsettlement of or departure from fundamental legal principles in matters of contract.

It has been argued on behalf of the suppliants that an implied contract on behalf of the Crown must be read, in the documents in question whereby the Crown had to erect these buildings within reasonable time and has failed to do so. Is there not, on the contrary, an implied contract introducing within these documents, some tacit condition in cases when the impossibility of performance arises? The respective ability to perform is a tacit condition which must be read into the contract; because the law implies exceptions and conditions that are not necessarily expressed.

A contract like the present for *personal services* which can only be performed during the lifetime of the party is obviously subject to the implied condition that he shall be alive to perform and his heirs and assigns would not be responsible in damages for the non-performance resulting therefrom. Ergo, logically reasoning in respect of the position of the Crown, under the present contract, circumstances unforeseen to both parties, have arisen that makes it unexpectedly burdensome and even impossible to perform on account of the war and from the delay in performance, justifiable under the circumstances, a breach of contract does not arise. The suppliants have a right, after reasonable delay, to be discharged from their obligation of performance, and that the contract be declared at an end and to be taken as having ceased to be operative as between the parties thereto with respect to further steps thereunder, if they see fit. And neither the suppliants nor the Crown can force the execution of their respective obligations under the present conditions and circumstances. The contract ceases to exist as between them.

I find that the Crown was and is absolutely justified in not proceeding to the erection of the buildings in question, a construction which would involve an expenditure of several millions of dollars when our Canadian Exchequer is now overburdened with the debts occasioned by the late iniquitous war. These circumstances operate as an impossibility of performance and I so find under the numerous authorities cited herein and that the suppliants are only entitled to recover the sum of $3,000 offered them by the Crown's statement in defence.

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The conditions of trade and finance have been so much altered by the war and its result that it must be found that the Crown did not act unreasonably in delaying the erection of the buildings in question—it is an urgent national necessity to delay such work. *North Metropolitan Electric Power Supply Co.* v. *Stoke Newington Corporation* (1); *Crown of Leon* v. *Lord Commission of the Admiralty* (2); See *Metropolitan Water Board* v. *Dick* (3); *Bank Line, Ltd.*, v. *Arthur Capel & Co.* (4); *Smith* v. *Beck et al* (5); *Blackburn Bobbins Co., Ltd.*, v. *Allan & Sons* (6) and cases above cited.

Under articles 1071 and 1072 C.C.P.Q. a debtor is excused of liability when the inexecution of an obligation proceeds from a cause which cannot be imputed to him or which is the result of a fortuitous event or by irresistible force without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract. The non-fulfilment of the conditions and order in council has not been caused by the act of the Crown.

The plea of prescription has been waived by the Crown, as will appear by the order in council of the 2nd April, 1919, filed herein as exhibit C; however, it also appears from exhibit 14, that the Petition of Right was lodged with the Secretary of State, as provided by sec. 4 of the Petition of Right Act, during the month of May, 1916. It was time and again held by this Court that the lodging of the petition of right, pursuant to the requirement of the Petition of Right Act interrupted prescription from that date.

(1) [1921] 1 Chy. 455.
(2) [1921] 1 K.B. 595.
(3) [1918] A.C. 119.
(4) [1919] A.C. 435.
(5) [1916] 2 Chy. 86.
(6) [1918] 2 K.B. 467.

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The suppliants are not entitled to any portion of the relief sought by their petition of right; but through the benevolence of the Crown expressing its willingness to pay them $3,000, there will be judgment accordingly. The Crown obviously succeeds on the issue whereby the Petition of Right claims $100,200 and the suppliants recover these $3,000, which are almost equal to a solatium under the circumstances.

The offer to pay $3,000, which is the amount the successful competitors in the first competition are all entitled to receive after they have supplied working plans under the second competition—is made by the statement in defence and it should carry costs to the suppliants up to that stage of the case.

Therefore, there will be judgment adjudging that the suppliants are entitled to recover the said sum of $3,000, with costs up to the stage of filing defence. All other claims set up by the suppliants are dismissed without costs to either parties.

Judgment accordingly.

1921
May 3.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

ALBERT HYE.....DEFENDANT.

Expropriation—Litigious right—Compensation.

By reason of the erection of the Quinze Lake Dam, and the consequent raising of the level of the water in the lake, parts of certain properties in the neighbourhood were flooded.

The Crown expropriated the right to so flood these properties including the one in question herein, which at the time of the expropriation belonged to one V. Subsequently, (November 1st, 1918) V. sold the property to H. together with V's right to recover the compensation from the Crown for all damages caused him by said flooding and by the expropriation. The Crown exhibited an information acknowledging liability and seeking to have the amount of the compensation fixed, and made H. the defendant.

Held: That the assignment from V. to H. was not an assignment of litigious rights; and that, on the facts, H. was entitled to recover compensation for damages to his said land by flooding, and by the expropriation of the easement to flood.

Olmsted v. *the King*, 53 S.C.R. 450 distinguished where the action was one sounding in tort.

INFORMATION exhibited by the Attorney-General for Canada to have the easement and right to flood certain lands expropriated under the Expropriation Act valued by the Court.

March 23rd, 1921.

Case was begun before the Honourable Mr. Justice Audette, at Haileybury, and on April 22nd, 1921, was concluded at the city of Ottawa.

R. V. Sinclair, K.C., and Louis Cousineau, for plaintiff.

E. B. Devlin, K.C., and J. W. Ste Marie, K.C., for defendant.

The facts are stated in the reasons for judgment.

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AUDETTE J. now (May 3rd, 1921) delivered judgment.

This is an Information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the right to flood the land described in the information, and belonging to the defendant, was, under the provisions of the Expropriation Act, taken and expropriated, for the purposes of the construction and operation of the Quinze Lake Dam and Reservoir, a public work of Canada, by depositing, both on the 26th October, 1917, and the 26th March, 1920, plans and descriptions, of the said lands, in the office of the Registrar of Deeds for the County or Registration Division of the County of Temiscaming.

The reason of the deposit of the amended plan and description of the said lands on the 26th March, 1920, was, as stated at bar, because the description deposited in 1917 was not considered sufficient to comply with the requirements of the Expropriation Act. The two plans are identical.

The date of expropriation will be taken, for all purposes, to be the 26th October, 1917.

The Crown has tendered and by the Information offers the sum of $105.50 as compensation for the expropriation of this right to flood the said land and for all damages resulting from the same.

The defendant by his statement in defence claims the sum of $2,000.00.

The defendant's title is ad nitted.

After the conclusion of the hearing of the cases of *The King* v. *A. Carufel*, under No. 3606 and *The King* v. *A. Grignon*, under No. 3609, counsel at bar, in the present case, agreed to the following admission, reading as follows, viz.:

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Admission—It is hereby ad nitted by the defendant that all the general evidence as to value of the different classes of land in the locality in question, as testified to in the two cases (viz., No. 3606, *The King* v. *A. Carufel*, and No. 3609, *The King* v. *A. Grignon*) shall be common to this case.

And it is admitted by the Crown that all the evidence of a similar nature adduced on its behalf in the two above mentioned cases, shall be common to the present case, the Crown, however, undertaking to file a statement showing the particulars of how their expert witnesses have arrived at the amount of their valuation.

It is further admitted that the plan Exhibit No. 5 herein, which is the particular plan applicable to this case, will be admitted without further evidence and taken as proved.

It is also agreed between counsel for the respective parties that the evidence of Henry H. Robertson given in these two previous cases mentioned under Nos. 3606 and 3609 will be taken as also given in this case, that is according to his own view, of what would be the area of the land flooded.

At the date of the expropriation the lands in question belonged to one Vien, who, on the 1st November, 1918, sold the same to the present defendant, as it then stood, with the right to recover from the Crown the compensation for the flooding of the said lands.

Counsel at bar, on behalf of the Crown, contended that, under the case of *Olmsted* v. *The King* (1), a claim for damages arising out of flooding of land cannot be transferred or assigned. However, the present case does not come within the ambit of *Olmsted* v. *The*

(1) 53 S.C.R. 450.

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THE KING v. HYE.

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King, (*ubi supra*) where the action was one sounding in tort. The assignment of such a claim would be in the nature of an assignment of litigious rights. What is sought to recover herein, is the compensation for the easement of flooding that the Crown has expropriated, and in which the information, acknowledging liability, seeks to have the amount of compensation duly fixed, under the provisions of the Expropriation Act.

It is not a case which can be qualified as one involving litigious rights, in the true acceptance of such terms. It is a case flowing from the right and interest that a subject has in a property compulsorily taken and in respect of which the Crown admits liability, and the plaintiff does not suffer as a result of such mutation of property. *Neville* v. *London and Express Newspapers, Ltd.* (1). The rights and interests expropriated are appurtenant to real estate, and for which the right to compensation is recognized both by the deposit of the plans and description and by the information herein. And the compensation money for such rights and interests is, by sec. 22 of the Expropriation Act, converted by mere operation of law, into a claim to the same. *Re Lucas & Chesterfield Gas and Water Board* (2).

It is not the case of a property changing hands after the entire fee has been expropriated. The expropriation is limited to an easement to flood over bench mark 866, which left Vien, the defendant's predecessor in title, as the owner of the land itself, even after the expropriation. The land has not been expropriated and therefore the property never became *extra commercium*. *Lamontagne* v. *the King* (3). Vien had a perfect right to sell his property under the circum-

(1) 35 T.L.R. 167. (2) [1909] 1 K.B. 16.
(3) 16 Ex. C.R. 203, at 211.

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stances, even after the easement had been expropriated, and as his assignee has been brought into Court by the Crown in these proceedings, I see no reason why the compensation should not be paid to him. The compensation for this easement has never been satisfied and the right and interest thereto can be assigned, as distinguished from a litigious right as mentioned in the *Olmsted case.*

To avoid unnecessary repetition, the reasons for judgment given this day by me in the case of *The King* v. *Adelard Carufel,* under No. 3606 are hereby made part hereof and more especially in respect to the general observation respecting the nature of the expropriation, the area taken and the compensation so far as applicable.

The expropriation of the easement is with respect to 21·10 acres, of which 1½ acre under cultivation and the balance 19·60 in bush land. For the 1½ acre under cultivation I will allow at $60 an acre, the sum of $90.00; for the 19·60 at $5, $98.00; for the 7·15 acres that *enclavés.* isolated from rest of farm by the severance, at $5 an acre, $35.75.

His communication to the east of his farm resulting from the severance of this 7·15 is also a serious matter and for that element of compensation and for the difficulty arising from the want of a bridge and the extra expenses in fencing I will allow, as covering also all elements of compensation, the further sum of two hundred dollars, making in all the sum of $423.75 as a just and fair compensation under the circumstances.

Counsel at bar, on behalf of the Crown, has laid stress on the fact that as this farm changed hands for the sum of $250, that this sale should be used as a criterion of the value of land in that neighbourhood.

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He also pressed, on the argument of the 18 other cases, that in fixing the compensation therein the present sale should be taken into consideration. I am unable to accede to this view for the obvious reason that the defendant's evidence in the present case is not common to the other cases, but is limited to the present one. It is the opinion evidence of witnesses on both sides only that is common to all these cases. Moreover, the sale in question took place after the property had been damaged and when settlers were leaving that part of the country, as established by general evidence.

Therefore there will be judgment as follows, viz.:

1°. The right to flood the lands in question is declared vested in the Crown as of the 26th October, 1917.

2°. The compensation for the right to so flood the lands in question and for all damages whatsoever resulting from the said expropriation is hereby fixed at the total sum of $423.75 with interest thereon from the 26th October, 1917, to the date hereof.

3°. The defendant, upon giving to the Crown a good and satisfactory title, free from all hypothecs, mortgages and incumbrances whatsoever, is entitled to recover from and be paid by the plaintiff the sum of $423.75 with interest as above mentioned and costs.

Judgment accordingly.

1921
May 3.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

ZEPHIRIN MOREAU.....DEFENDANT.

Expropriation—Improvement on property subsequent to notice thereof—Compensation.

Held: Where a person, notwithstanding that he was fully aware of the expropriation of part of his land by the Crown, continues to erect a building thereon, he does so at his own risk and peril, and must assume the consequences of his act; and in such a case, the court should not allow him any compensation for anything done after the expropriation.

Chambers v. *London, Chatham & Dover Ry.* (1863) 8 L.T. 235; *The King* v. *Thompson*, 18 Ex. C.R. 23; and *The King* v. *Lynch's, Limited*, 20 Ex. C.R. 158, referred to.

INFORMATION exhibited by the Attorney-General for Canada to have the easement and right to flood certain lands expropriated under the Expropriation Act valued by the Court.

March 23rd, 1921.

Case was begun before the Honourable Mr. Justice Audette, at Haileybury, and on April 22nd, 1921, was concluded at the city of Ottawa.

R. V. Sinclair, K.C., and Louis Cousineau, for plaintiff.

E. B. Devlin, K.C., and J. W. Ste. Marie, K.C., for defendant.

The facts are stated in the reasons for judgment.

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Reasons for Judgment.

Audette J.

AUDETTE J. now (May 3rd, 1921) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the right to flood the land described in the information and belonging to the defendant, was, under the provisions of the Expropriation Act, taken and expropriated for the purposes of the construction and operation of the Quinze Lake Dam and Reservoir, a public work of Canada, by depositing, both on the 26th October, 1917, and the 26th March, 1920, plans and descriptions of the said lands in the office of the Registrar of Deeds for the County or Registration Division of the County of Temiscaming.

The reason of the deposit of the amended plan and description of the said lands on the 26th March, 1920, was, as stated at bar, because the description deposited in 1917 was not considered sufficient to comply with the requirements of the Expropriation Act. The two plans are identical.

The date of expropriation will be taken, for all purposes, to be the 26th October, 1917.

The Crown has tendered and by the Information offers the sum of $1,394.75 as compensation for the expropriation of this right to flood the said land and for all damages resulting from the same.

The defendant by his statement in defence claims the sum of $7,000.00.

The defendant's title is admitted.

After the conclusion of the hearing of the cases of *The King* v. *A. Carufel*, under No. 3606, and *The King* v. *A. Grignon*, under No. 3609, counsel at bar, in the present case, agreed to the following admission, reading as follows, viz.:

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Admission—It is hereby admitted by the defendant that all the general evidence as to value of the different classes of land in the locality in question, as testified to in the cases (viz., No. 3606, *The King* v. *A. Carufel*, and No. 3609, *The King* v. *A. Grignon*) shall be common to this case.

And it is admitted by the Crown that all the evidence of a similar nature adduced on its behalf in the two above mentioned cases, shall be common to the present case, the Crown, however, undertaking to file a statement showing the particulars of how their expert witnesses have arrived at the amount of their valuation.

It is further admitted that the plan Exhibit No. 5 herein, which is the particular plan applicable to this case, will be admitted without further evidence and taken as proved.

It is also agreed between counsel for the respective parties that the evidence of Henry H. Robertson given in these two previous cases mentioned under Nos. 3606 and 3609 will be taken as also given in this case, that is according to his own view, of what would be the area of the land flooded.

To avoid unnecessary repetition, the reasons for judgment given this day by me in the case of *The King* v. *Adelard Carufel*, under No. 3606, are hereby made part hereof and more especially in respect to the general observations respecting the nature of the expropriation, the area taken and the compensation so far as applicable.

The flooded area is admitted.

For the 64·85 acres of bush land affected herein, an allowance of $5 will be made, namely..... $ 324 25

For the 9·28 acres under cultivation $60 an acre will be allowed.....	558 80
Now the total area of the farm is 91 acres out of which the Crown will now flood 74·15, leaving a balance of 16·85 acres of which 12·13 is under cultivation and 4·74 would be rock.	
The property has been destroyed as a farm and cannot now be used as such. For the damages to 12·13 acres under cultivation $50 an acre will be allowed (as allowed by the Crown's valuation).....	606 50
and for the balance of 4·74 the sum of $5 an acre.....	23 70
as when the defendant purchased the farm, he paid under a measurement including these 4·74 acres—at any rate, I presume so—as it would be done in ordinary cases.	
In the autumn of 1916 the defendant started building a house and before the expropriation, he had already dug a cellar and built the basement, including the flooring of the ground flat and for that expenditure I will allow.....	175.00
	$ 1,788.25

He further claims for the building which he continued to erect in face of the expropriation, which was well known to him. He therefore did so at his own risk and peril and by creating a new residence thereon, he assumed the full responsibility of such a course and its consequences, thus waiving in advance any right to complain in respect of the same. *Chambers*

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v. *London, Chatham and Dover Ry. Co.* (1); *The King* v. *Thompson* (2); *The King* v. *Lynch's, Limited* (3).

There will be judgment as follows, viz.:

1°. The right to flood the lands in question herein is hereby declared vested in the Crown as of the 26th October, 1917.

2°. The compensation, for the right to so flood the defendant's land and for all damages resulting from the expropriation, is hereby fixed at the sum of $1,788.25 with interest thereon from the 26th October, 1917, to the date hereof.

3°. The defendant, upon giving to the Crown a good and satisfactory title, free from all hypothecs, mortgages, and incumbrances whatsoever, is entitled to recover from and be paid by the plaintiff the said sum of $1,788.25 with interest as above mentioned and costs.

Judgment accordingly.

(1) [1863] 8 L.T.235, 11 W.R. 479. (2) 18 Ex. C.R. 23.
(3) 20 Ex. C.R. 158.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1921
April 26.

THE OWNER, MASTER AND CREW OF GAS BOAT *THE FREIYA*..... PLAINTIFF;

v.

THE GAS BOAT, *R.S.*..... DEFENDANT.

Shipping—Fishing Industry—Custom—Proof of—Salvage

On the 29th July last, the *R.S.*, a fishing boat chartered by and engaged in fishing for the G.C. Cannery Company went adrift in Knight Inlet, B.C.

The *Freiya* was owned by one C. and was at the time engaged in buying fish from the same Company and others and taking it to market, and claims for alleged salvage services rendered the *R.S.* when adrift as aforesaid.

The *R.S.* alleged that there existed a long established custom in these waters that all vessels engaged in the fishing industry afford to each other in the common interest and for their joint benefit voluntary and gratuitous assistance to crews and vessels in distress in any of the frequent accidents which are incidental to vessels of various descriptions engaged in that industry, and that this mutual assistance is not confined to the vessels attached to or employed in connection with the various canneries, but accidents to those which carry on independently the fishing business in its various aspects.

Held: That the above custom has been sufficiently established with reasonable certainty as being so notorious and generally acquiesced in that it may be presumed to have been known to all persons engaged in that industry who sought to inform themselves on so important a matter as it was incumbent upon them to do in working under local conditions.

2. That such a custom was in the interest of humanity and industry, was not unreasonable and could be successfully invoked in favour of the *R.S.*; and that in consequence the present action should be dismissed.

ACTION by plaintiff against defendant to recover for salvage services rendered to defendant by the plaintiff ship.

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Reasons for Judgment.

Martin L.J.A.

April 9th and 11th, 1921.

Case was tried before the Honourable Mr. Justice Martin, at Vancouver.

D. M. Hossie, for plaintiff.

E. C. Mayers, for defendant.

The facts are stated in the reasons for judgment.

MARTIN L. J. A. now (April 26th, 1921) delivered judgment.

This is an action for salvage of the gas fishing boat *R.S.* in Knight Inlet on the 29th of July last. The boat was chartered by the Glendale Cove Cannery Company and engaged at the time in getting fish for the cannery. The power boat *Freiya* is owned by one Carson and she was engaged at the time in buying fish from the Glendale Cannery and others and taking it to market at Seattle, or as might be. She had been at the cannery in question for some days before and after the accident of the *R.S.*, buying and loading fish from the Company and she claims an award for alleged salvage service rendered to the *R.S.* when adrift in Knight Inlet as aforesaid.

The first defence set up is one of much importance to those engaged in the fishing industry on this Pacific Coast of British Columbia, and it is that there is a long-established custom in these waters that all vessels engaged in the fishing industry afford to each other in the common interest and for their joint benefit voluntary and gratuitous assistance to crews and vessels in distress in any of the frequent accidents which are incidental to vessels of various descriptions engaged in that industry, and that this mutual assist-

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ance is not confined to the vessels attached to or employed in connection with the various canneries, but accidents to those which carry on independently the fishing business in its various aspects. Obviously there cannot be anything unreasonable in such a custom as it is both in the interests of humanity and industry, but on the contrary everything is in favour of it to one at all familiar with the waters of this Province and the conditions in general under which fishing operations are carried on and so the only other aspect of the question is has the custom been sufficiently established with reasonable certainty as being so notorious and generally acquiesced in that it may be presumed to have been known to all persons engaged in that industry who sought to inform themselves on so important a matter as it was incumbent upon them to do in working under local conditions.

After careful consideration of the evidence, I am satisfied that the defendant vessel has discharged the burden imposed upon it in that respect and, indeed, it is confirmed in its submission by the evidence of Carson, the owner of the plaintiff ship, whose cross-examination upon this point was unsatisfactory and he attempted to evade it by saying that he was not sufficiently interested to inquire into the existence of such a custom, though the evidence shews that there were special reasons why he should have done so.

In *Wright* v. *Western Can. Accident Co.* (1), I decided there was a custom in Victoria in the building trade to make allowance for the extra cost occasioned by the discovery of unexpected rock encountered in excavation work, and there is a note-worth case in connection with the fishing industry which supports my view. I refer to *Noble* v. *Kennoway* (2) a decision of Lord

(1) (1914), 20 B.C.R., 321 at 328. (2) (1782), 2 Doug. 510.

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Mansfield relating to the Labrador Fishery, wherein it was decided that if a policy on fishing vessels in terms expressed only twenty-four hours after their arrival for the discharge of cargo, yet by the custom of Labrador Fishery the liability of the underwriters was extended to cover a period of several months, within which the cargo or part thereof was kept on board, which custom was alleged to be in accordance with the trade on that coast. The custom there was proved by witness who had never been in Labrador and it was supported by evidence given as to the similar custom in Newfoundland, where the fishing trade had long been established, though the new trade of Labrador had only been opened up since the Treaty of Paris for a period of three years. Lord Mansfield said, p. 513:

"Every underwriter is presumed to be acquainted with the practice of the trade he insures and that whether it is established or not. If he does not know it he ought to inform himself. It is no matter if the usage had only been for a year. This trade has existed and has been conducted in the same manner for three years. It is well known that the fishery is the object of the voyage and the same sort of a fishery is carried on the same way at Newfoundland. I still think the evidence on that subject was properly admitted to show the nature of the trade. The point is not analogous to a question concerning a common law custom."

The other justices concurred with Lord Mansfield, Mr. Justice Buller adding that there was sufficient evidence to support the custom "without" calling in aid the usage in the Newfoundland trade, and that he was of the opinion that such evidence was admissable in order to prove the reasonableness of the custom in Labrador.

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In the case at bar, I have before me the evidence of reputable persons on the ground, who speak with reasonable certainty from their personal experience, and knowledge of these waters for many years, and I have no doubt that if it had been the *Freiya* which had the misfortune to be the victim of an accident at the time in question, she would have invoked (and successfully) in her own favour the benefit of the custom which I now decide exists in favour of the *R.S.*

Such being the view I have taken of the case, it is not strictly speaking necessary to go into the question of the alleged salvage service, or decide the nice point as to whether it should in the most favourable light be regarded as nothing more than towage, and I think it now desirable to say that if the services can be regarded as salvage, it would only be so in a technical sense, and the amount awarded would be so small that it would be difficult in the stress and in the absence of necessary evidence as to the set of the tide, to distinguish it in practice from what would be allowed as towage, in which service the *Freiya* was of the greater assistance. Upon evidence I would not find that the loss of the fish on the *Freiya* was due to the services rendered, whatever they were.

I make observations because of the objection that has been taken to the extravagant amount of the claim, viz., $6,000.00, for which the ship was arrested, and though the plaintiff's solicitor subsequently agreed to bail being given for half that amount, yet it was so extravagant and oppressive that I call attention to my observations in *Vermont S.S. Co.* v. *The Abbey Palmer* (1), and *Grand Trunk Pacific Coast SS.*

(1) [1904] 8 Ex. C.R. 462.

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Co. v. *B.B.* (1), on the impropriety of that course, i.e., forcing upon owners the always onerous and sometimes impossible burden of furnishing large bail. See also *The Freedom* (2), wherein it was said: "The Court has always discouraged the instituting of suit for an excessive amount."

It follows that the action should be dismissed with costs.

Judgnemt accordingly.

(1) [1914], Mayers Admiralty Practice 544. (2) [1871] L.R. 3 A. & E. 499.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1921
April 26.

ROSS R. *PEERS*, AND OTHERS.....PLAINTIFFS;

v.

THE SHIP *TYNDAREUS*.....DEFENDANT.

Shipping and Seaman—Towage—Collision—Negligence—Unsuspected obstruction to the view—Lights—Judicial observation.

On the 15th August, 1920, about 1.00 a.m. off Port Atkinson, B.C., the S.S. *Tyndareus*, a large ship collided with a crib, in tow of the tug *Alcedo*.

The crib was 90 feet long and 40 feet wide and stood about 15 feet out of water at the top of the shingle bolts, and was about 600 feet astern of the tug. The weather was calm and the night clear, but dark and hazy with a low-lying cloud bank of smoke in places which might conceal one vessel from another at water level. The tide was nearly slack on the ebb, at the point of collision. The *Alcedo* was proceeding east at about one knot an hour, when the *T* suddenly appeared on her quarter 25 yards from the *Crib* into which she crashed before anything could be done to avoid collision.

No signals were given by either vessel, and neither changed their course or speed.

Both vessels were displaying proper lights and bright look-outs were kept.

Held: 1. That, on the facts, the defendant was not guilty of any negligence; the collision being due to the vessels not discovering each other in time, because of the unsuspected obstruction to the view caused by the low-lying smoke cloud aforesaid, or to the entire absence of, or inadequate, lights on the *Crib*.

2. *Judicial Observation:*—That the light on a boom or crib being towed should be of at least the same visibility as a ship's white light (5 miles,) as required by Article 2 (a) of the Sea Regulation for "Bright white lights" in general, if not indeed of greater visibility behause of its lying so much nearer to the water.

ACTION to recover damages due to collision between the ship *Tyndareus* and the tow of the *Alcedo* off Port Atkinson, B.C.

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Martin L.J.A.

February 4th, and 7th, 1921.

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

E. C. Mayers and *R. M. Maitland*, for plaintiff.

E. A. MacDonald. K.C., and *A. C. DesBrisay*, for defendant.

The facts are stated in the reasons for judgment.

MARTIN L. J. A. now (April 26th, 1921) delivered judgment.

This is a collision action to recover damages against the S.S. *Tyndareus* (length 535 feet; tonnage *circ*, 14,000; E. B. Francis, master) for the loss of a crib with shingle bolts off Point Atkinson, which was being towed by the tug *Alcedo* (John A. Seeley, master) towards Prospect Bluff, about 1 a.m. on the 15th August last. The weather was calm and the night was clear but dark and hazy from smoke in places towards the north shore of English Bay, and the tide at the point of collision was nearly slack on the ebb. The crib which was 90 feet long, 40 feet wide, and stood about 15 feet out of water at the top of the shingle bolts, was being towed about 575-600 feet astern of the tug, and it is alleged that while the *Alcedo* was proceeding on a course east magnetic at a rate through the water of one knot an hour, a large ship (the *Tyandareus*) suddenly appeared on her port quarter about 25 yards from the crib into which she crashed before anything could be done to avoid the collision. No signals were given by either vessel nor did either of them change her course or speed till after the collision. The *Tyndareus* contends she was on a true west course to clear Port Atkinson, *en route*

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Reasons for Judgment.

Martin L.J.A.

for Union Bay, at a speed of something over twelve knots, and her story in brief is that despite a bright look out, both forward and from the bridge, she saw nothing to indicate the presence of a vessel in dangerous proximity and there was no light near her except one white light, first noticed about half way between Prospect Bluff and Point Atkinson, about half a point on her port bow which she later took to be the stern light of a small steamer heading in a southerly direction, and shewing no other lights, and that this was the apparent state of things for 8 minutes before the collision, when suddenly, just before the impact, the vessel ahead swung round till she shewed her port light forward of the port beam of the *Tyndareus* which passed the vessel but ran into the crib beyond her which could not be seen and had no light upon it. It is obvious that if the two accounts of the courses taken are correct there could have been no collision, and the case, apart from the important question of the adequacy of the light on the crib, really comes down to a question of fact upon very conflicting evidence.

It is a strange case and has occasioned me much difficulty because I am satisfied that each vessel had the proper lights displayed and it seems incredible that if they were on the courses alleged they could not have seen one another in ample time to avoid a collision, unless they were temporarily obscured from view by a low-lying cloud bank of smoke coming imperceptibly from the north shore, smoke from that quarter being spoken of by the signal operator at Prospect Bluff from which elevation of 250 feet he could easily see the outstanding high light at Point Atkinson and yet vessels at water level might be concealed from one another by such a smoke cloud as aforesaid.

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I have no doubt whatever that a bright look-out was kept on the *Tyndareus* to which at least 5 creditable witnesses have testified, nor have I reason to doubt the statement of the mate of the *Alcedo* to the same effect. I am inclined to think, however, that the light on the crib had by some means become extinguished or dislodged so as to become invisible from the *Tyndareus*, very shortly before the collision, the evidence, both positive and negative, of several witnesses on the *Tyndareus* that there was no light on the crib at the time of the impact is almost irresistible. But if it had been burning I am not satisfied that it was sufficient for the purpose, having in mind my observations on the point in *Paterson Timber Co.* v. *S.S. British Columbia* (1). Here the light was only an ordinary cold blast lantern with a visibility of "about two and a half or three miles," which I do not think conveys that reasonable intimation of the true state of affairs" that I held was necessary in the *Paterson case* as a matter of good seamanship and safe navigation apart from any regulation on the subject of boom or crib lights. (I pause here for a moment to express my regret that nothing has yet been done to regulate such lights though the necessity for it was pointed out at p. 90 of said case, and the present action confirms my observations). In the case at bar I cannot help thinking that the accident might well have been avoided if there had been a light on the crib of the same visibility, 5 miles, as that required by Art. 2 (a) for "Bright white lights" in general. I can see no good reason why a boom or crib light should not be of the same visibility as a ship's white light;

(1) (1913), 18 B.C.R. 86.

indeed, there is more reason why it should be of greater power, if anything, because of its lying so much nearer the water, with a consequent reduction in visibility.

As to the submission that if the tug is to be considered as an overtaken ship then Art. 24 requires the overtaking vessel to "keep out of the way," I am unable to find that in fact the *Tyndareus* was an overtaking vessel, though she thought she was for a time; and then she did in fact clear the tug but ran into the boom the existence and position of which she was unaware for reasons which I am unable to find were negligent on her part. There is in my mind uncertainty about the position of the tug and I am inclined to think she was not where her mate and master have deposed to, but probably drifted laterally with the tide, while going at so slow a speed, in an imperceptible manner. As to the position of the *Tyndareus* I can entertain no doubt in view of the cross-bearing taken just after the collision, viz., one mile south from Point Atkinson.

On the whole case, without attempting to state more than in outline the principal facts which have engaged my prolonged consideration and re-consideration (having found it indeed one of the most perplexing and difficult in all my experience) I can only come to the conclusion that I am unable to find the *Tyndareus* guilty of negligence and therefore the action against her must be dismissed. In so doing I feel bound to say, in the unusual circumstances, that I do not wish it to be understood that I doubt the integrity of the witnesses on behalf of the *Alcedo;* indeed, I am glad to be able to say that I was much and pleasantly impressed by the evident sincerity and good faith of

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the witnessess on both sides, and I am satisfied that, except as to the boom light, every reasonable precaution was taken that good seamanship suggested, and yet, despite the assistance of able counsel on both sides, who conducted their respective cases exceptionally well, and expeditiously, I am unable to understand how each of these vessels failed to discover the true position of the other in due time, unless it was because of the unsuspected obstruction to the view caused by the low-lying smoke cloud already referred to. It follows therefore that judgment should be entered in favour of the defendant ship and the costs will follow the event as usual.

Judgment accordingly.

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

1921
June 27.

POINT ANNE QUARRIES, LIMITED (PLAINTIFF)..... } RESPONDENT;

AND

THE SHIP *M. F. WHALEN* AND THE OWNERS THEREOF (DEFENDANTS) } APPELLANTS.

Towage—Negligence—Efficient equipment—Limitation of Liability—Onus of Proof—Contract reformed—Appeal.

Held (by the trial Judge): In a contract for towage there is an implied contract that the tug or ship towing shall be efficient and properly equipped for the service.

2. A contract may be re-formed in a case where it is admitted that by inadvertence certain terms agreed upon were omitted.

3. The provisions of R.S.C. 113, s. 921 (d) relating to limitation of liability apply to a towage contract, and in ordinary cases where loss has occurred without the actual fault or privity of the owners a limitation of liability is permitted; but, where the evidence discloses facts and circumstances which indicate knowledge on the part of the owners of the insufficiency of the tug or its want of capacity either in structure, equipment or in the crew provided to carry out a contract of towage, limitation of liability will not be allowed.

4. In case of loss by improper navigation the onus is cast upon the owners of showing that what occurred was due to causes which arose without their actual fault or privity or was not contributed to by those causes, and failure to satisfy that onus, prevents the application of the provisions of the statute above referred to as to limitation of liability.

Held: On appeal (Affirming the judgment appealed from) that the owners being in control of their tug and crew, and having exercised this control by a telegram to the master, reading: "Point Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it. If you can save this scow without risk to your tug do so;" thereby became privy to and partakers in responsibility with all its legal consequences in respect to all actions of the tug subsequent thereto, and there should be no limitation of the liability provided for by R.S.C. 1906, ch. 113, sec. 921.

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POINT ANNE QUARRIES LIMITED v. THE SHIP M. F. WHALEN AND THE OWNERS THEREOF.

Reasons for Judgment.

Hodgins L.J.A.

THIS was an action brought by the plaintiffs claiming damages to a scow while being towed by the defendant ship, and loss of its cargo.

The trial of the case took place before the Honourable Mr. Justice Hodgins on the 7th, 8th and 9th days of March, 1921, at Osgoode Hall.

S. Casey Wood and *G. M. Jarvis* for plaintiff.

A. E. Knox and *George Keogh* for defendant.

The facts are stated in the reasons for judgment, which follow:

HODGINS L. J. A. now (April 11th, 1921) delivered judgment.

Action claiming damages for injury to a scow while being towed by the defendant ship, a tug of 112 gross tons, from Presqu'ile to Toronto, and for the loss of its cargo. The scow originally cost $36,000.00 and was laden with 1,000 tons of stone. It was cut adrift on the night of November 11th, 1920, by order of the Master of the *Whelan*, when beyond Port Hope, in Lake Ontario. The scow then drifted down the lake and stranded near Consecon in Prince Edward County. It was agreed, that if the plaintiffs succeeded, the damages including the value of the repairs to the scow, after they were completed, were to be fixed by the Registrar in Toronto.

The cargo was valued at $1,875.00 and was a total loss.

The tug *Whelan* and scow left Presqu'ile on 11th November, 1920, at 8 a.m., and the log of the tug, as deciphered at the trial, is as follows:—

November 11th, 8 a.m. Presqu'isle. Log out. Zero. Wind south-west, light barometer 29·60. Course south-west by south.

November 11th, 9.50. Hauled course west. Log 3–¾. Wind south. Barometer 29·50. Proctor Point.

November 11th, 11 a.m. Wind changed south-west. Strong. Barometer 29·50.

6.30 p.m. Cobourg. Course south-west by west-half-west. Wind south-west. Gale. Barometer 29·10.

10.20 p.m. Let go Scow No. 2 and drifting wind west-south-west. Gale. Barometer 29·10.

11.00 p.m. Get Cobourg. Wind-bound. Wind too strong for steering. We couldn't fetch her back to the wind. Log 32¼.

November 12th. Gale south-west; too big for going outside.

November 13th, 2.30 a.m. Left Cobourg for go after the scow. Wind west.

6.10. In Presqu'isle.

6.20. Brochton's Dock. Wind south-west. Gale. Barometer 29·65.

The log is not accurate in all its details and as to part of it there was, in my judgment, a deliberate attempt to manufacture evidence. To this I will recur.

The plaintiffs and the Kirkwood Steamship Line made a contract dated October 27th, 1920, which dealt with the towage of what were denominated as the plaintiff's "barges." It appears that the owners who intervene, and whose exact status becomes material later on, were anxious to sell the *Whelan* to the plaintiffs, and this trip was to some extent a test which would in all probability determine whether or not a sale would be effected. The tug was sent to Presqu'ile and the instructions to its Master from the Kirkwood Steamship Line were that he was to get

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his orders from the plaintiffs "taking whatever is light (as stated in the contract) at this (Toronto) end, and bringing up what is loaded at the quarry end." In consequence of these instructions the tug undertook the towage of the scow and cargo in question. It is asserted that this towage was outside the scope of the contract, a point important as to the liability of the owners, but not entirely controlling responsibility for what happened in the course of the voyage.

The arguments urged on behalf of the plaintiffs were concentrated on four periods of time—on the 11th November—off Cobourg, between Cobourg and Port Hope—off Port Hope and beyond, and the whole of the day following. The charges were that negligent navigation was shown by not putting into Cobourg when off that port, in not seeking refuge in Port Hope, and in the alternative, in not turning back towards Presqu'ile during one or other of these periods. It was also asserted that the crew were both negligent, incompetent and disobedient and that the tug was not properly equipped and efficient for the work undertaken.

The tow rope was a long one, about 600 feet, and there was about 9-10 of its length out board, and the remaining tenth in board. This length of rope was given as the reason why refuge was not sought in Cobourg or Port Hope when passing there. It is a fact which is practically conceded, that the horse power of the *Whelan* was not sufficient for the task in hand, in view of the weather conditions which supervened. It fell from 140 H.P. to 100 H.P. before Cobourg was reached. This caused a consultation between the Master and the Mate of the tug, one Mailhot, as to whether it would not be safer to get into that harbour. It was decided that with the

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length of tow rope which was out, the *Whelan* could not make that port in safety, the trouble alleged being that the approach was difficult to negotiate with a heavy scow in a south west wind, and that if the harbour was reached there was no space in it of sufficient depth to allow manoeuvering so as to bring both tug and tow to anchor in safety and afloat. Having arrived at that decision the Master kept past Port Hope, the steam pressure steadily diminishing, the wind and sea increasing meanwhile. About 10 p.m., when 2½ to 3 miles beyond Port Hope, the *Whelan* began to drift back though being driven with all the steam she had. An attempt was made to turn to starboard for Port Hope. She was so light, her towing posts were so far back and her power so small that she could not be got to swing round and was unmanageable. In an endeavour then to turn to port so as to be able to return to Presqu'ile, the tow rope caught in a chock on the quarter. This accident, according to the Master's evidence, caused the tug to lose its power to turn, every effort being defeated by the awkward strain of the scow, while the diminished power, and the violence of the wind aided to prevent the tug from overcoming the drag and to bring herself into the wind and turn. In consequence of this unfortunate situation and being of the opinion that the rope could not be got out of the chock owing to the space available in which to work being so limited that a sufficient force of men could not tackle it together, and because the vessels were on a leeshore, the Master decided to cut the scow adrift, and he did so. He then turned and reached Cobourg harbour before midnight. I accept the evidence given as to the restricted space at the stern rendering it very

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difficult, if not impossible, owing to the wind and sea to get any slack on the rope at 10 p.m., so as to enable the crew to extricate it from the chock.

But I have come to the conclusion, after much consideration, that the Master of the *Whelan* cannot be absolved from negligence in navigation nor can it be said that the tug was, in the circumstances which occurred, and which might have been foreseen, adequate for the duty undertaken. While not convinced that his judgment was entirely wrong, as to the possibility of taking an unwieldly scow safely into Cobourg Harbour, I have no doubt that the situation at that time—6.30 p.m.—was such as to demand some definite decision by the Master as to what his ultimate course should be. He noticed at 6.30 p.m. that the power was diminishing. The fact that he discussed his position when off Cobourg with the Mate and had before his eye the low barometer and the increasing wind and sea, rendered it in my judgment reasonable that he should have made up his mind as to what safety and good seamanship demanded. He ought to have realised that if Cobourg was impossible, Port Hope would be so also, and that his only hope then would be to press on for Toronto or turn back. But the failure of power of which he was fully conscious, when opposite Cobourg, was as he knew, bound to increase, and the likelihood of heavier weather should have aroused in him the certainty that he could not persevere very long on his course and might be driven ashore if the steam pressure dropped much lower. In the circumstances in which he found himself at 10 p.m. with his tow rope fast in a chock and his power low and the tug failing to make progress or to respond to her helm, I cannot say that his act in cutting the rope was not justified. But I have heard nothing on

his behalf to warrant me in holding that either off Cobourg or later until the last moment when the rope got fast, he could not have turned both tug and scow and made down the lake, favoured by the wind and the drift. This, in view of the conditions I have described, was not only possible but advisable, and the length of tow rope was not any hindrance but rather a help in executing that manoeuvre. Added to the consideration of immediate safety was the fact that by retracing his course he would have had a chance of standing by the scow and keeping it off shore. To sum up my view, the weather, the barometer, and the increasing loss of power required action, either in seeking shelter or if he could not make a port by reason of his length of his tow line, then by turning back when conditions were still favourable, thus taking advantage of the set of the wind and waves, and keeping the scow under his control. If, indeed, this alternative had been taken, it is entirely probable that when turned he would have been able to haul in some portion of the rope when the strain on it would be less, and if so to have resumed his course and gone into either Cobourg or Port Hope if he found that expedient more desirable.

I cannot see why this change was not decided upon. The tug is shown to be an ocean vessel staunch and good. The difference between an attempt to turn at 10 o'clock at night and at 6.30 p.m. is easily calculable, as the conditions were radically changed for the worse as the evening wore on, apart from the jamming of the tow rope. In what he did the Master displayed, as I see it, neither proper seamanship nor resource and he seemed to lack realization of what would be likely to happen if he kept on his course during the night, while the power continued to decline

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and the sea and wind got higher. The inability of the tug to maintain its horse power at an efficient figure is a very important factor. It was due either to want of capacity to develop or to maintain sufficient power in bad weather or to do so with the crew then on board. From the evidence I am forced to conclude that both factors were present on this occasion and that to continue safely on its course was more than the tug was capable of. There is an implied obligation in a contract for towage that the tug shall be efficient and properly equipped for the service. The *Undaunted* (1), the *West Cock* (2).

A further failure on the following day, must be laid at the Master's door. Being safely moored in Cobourg Harbour, his engineer and crew refused next morning to go out to seek for the drifting scow. The duty of a tug, when it has had to cut its tow adrift or has lost it through stress of weather, is to stand by so far as that can be done without actual peril to life or property. The *White Star* (3); see also *Minnehaha* (4). It is no excuse that it would have been difficult or even dangerous to try and secure the tow again, unless that result is clearly proved to be the reasonable consequence of such an attempt. It was said that if the tug had gone out and found the scow, it would hardly have been possible to secure it, as the tow rope was floating with the scow and no other cable was available. Besides this it was urged that no man could have been landed upon the scow to make it fast, if a rope had been procured in Cobourg.

I do not deny the probable difficulty or the danger, but I do not think the excuse can be accepted at its face value, unless it is shown that all reasonable

(1) 1886, 11 P.D. 46.
(2) 1911, P.D. 208.
(3) (1866) 1A & E 68.
(4) (1861) 30 L.J. Adm., 211 P.C.

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efforts were made to do what was possible under the circumstances in the endeavour to render assistance. The reasons given for the absolute failure to make any attempt were, first, the refusal of the engineer and crew to go out, and the absence of a tow rope. No evidence was given of any effort at all to supply the engineer's place. This, in case of emergency, should have been done by shipping a temporary substitute if available. There is nothing in R.S.C., c. 113, Part VII, to prevent this in a tug of the size of the *Whelan*. The crew, if they disobeyed the Master's orders, could not be compelled to do their duty. But others might be found in Cobourg. If any, even slight, evidence had been given that search was made for an engineer, sailors or rope, in the Port of Cobourg, I would be bound to find that blame could not attach to the Master. But in the absence of any such suggestion it is not reasonable to say that the duty which rested on the tug had become entirely impossible of performance. Equally so, I cannot accept the argument that had everything been done and the scow overhauled no man could have been found sufficiently agile to be capable of landing on board the scow and hauling a line aboard. Impossibility of performance must rest upon actual conditions and not upon mere apprehension accompanied by the absence of even the smallest attempt to bring about a state of affairs favourable to whatever action necessity demanded. There is no doubt in my mind, upon the evidence, that the weather conditions on the 12th November, before the scow grounded, were such that if the tug had gone out with a tow rope, a rescue would have been in all probability successfully accomplished. Incompetence and slackness vitiate what might be a good defence, and nothing has been proved

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from which it could properly be inferred that what could be done was done, nor has it been shown that those in charge of the tug were exonerated by conditions which they could not control, so as to avoid responsibility for contributing by inaction to the subsequent loss of cargo and injury to the scow.

In this connection I must refer to the entry in the log under date November 12th, made by the mate which is as follows:—

"Nov. 12th. (Gale south-west too big for going outside.") In the witness box the mate stated that he made this after midnight of the 11th–12th November, when the tug arrived in Cobourg. If so, what he did was contrary to section 243, s.s. 1 of the Canada Shipping Act, R.S.C., c. 113. I am unable to accept his testimony as truthful, or if truthful, that the entry was not intended to mislead. It is so extremely unlikely that the writing up of the log of the 12th November would be done before the day had well begun, or if made at night, that it would have referred to the impossibility of going out during the whole of the succeeding 24 hours. It was doubtless intended to make evidence for the crew and for the owners and to be read as if made at a later hour, after the refusal of the crew had to be concealed. I shall direct the Registrar to report to the Department having to do with the licensing of ship's officers the circumstances surrounding this entry and my finding thereon.

The result of the foregoing is that I find that the *Whelan* was negligently navigated by her Master and that he failed to take any reasonable steps towards endeavouring to secure the scow and its cargo on the day after its abandonment. I also find that the tug lacked capacity to accomplish the task undertaken

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by it in the weather conditions which ought to have been expected in November in that it could not sustain sufficient steam pressure, a condition aggravated by the inefficiency of the crew.

There remains a somewhat more difficult question to be determined, namely, whether the owners are entitled to limit their liability under R.S.C., c. 113, s. 921 (d). That section applies to a towage contract. *Wahlberg* v. *Young* (1); *Fulham* v. *Waldie* (2).

The condition is that the damage which happens by reason of the improper navigation of the ship shall be without the owners' actual fault or privity. The cause of the loss in question here was not only the negligent navigation, in the popular sense of the term, of the master, but was also due to what I have called the want of capacity to maintain sufficient steam pressure and also to the incompetency of the crew to bring out the best results of which the boilers were capable. The accident of the jamming of the tow ropes by reason of the action of both tug and tow in a heavy sea, which finally led to the abandonment, brought about a crisis due to the gradual failure of power. It is argued that these matters in the peculiar circumstances of this case, occurred without the owners actual fault or privity, both in law and in fact. Among these circumstances are the provisions of the contract. This names only "barges" and it is urged that to tow a scow was outside the scope of the owners' engagement, nor could it have been foreseen by them and so could not have been provided for. There is force in this contention if the facts support it. At the trial leave was asked by the plaintiffs to amend by claiming reformation of the contract so as to make it express the true bargain. I then intimated that

(1) [1876] 45 L.J. C.P. 783. (2) [1909] 12 Ex. C. R. 325.

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reformation did not seem to be necessary but on reflection I have come to the conclusion that the plaintiffs may, if they desire it, so amend and that upon their doing so, the contract should be reformed *quantum valeat* by adding the words "and scows" after the word "barges." The evidence makes it clear that these words were omitted by inadvertence, to use the language of Mr. T. R. Kirkwood, and also that he knew the equipment of the plaintiffs included "scows" and that the *Whelan* was intended to do for the plaintiffs the work done by Russell's tug *Lakeside*, whose place this tug was to take, and I so find. I am not convinced that reformation is strictly necessary as this action does not depend wholly upon a breach of the agreement to tow but may succeed irrespective of the contractual relationship. But as the defence was permitted to set up a claim to limit liability on an application made 2 days before the trial, it seems only fair that the plaintiffs should be allowed to assert that the true bargain should be the condition under which that limitation should be determined. Had the facts appearing at the trial been before me when granting leave to set up section 921 I should have made this a term of granting that leave. Irrespective of this relief I am of the opinion that the owners cannot successfully assert want of actual fault or privity. Improper navigation is not restricted to what happens while afloat; it may include antecedent matters which reaching in effect into the voyage, so control the navigation attempted as to permit it to be rightly described as improper. In the *Warkworth* (1), Lord Esher, M.R., said that "all damage wrongfully done by a ship to another whilst being navigated, where the wrongful action of the ship whereby the damage is

(1) [1884] 9 P.D. 145, at p. 147.

done is due to the negligence of any person for whom one owner is responsible is comprised within the Statute." In that case the collision was caused by the ship's steering gear failing to act at a critical moment, due to the negligence of a person on shore employed by the owners in overlooking the machinery. See also *Diamond* (1).

The owners themselves selected this tug to do the plaintiffs' work. The correspondence makes this plain; their descriptions and their proffers before the contract was made indicate very clearly that this vessel was virtually warranted to be fit to tow whatever the plaintiffs had been in the habit of entrusting to tug boats. The Master was given definite instructions that he should take his orders from the plaintiffs and the owners did not suggest any limitation on these orders. It was of course open to the Master to decline a job for which his tug was not fitted, but that would not be because the owners had so directed him, but would have rested upon a personal election not to undertake too hazardous an enterprise. His not refusing, but accepting the tow was, so far as the owners are concerned, in line with their instructions to him. Where a principal gives open instructions he cannot restrict them after the event and if they are ambiguous he is bound by the construction placed upon them by his agent. In this case if the tug was insufficiently equipped and manned for the duty undertaken by their agent, or was structurally unsuited to its probable requirements, the owners cannot set up that what he did was so far outside what he was entitled to do that they could not in law be privy to it. And upon the contract, as reformed, there can be

(1) [1906] P. 282, and Mayer's Admiralty Law, P. 163.

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no doubt that they must stand to the plaintiffs in the position of supplying a vessel unable to perform its task through want of sufficient power and suitability in structure, as well as through lack of a capable and efficient crew. The restricted space in which the work of firing and clearing away the ashes had its effect in reducing the power. Whether the remark made by Mr. T. R. Kirkwood as to which I accept the evidence given on behalf of the plaintiffs in reply, referred to the better staying qualities and boiler efficiency or to the structure and layout of the sister tug *Metax* or to its crew, makes little difference. It discloses knowledge that there were defects in the *Whelan* or want of proper seamanlike qualities in the crew, and brings it directly home to the owners who must accept such responsibility as that knowledge casts upon them. *The Republic* (1). If nothing appeared in the case but the negligent navigation of the Master due to his want of decision and failure to use proper judgment as to what should have been done or the inefficiency of the crew and their refusal to do their duty, the owners would have a valid excuse under section 921. But the other matters raise quite a different question.

The statutory provision enabling liability to be limited in case of loss by improper navigation casts the onus on the owners of showing that what occurred was without their actual fault or privity. *Grain Growers Export Co.* v. *Canada Steamship Lines* (2). But if the damage arose because they had furnished a vessel which was not fitted for the task it undertook, and so caused the navigation to be improper naviga-

(1) [1894] 61 Fed., R. 109, Affirming [1893] 57 Fed., R. 240.

(2) [1917] 43 O.L.R. 330.

tion, then the section does not protect them. Incapacity to tow efficiently or to manoeuvre properly due to want of sufficient motive power, or want of suitable space to work in affects the navigation of the tug in such a manner that it cannot be said that what occurred was without the actual fault or privity of the owners.

It appears that the Kirkwood Steamship Lines were managing the *Whelan* and other vessels, and in this case, as appears by the two telegrams produced, stood in relation to the registered owner, T. M. Kirkwood, in this particular enterprise, as partners and equal sharers of the profits either of operation or sale. Neither, therefore, can be permitted to take advantage of the limitation clause in the statute. *Hughes* v. *Sutherland* (1). I hold that this defence fails and that limitation of liability cannot be allowed.

There will be judgment reforming the contract as indicated and condemning the *Whelan* in damages, to be ascertained by the Registrar in Toronto, for the loss of the cargo of the scow and for the costs of the repairs to the scow and such other damages if any as follow upon the liability declared. The counterclaim will be dismissed with costs. The defendants will pay the costs of the action and counterclaim up to and including the trial forthwith and the costs of the reference after the report is made.

I am indebted to each of the counsel for the speed and skill with which they conducted their side of the case.

(1) [1881] 7 Q.B.D. 160.

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APPEAL was taken from this judgment to the Exchequer Court of Canada, which appeal was heard before the Honourable Mr. Justice Audette on the 21st day of June, 1921, at Ottawa.

A. R. Holden K.C. for appellants.

S. Casey Woods, K.C., and *Mr. Jarvis*, for respondent.

AUDETTE J. now (this 27th June, 1921) delivered judgment.

This is an appeal from the Local Judge of the Toronto Admiralty District, in an action *in rem*, for injury to the plaintiff's scow No. 2, and for the loss of her cargo, when the scow was cut adrift on the night of the 11th November, 1920, when beyond Port Hope, on Lake Ontario.

The details of the case are clearly and abundantly set out in the reasons for judgment of the learned trial judge and I am therefore relieved from the necessity of repeating them here on appeal. In the view I take of the case, the controversy resolves itself into a very small compass.

As I have already had occasion to say, sitting as a single judge, in an Admiralty Appeal from the judgment of a trial judge, that while I might, with diffidence, feel obliged to differ in matters of law and practice, yet as regards pure questions of fact, I would not be disposed to interfere with the judge below, unless I came to the conclusion that it was clearly erroneous. *Fraser* v. *S.S. Aztec* (1).

(1) 20 Ex. C. R. 450.

The Supreme Court of Canada further held that when a disputed fact involving a nautical question (such as the one raised in this case) with respect to what action should have been taken immediately before the accident, is raised on appeal, the decree of the court below should not be reversed merely upon a balance of testimony. *The Picton* (1).

The trial judge in the present case has had to pass upon testimony of a very important nature and in respect of which there is much conflict; but on the other hand he has had the opportunity of hearing and seeing the witnesses and testing their credit by their demeanor under examination before him. In these circumstances he disregarded the testimony of some of them whom he disbelieved. *Riekman* v. *Thierry* (2); *Dominion Trust Company* v. *New York Life Insurance Co.* (3). Therefore with his findings upon the facts, I will not interfere.

The only question which calls for special consideration is that of the statutory limitation of liability to $38.92 for each ton of the vessel's tonnage, in the case provided for by sec. 921 of the Canada Shipping Act, ch. 113 R.S.C. 1906.

The solving of the question is not without difficulty. Numerous cases were cited at bar by counsel respectively upon the point of law. The cases most stressed were that of *Wahlberg* v. *Young* (4); *Fulham* v. *Waldie* (5); and *McCormack* v. *Sincennes-McNaughton* (6). This last case was carried on appeal to the Supreme Court of Canada and the reasons for judgment of the

(1) 4 S.C.R. 648.
(2) 14 R.P.C. 105.
(3) [1919] A.C. 254.
(4) [1876] 45 L.J., C.P. 783.
(5) [1909] 12 Ex. C.R. 325.
(6) 19 Ex. C.R. 35.

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learned judge of that tribunal were much discussed and relied upon. This judgment on appeal, important as it is, for some reason unknown, has not been reported.

All of the cases cited, and especially those specifically mentioned are distinguishable on the facts from the present case in that the owners of the defendant ship here expressly made themselves privy to all that occurred after the tug had cut the scow adrift and had sought shelter in the haven for the night. I refer to the fact creating this privity below.

Accepting, as I do, all findings upon what occurred before the scow was cut adrift and when the tug put in Cobourg for the night, we face the other phase of the case, wherein arose the question as to whether or not on the following day the tug did her duty and acted with proper seamanship when she did not go out to rescue the scow. It appears from the evidence that while it was blowing on the 12th, that it was far from blowing a gale, or that there was a wind blowing that would justify a vessel of 84 feet not going out. It would seem to be a case of funk. No one at trial seems to have assumed the impossible task of justifying this conduct.

Now, on the day following the cutting adrift of the scow, the emergency arose, constituting a concrete duty upon the crew, to avoid the consequences of the negligent events of the first day; to avoid the result, as found by the trial judge, of an antecedent negligence. And, between the first day and the end of the second day, a time came when the happening of the casualty could have been avoided and in what happened on the second day the owners of the vessel clearly became privy as appears by their telegram (exhibit 3) to the Captain, which reads as follows, viz.:

"Montreal, Nov. 12, 1920.

"Captain Henry Malette,

"Tug *Mary Francis Whalen*,

"Cobourg, Ont.

"Point Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it. If you can save this scow without risk to your tug do so.

"Kirkwood Steamship Line."

Another telegram (Exhibit 15) to the same effect, is sent, on the same day, by the defendants to the plaintiff.

The owners had control over their tug and crew and exercised it by that telegram. They thereby became privy to and partakers in responsibility with all its legal consequences in respect to all actions taken by the tug on the 12th November—actions which resulted in the scow being allowed to run aground and become a wreck. This happened for want of the tug running out from Cobourg in weather which, under the evidence, should not justify keeping in harbour or haven a vessel like the *Whalen*. The telegram contains the words "without risk to your tug." But the evidence establishes that there was no storm prevailing on the 12th—far from it. There is always some risk inherent to navigation, and this seems to have given rise to the doctrine popularly called "perils of the sea," understood in its more extended sense as covering all accidents on the watery plane. *Todd & Whall* (p. 249), impliedly recognizing that risk, say that a mariner must always be ready for a "sea fight."

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It appears from the evidence that from the morning of the 12th to the morning of the 13th, the scow could and should have been easily saved. Captain Malette himself repeatedly stated that there was no danger for his tug to navigate in that weather and that "she could winter out there."

Now, after the tug cast the scow adrift and sought comfort rather than necessary shelter in the harbour of Cobourg, there is no doubt that there came a time when the impending catastrophe could have been averted—but for self-created incapacity on behalf of the defendants—and the negligence which produced a state of disability, in which the crew and the owners contributed, is in very truth the efficient, the proximate, the decisive cause of the mischief. *Brenner* v. *Toronto Ry. Co.* (1); *B.C. Electric Ry. Co.* v. *Loach* (2).

In the circumstances of the case the statutory limitation of liability cannot be applied or allowed.

Under the evidence considered in its *ensemble*, weighing its conflict to the best of my ability, I am of opinion that the learned judge, who had the additional advantage of seeing and hearing the witnesses and so testing their credibility, has come to the proper conclusion, and I hereby affirm the judgment pronounced on the 7th April, 1921, on all issues and dismiss the appeal with costs. However, seeing that no additional costs were incurred in the consideration of this appeal, upon the counter claim, there will be no costs to either party upon the issue of the counter claim.

Judgment accordingly.

(1) 13 Ont. L.R. 423: (2) [1916] I.A.C. 719, at 725 et seq.

HIS MAJESTY THE KING.....PLAINTIFF;

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June 27.

AND

JOSEPH EUGENE CARON.....DEFENDANT.

Revenue—Constitutional Law—Income War Tax Act—B. N. A. Act—Direct taxation—Minister of Provincial Crown.

C. was a minister of the Crown for the Province of Quebec, and in receipt of a salary as such and of an indemnity as a member of the provincial legislature. Being assessed by the Dominion authorities on his income, he claimed (1) that the Income War Tax Act, 1917, and amendments, was unconstitutional and *ultra vires* of the powers of the Dominion Government, and (2) that in any event it was *ultra vires*, and unconstitutional in so far as it purports to apply to him.

Held, that the right of the Dominion of Canada under Art. 3 of Sec. 91 of the B.N.A. Act to raise a revenue by "any mode or system of taxation," namely, by direct or indirect taxation, in no way conflicts with the right granted to the provinces by section 92, Art. 2 to raise a revenue by direct taxation for provincial purposes.

2. That the Dominion Crown has independent plenary power within its own proper legislative domain, and disparate from and unrelated to any provincial right of taxation, to raise a revenue by direct taxation upon the income of persons residing within its territorial jurisdiction, and that the defendant could not claim any immunity or exemption from such taxation.

INFORMATION by the Dominion Crown to recover from defendant the sum of $210 income tax.

May 13th, 1921.

The case now heard before the Honourable Mr. Justice Audette, at Ottawa.

E. L. Newcombe K.C. and *C. P. Plaxton*, for plaintiff.

Aimé Geoffrion K.C. and *Charles Lanctot K.C.*, for defendant.

The facts are stated in the reasons for judgment.

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AUDETTE J. now (27th June, 1921), delivered judgment.

This is an information, exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the defendant is the Minister of Agriculture for the Province of Quebec, receiving as such a salary (R.S.P.Q., 1909, Sec. 574), of $6,000, and an indemnity of $1,500.00 as a member of the Legislature, and that in computing the amount of income tax for which the defendant is claimed to be liable for the year 1917, the said sums have been taken into consideration and account, showing in the result a liability to the Crown, for such income tax, of the sum of $210.00.

By his amended statement of defence the defendant denies, among other things, that he is "a person liable to taxation under the Income War Tax Act, 1917, and amendments thereof, alleging that the said Acts are unconstitutional and *ultra vires* of the powers of the Parliament of the Dominion of Canada in so far as they intend to apply to the defendant who is a Minister of the Crown for the Province of Quebec.

The defence rests upon paragraphs 6a and 7 thereof, which respectively read as follows, viz.:—

"6a. The Income War Tax Act, 1917, and amendments thereto, are unconstitutional and *ultra vires* of the powers of the Parliament of Canada."

"7. The Income War Tax Act, 1917, and amendments thereof are unconstitutional and *ultra vires* of the Parliament of the Dominion of Canada in so far as they intend to apply to the defendant, who is a Minister of the Crown for the Province of Quebec."

By sec. 2 (I) of 9-10 Geo. V, (1919) sub. sec. 1 of sec. 3 of the Income War Tax Act, 1917, was amended by including in the term "income" the salaries and indemnities or other remuneration of members of

Provincial Legislative Councils and Assemblies, whether such salaries or indemnities are paid out of the revenues of His Majesty in respect of any province. And by sec. 10 of the Act this amendment is deemed construed to have come into operation on and from the date upon which the Income War Tax Act, 1917, came into operation.

The parties hereto have filed the following admission of facts, viz.:

"It is admitted for all purposes of this action that the Minister of Finance determined the amount payable for the tax by the defendant herein pursuant to the requirements of the Income War Tax Act, 1917, and amendments thereto, as being the sum of $210.00, and thereupon, 21st November, 1918, sent by registered mail a notice of the said assessment in the form prescribed by the Minister to the defendant notifying him of the aforesaid amount as payable by him for the tax; also it is admitted that of the income in respect of which such tax was determined six thousand dollars is defendant's salary as Minister of Agriculture of Quebec under Article 574 of the Revised Statutes, 1909."

The whole controversy rests upon Art. 3 of sec. 91 of the British North America Act, 1867, and Art. 2 of sec. 92 thereof, which respectively read as follows:

"Sec. 91, Art. 3.—*The raising of money by any mode or system of taxation.*"

"Sec. 92, Art. 2.—Direct taxation within the Province in order to the raising of a revenue for provincial purposes."

It is a sound rule of statutory construction that every word ought to be construed in its ordinary or primary sense, unless a second or more limited sense is required by the subject-matter of the context.

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There is no conflict between these two sections, and taking them in their plain and ordinary meaning it is beyond cavil that the plenary power of "raising money by any mode or system of taxation"—either direct or indirect—is vested in the Dominion; and it is equally true that the Province has plenary power to raise money by "direct taxation," but for provincial purposes exclusively. This is the proper meaning that judicial interpretation arising out of decided cases attaches to these two sections. "Each class is allowed full scope to which upon the natural import of language used it is entitled, the jurisdictions must inevitably overlap, or to use Lord Watson's expression, 'interlace.' . . . The federal classes are to be viewed as confined to matters of common Canadian concern and the provincial as covering matters of local provincial concern, and after applying further the great cardinal rule of interpretation laid down by the Privy Council in the *Parson's case* that the two sections 91 and 92 must be read together and the language of the one *interpreted and where necessary*, modified by that of the other, it will appear that there are domains in which *intra vires* federal legislation will meet *intra vires* provincial legislation." Clement's Canadian Constitution, 464. See also Lefroy's Canada's Federal System, 166, 265, 279 and 281.

But there is more. The powers of the Dominion, given by the opening enactment of sec. 91, makes it lawful to make laws for the peace, order and good government of Canada, in relation to all matters *not coming* within the classes of subjects assigned to the provinces. And it adds: "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section—as above mentioned—it is hereby declared that (*notwithstanding anything in the*

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Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated." And there follows the several Articles, among which Art. 3 is found which gives the Dominion the right to raise a revenue by direct taxation, *notwithstanding anything in the Act. Intra vires* federal legislation must override, if necessary, inconsistent *intra vires* provincial legislation; because when such authority is so given to the Dominion, it has paramount authority, and the plenary operation assured by the *non obstante* clause with which the class enumeration opens. *Tennant's case* (1); *The Fisheries Case* (2). By the very language of the opening clause of sec. 91 the rule of federal paramountcy must obtain.

However, is there in this case actual conflict? There is nothing repugnant to either enactment in finding that the Dominion has full authority, etc., and that it is acting within the full scope of its powers and with respect to matters of common Canadian concern or of the body politic of the Dominion, in enacting the Income Tax Act and that the Province has the power, in raising revenues for Provincial purposes, to raise revenue by direct taxation.

The Dominion has a right, under sec. 91, to raise revenue, for matters of common Canadian concern—and for peace, order and good government—by direct and indirect taxation, whilst the province, for provincial purposes can only raise by direct taxation. There is no repugnancy or conflict between these respective powers. The exercise by the Dominion of the authority to raise revenue by direct and indirect taxation for federal purposes does not trench upon the authority of the Province to raise revenue for provincial purpose by direct taxation.

(1) [1894] A.C. 31. (2) [1898] A.C. 700.

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Finding otherwise would, without justification, interfere with the revenues of the Dominion when there is no text in the Act, or possible construction thereof, to justify such course.

In the interpretation of a self-governing constitution founded upon a written organic instrument, such as the B.N.A. Act, if the text is explicit, the text is conclusive. But, when the words establish two mutually exclusive jurisdictions, recourse must be had to the general context of the Act. *Reference case* (1).

Dealing with the proviso at the end of sec. 91, the case of the *Attorney-General of Ontario* v. *Attorney-General for Dominion* (2), settles and correctly describes all the classes enumerated in sec. 92 as being from a provincial point of view of a local or private nature. It is to be read, therefore, as a limiting proviso to sec. 92. In other words, as put by Mr. Justice Clement's Canadian Constitution: "Provincial jurisdiction extends to all matters in a provincial sense, local or private within the province; subject, however, to this proviso, that any matter really falling within any of the class enumerations of sec. 91, is to be deemed of common Canadian concern and not in any sense a matter local or private within any province." And at p. 366 he adds: "It has been frequently recognized by this Board, and it may be regarded as settled law, that according to the scheme of the British North America Act, the enactments of the Parliament of Canada, in so far as they are within its competency must override provincial legislation."

In *Citizens Insurance Co.* v. *Parsons* (3), cited by plaintiff's counsel at bar, Sir Montague Smith, L. J., referring to the apparent conflict of powers between

(1) [1912] A.C. 571. (2) [1896] A.C. 348.
(3) 7. A.C. 96-108.

secs. 91 and 92, by way of illustration of the principle that the powers exclusively assigned to the provincial legislatures were not to be absorbed in those given the Dominion Government, said:—

"So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in sec. 91; but, though the description is sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by sec. 92, it obviously could not have been intended that in this instance also the general powers should override the particular one."

Continuing, Sir Montague Smith says:—"With regard to certain classes of subjects, therefore, generally described in sec. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislature of the province. In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist, and in order to prevent such a result, *the two sections must be read together, and the language of one interpreted, and when necessary, modified by that of the other.*"

And that is the principle of construction which I have sought to apply to this case.

Part of the passage last cited has been referred to by Lord Hobhouse in the *Lambe case* (1), and relied upon by defendant's counsel at bar, but in my opin ion

(1) 12 A.C. 575.

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nothing can be gathered from it which would justify the contention that the Dominion could in any way be deprived of its power of direct taxation.

Then we have a recent expression of opinion touching the respective powers of legislation granted by secs. 91 and 92 by their Lordships of the Judicial Committee in the *John Deere Plow Co's case* (1) to the following effect: "The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec. . . . To these resolutions and the sections founded on them, the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case, *Attorney-General for Commonwealth* v. *Colonist Sugar Refining Co.* (2), that if *there is at points obscurity in language, this may be taken to be due, not to uncertainty* about general principle, but to the difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side, shews that those who passed the Confederation Act, intended to leave the working out and interpretation of these provisions to practice and to judicial decision."

There is an early case which deserves mention if only for the clarity of its language touching the matter in controversy between the parties in the case now before the Court. I refer to *Dow* v. *Black* (3), where

(1) [1915] A.C. 330. (2) [1914] A.C. 237, at 254.
(3) L.R. 6 P.C. 272, at p. 282.

Lord Colville says: "They (their Lordships) conceive that the 3rd article of sec. 91 is to be reconciled with the 2nd article of sec. 92 by treating the former as empowering the supreme legislature to raise revenue by any mode of taxation whether direct or indirect; and the latter as confining the provincial legislature to direct taxation within the Province for provincial purposes."

Now, passing to the other contention of the defence respecting property and civil rights, counsel asserts, *inter alia*, that an outside authority over which the provincial legislature has no control cannot deprive its members of part of the monies voted actually to them as members, compensating them in the discharge of their duties as representatives of the people of the Province, or voted as salaries to members of the Provincial Government. And he asks that if this tax is lawfully imposed what is then to prevent the Parliament of Canada imposing a direct tax and to *any amount* expressly on members of the Provincial Legislature? And he adds that the revenues, and duties, under sec. 126, raised by the legislature form a consolidated revenue fund.

The reply to this purely supposititious case is that the proper time to deal with it will be when it arises. The Courts do not concern themselves with or forestall difficulties that may be imagined but which do not exist in the facts before them; nor are they disposed to answer hypothetical questions. See per Lord Mansfield in *The King* v. *Inhabitants of West Riding of Yorkshire* (1), *and Dyson* v. *Attorney-General* (2).

The Dominion in raising this tax does not in any manner attempt to interfere with the exercise of provincial powers, but merely asserts that when the power is exercised the recipient of the indemnity and

(1) [1773] Lofft's Rep. 238. (2) [1911] 1 K.B. 410.

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the salary shall be answerable to federal legislation in the same manner as other persons or residents, irrespective of the source from which the individual's income is derived.

In the *Lambe case* (1), their Lordships make the following observation in respect of oppression or *ad convenienti* argument: "If they find that on the due construction of the Act a legislative power falls within sec. 92, *it would be quite wrong of them to deny its existence because by some possibility it may be abused,* or may limit the range which otherwise would be open to the Dominion Parliament." And per Lord Loreburn L.C. in *Attorney-General of Ontario* v. *Attorney-General for Canada* (2): "It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensible to self-government, and obviously bestowed by the B.N.A. Act. Indeed it might ensue from the breach of almost any power."

And, as said, *inter alia,* in Clement's Canadian Constitution, 3rd Ed., p. 482: "In the case from which this finding is taken, the right of the provinces to tax objects and institutions over which the federal parliament has legislative jurisdiction was affirmed in the *Lambe case* (*ubi supra*) . . . Dominion excise laws may be rendered nugatory by provincial prohibition. A province may sell its timber on terms prohibiting exports . . . As has been said, lawful legislation does not become unlawful because it cannot be separated from its inevitable consequences."

As a further answer to the defence's contention in this respect, the observations of Lord Hobhouse in the same case are very apposite. He said: "Their

(1) 12 A.C. 575. (2) [1912] A.C. 571.

Lordships cannot conceive that when the Imperial Government conferred wide powers of local self-government on great countries, such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to make laws to levy taxes."

The well-known cases of *Webb* v. *Outrim* (1), and *Abbott* v. *City of St. John* (2) were much discussed at the argument.

In the case of *Railroad Co.* v. *Paniston* (3), Strong J. is reported as saying, at page 36: "It is therefore manifest that exemption of federal agencies from state taxation is dependent not upon the nature of the agent or upon the mode of their constitution, or upon the fact that they are agents, *but upon the effect of the tax*, that is upon the question whether the tax does in truth deprive them of powers to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect; it leaves them free to discharge the duties they have undertaken to perform. A tax upon their operation is a direct obstruction to the exercise of federal powers."

The stock argument of interference with property and civil rights in the province needs only a passing observation. In the case of *Cushing* v. *Dupuy* (4), their Lordships offered, *inter alia*, the following observations: "It is therefore to be presumed, indeed it is a necessary implication, that the Imperial Statute, in assigning to the Dominion Parliament the subjects

(1) [1907] A.C. 81.
(2) 40 S.C.R. 597.
(3) 18 Wall (85 U.S.) 5.
(4) 5 A.C. 409; 49 L.J.P.C. 63.

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of bankruptcy and insolvency intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, *so far as a general law relating to those subjects might affect them.*" Thereby reserving to the sovereign legislature its plenary power in relation to all matters coming within the classes of subjects mentioned in sec. 91, as the Act expressly states. See also *Tennant* v. *Union Bank* (1); *Attorney-General* v. *Queen Insurance Co.* (2); *Bourgoin* v. *Montreal, Ottawa and Occidental Ry. Co.* (3).

Again in the *Russel's case* (4), is found the following language: "Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada, which did not in some incidental way affect property and civil rights; and it could not have been intended when assuring to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude the parliament from the exercise of this general power whenever any such incidental interference could result from it. The true nature and character of the legislation in the particular instances under discussion must always be determined in order to ascertain the class of subject to which it really belongs."

And again per Anglin J. in *re Insurance Act* (5);..... "when a matter primarily of civil rights has attained such dimensions that it 'affects the body politic of the Dominion' and has become 'of national concern', it has, in that aspect of it, not only ceased to be 'local and provincial,' but has also lost its character as a matter of 'civil rights *in the province*' and has thus so far ceased to be subject to provincial jurisdiction that

(1) [1894] A.C. 31; 63 L.J.P.C. 25.
(2) 3 A.C. 1090, per Sir George Jessel. M.R. at p. 1096.
(3) 49 L.J.P. C. 68.
(4) 7 A.C. 829.
(5) [1910] 48 S.C.R. 260 at p. 310.

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Dominion legislation upon it under the 'peace, order and good government,' provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount."

On the whole I fail to see any ground upon which the defendant should be treated with discrimination as regards the other citizens or public of Canada in relation to liability for a tax of the nature here in question. See *Hollinshead* v. *Hazleton* (1).

I have come to the conclusion that the Dominion has, under the several provisions of sec. 91 of the British North America Act, 1867, independent plenary power within its own proper legislative domain, and disparate from and unrelated to any provincial right of taxation, to raise revenue by direct taxation upon the income of persons residing within its territorial jurisdiction, and that the immunity or exemption claimed by the defendant cannot avail.

There will be judgment against the defendant, as prayed, for the sum of $210, with interest thereon at the rate of seven per centum per annum (as provided by sec. 10 of 7-8 Geo. V, ch. 28) from the 21st November, 1918, to the date hereof and with costs.

Judgment accordingly.

(1) [1916] 1. A.C. 428 at pp. 436 and 461.

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June 13.

QUEBEC ADMIRALTY DISTRICT.

JEAN BAPTISTE ROBILLARD...PLAINTIFF;

VS.

THE SAILING SLOOP *ST. ROCH*..DEFENDANT;

AND

ALCIDE CHARLAND.....INTERVENANT.

Shipping—Merchant Shipping Act—Bill of sale—Form thereof—Bad faith—Entry in register of shipping not conclusive as to ownership—Maritime law of England.

Held: That where the vendee of a ship bought in bad faith, knowing that his vendor was committing a fraud, the sale should be set aside.

2. That where the bill of sale of a ship had not been executed in accordance with the provisions of sec. 24 of the Merchant Shipping Act, it did not transfer the ownership therein.
3. That where a question of ownership is raised, the entry in the register of shipping is not conclusive, and the court may inquire into the validity of the bills of sale and into all other circumstances affecting the right of property in the ship.
4. That although the Exchequer Court of Canada on its Admiralty side sits in Canada, it administers the maritime law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty.

ACTION IN REM claiming the ownership and possession of the defendant ship and praying that the transfer thereof on the register be set aside as irregular and in bad faith.

May 29th and 30th, 1921, and June 13th, 1921.

The case was heard before the Honourable Mr. Justice Maclennan at Montreal.

Conrad Pelletier K.C., for plaintiff.

F. J. Bisaillon K.C., for defendant and intervenant.

The facts are stated in the reasons for judgment.

MACLENNAN D.L.J.A. now (13th June, 1921) delivered judgment.

This is an action *in rem* by which plaintiff claims the ownership and possession of the sailing sloop *St. Roch*. The action is contested by the intervenant, Alcide Charland.

Plaintiff's case is that, on 17th June, 1897, he bought the *St. Roch* through Calixte Deneau from Adolphe Laperrière, Jr., with his own money, and, as he was then involved in some litigation with his wife, took a bill of sale from Laperrière in the name of his uncle, Joseph Robillard, as purchaser, which bill of sale was registered at the Custom House, Montreal, on 29th June, 1897; that he took possession of and operated the sloop from that date for his own profit and benefit, and kept the sloop in repair until the close of the navigation season of 1918; that his uncle, Joseph Robillard, died on 17th October, 1905, leaving a will under which his wife, Annie de Lorimier, was the universal legatee and sole executrix and that she, at plaintiff's request, on 3rd March, 1908, executed a bill of sale of the *St. Roch* to Mélina Robillard, a sister of plaintiff, which bill of sale was duly registered on June 22nd, 1908; that Mélina Robillard allowed her name to be used in said bill of sale for the purpose of holding the *St. Roch* for and on behalf of plaintiff; that she had no real interest in the sloop; that she died on 11th February, 1919, leaving a will in which she appointed her nephew, Nathaniel Rondeau, exec-

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utor and trustee and that the latter, during plaintiff's illness and without his knowledge or consent, knowing that Mélina Robillard had no interest in the *St. Roch*, and that she was only holding the sloop in her name for the plaintiff, illegally and in bad faith, by an irregular bill of sale dated 12th May, 1919, and registered 15th August, 1919, purported to sell the sloop for an insignificant price to the intervenant, Alcide Charland, and by his action the plaintiff claims to be declared the sole and real owner of the sloop and its equipment, and to be put in possession thereof.

The intervenant's case is that he is the sole and actual owner of the *St. Roch* in virtue of the will of Mélina Robillard and the bill of sale of 12th May, 1919, in which intervened Anthime Robillard and Maria Anne Robillard, wife of Louis Rondeau, in their quality of sole legatees of Mélina Robillard. The intervenant admits the bills of sale from Laperrière to Joseph Robillard and from Annie de Lorimier to Mélina Robillard and the death of the latter, and all other allegations of the plaintiff's claim are denied, and the intervenant concludes for the quashing of the arrest of the *St. Roch* and the dismissal of plaintiff's action with costs.

The first important question to be decided is:— Is it the Maritime Law of England or the Canadian Law which governs the rights of the parties in respect to plaintiff's claim for title and possession of the sailing sloop *St. Roch*? The Exchequer Court of Canada as a Court of Admiralty is a court having and exercising all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890 (Imp.), over the like places, persons, matters and things as are within the jurisdiction of the Admiralty Division of the High Court in England, whether

exercised by virtue of a statute or otherwise, and as a Colonial Court of Admiralty it may exercise such jurisdiction in like manner and to as full an extent as the High Court in England.

In *The Gaetano and Maria* (1), Brett, L. J., at p. 143, said:—

"The law which is administered in the Admiralty Court of England is the English Maritime Law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English Maritime Law."

Although the Exchequer Court in Admiralty sits in Canada it administers the Maritime Law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty.

The plaintiff's action is based upon section 4 of the the Admiralty Court Act, 1840 (3-4 Vict., ch. 65 Imp.), which provides that the Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel arising in any cause of possession which shall be instituted in the said Court after the passing of that Act. This is a cause of possession.

26 Halsbury's Laws of England, p. 15, says:—

"Ownership in a British ship or share therein may be acquired in any of three ways—by transfer from a person entitled to transfer, by transmission or by building. Acquisition by transfer and transmission have been the subject of statutory enactment. Acquisition by building is governed by the common law. Ownership in a British ship or share therein is a

(1) 7 P.D., 137.

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question of fact and does not depend upon registration of title. Whether registered or unregistered, a person in whom ownership in fact vests is regarded in law as the owner—if registered, as the legal owner; if unregistered, as the beneficial owner."

The statutory provisions applicable to the transfer of a registered ship are to be found in the Merchant Shipping Act 1894 (Imp.) sec. 24, and beneficial or equitable ownership is recognized in sec. 57, and section 91 make these provisions applicable to Canada.

The register of the *St. Roch* shows that she was built in 1894 and registered on July 27th, 1896, in the name of Adolphe Laperrière, Jr., as owner; that he executed the bill of sale in favour of Joseph Robillard, whose executrix executed a bill of sale in favour of Mélina Robillard, and whose executor in turn executed a bill of sale to Alcide Chartrand, the intervenant. If these several bills of sale and their registration are conclusive evidence of ownership, the plaintiff has no case. He, however, claims a right to look behind the bills of sale and investigate all the surrounding circumstances in order to determine the real character of the bills of sale and to establish that he was at all times since the registration of the bill of sale in favour of Joseph Robillard, the real beneficial and equitable owner of the sloop and that, although Joseph Robillard and Mélina Robillard appeared on the register as the registered owner, each of them was in fact only his nominee or trustee holding the apparent and registered title for his benefit and on his behalf, or under the title, as it is known in the Province of Quebec in civil matters, of a *prête-nom* for him. The right of the court in a case like this to inquire into the validity of the bills of sale and into all other circumstances affecting the right of property in

the sloop is clearly recognized in the Maritime Law of England, as will appear from a reference to the following cases:—*The Victor* (1); *The Empress* (2); *The Margaret Mitchell* (3); *Gardner* v. *Cazenove* (4); *Orr* v. *Dickinson* (5); *Holderness* v. *Lamport* (6); *Ward* v. *Beck* (7); *The Innisfallen* (8); *The Jane* (9); *The Rose* (10).

The same principles were adopted and applied by the Local Judge of this Court in British Columbia recently in the case of *Haley* v. *S.S. Comox* (11).

Applying the principles laid down in these cases, it is clearly established that the plaintiff became the purchaser and real owner of the sloop in 1897; that he paid the price with his own money and remained in possession until the end of 1918; that during all these years he kept the sloop in good order and repair at his own expense and that he never rendered any account of his operations to his uncle, Joseph Robillard, nor to his sister, Mélina Robillard, nor to any one else. He was in fact openly and publicly in possession and operating the sloop for his own benefit and advantage and no one else ever claimed to be the real owner of the St. Roch. On the death of Joseph Robillard, his widow, knowing the sloop really belonged to plaintiff, executed at his request the bill of sale in favour of plaintiff's sister, Mélina Robillard, who was unmarried, lived in plaintiff's house as a member of his family and never exercised or claimed any right of ownership in the sloop. There is evidence that during

(1) 13 L.T. 21.
(2) Swabey 160.
(3) Swabey 382.
(4) 1 H. & N., 423, 435 & 436.
(5) 28 L.J. Ch. 516, 520.
(6) 30 L.J. Chan. 489 & 490.
(7) 32 L.J. C.P., 113 & 116.
(8) L.R. 1 A. & E. 72.
(9) 23 L.T., N.S., 791.
(10) L.R. 4 A. & E. 6.
(11) 20 Ex. C.R. 86.

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her lifetime she admitted that the *St. Roch* belonged to plaintiff. At the close of the navigation season of 1918, plaintiff laid up the sloop at Berthier for the winter. In January, 1919, he became ill and came to Montreal for an operation in an hospital and was ill and unable to attend the business matters during practically the whole of that year. During his illness his sister died and the sloop passed into the possession of Alcide Chartrand in May, 1919. The evidence clearly establishes that although the sloop was registered, first, in the name of Joseph Robillard, afterwards, in the name of Mélina Robillard, the plaintiff was during all these years the real owner.

The intervenant Charland claims title under the bill of sale dated 12th May, 1919, and registered 15th August, 1919, in connection with which two important questions have to be considered. First, was the transfer of the *St. Roch* to Charland made in accordance with the provisions of the Merchant Shipping Act? And second, Did Charland buy the sloop in good faith and without knowledge of fraud on the part of Nathaniel Rondeau? Unless both these questions can be answered in the affirmative, Chartrand's title is defective.

Under section 24 of the Merchant Shipping Act a registered ship shall be transferred by bill of sale which shall be executed by the transferer in the presence of and be attested by a witness or witnesses. The bill of sale upon which Charland relies describes the transferors as being Nathaniel Rondeau, executor under the will of Mélina Robillard, and Anthime Robillard and Marie Anne Robillard, wife of Jean Louis Rondeau, sole legatees of Mélina Robillard, who, "In consideration of the sum of $850.00 paid to us by Alcide Charland, of 263 Moreau Street, in the

said City of Montreal, Province of Quebec, Canada, Sailor, the receipt whereof is hereby acknowledged, transfer 64 shares in the ship above particularly described, and in her boats, guns, ammunition, small arms and appurtenances to the said Alcide Charland. Further, we, the said Anthime Robillard and Marie Anne Robillard, for ourselves and our heirs covenant with the said Alcide Charland and his assigns, that we have power to transfer in manner aforesaid the premises hereinbefore expressed to be transferred and that the same are free from incumbrances. In witness whereof we have hereunto subscribed our name and affixed our seal this twelfth day of May, one thousand nine hundred and nineteen.

Executed by the above named Anthime Robillard and Marie Anne Robillard, in the presence of:—Donat Martel, Notaire, Notary Public, 92 Notre-Dame East, Montreal.

Anthime Robillard, Marie Anne Robillard, Jean Louis (his X mark) Robillard.

Witness: René Coutu, Nathaniel Rondeau."

This bill of sale purports to show that Anthim Robillard and Marie Anne Robillard executed it, that they signed it in the presence of Donat Martel. No witness was examined to prove the execution of the bill of sale, but Alcide Charland swore that it was signed by Nathaniel Rondeau; he does not say that Rondeau signed in his presence. According to Charland's evidence, he bought from Rondeau as executor. Under the will of Mélina Robillard the two legatees, Anthime Robillard and Marie Anne Robillard certainly had no power to sell the sloop. By section 24 of the Merchant Shipping Act, the bill of sale must be in the form given in the first schedule

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of the Act and must be executed by the transferor in presence of and be attested by witness or witnesses. There is no witness or attestation of the signature of Nathaniel Rondeau in the bill of sale. The notary Donat Martel, witnessed and attested the signatures of Anthime Robillard and Marie Anne Robillard. The Privy Council, in 1912, in the case of *Shamu Patter* v. *Abdul Kadir Ravuthan* (1), laid down the principle that the word "attesting" in a statutory provision similar to section 24 of the Merchant Shipping Act meant the witnessing of the actual execution of the document by the person purporting to execute it. Rondeau does not covenant that he had power to make the transfer. This is another defect in the bill of sale.

In *Burgis* v. *Constantine* (2), Sir Gorell Barnes, at page 1052, said:—

"Beneficial owners who leave their shares on the register in the name of another person are to be bound by anything he does in the manner provided by the Act, but not otherwise." See also observations of Fletcher Moulton L.J., p. 1053, and Farwell L.J., p. 1055.

Assuming that Nathaniel Rondeau, as executor, had the right to transfer the sloop by bill of sale, it is settled law that he could only do so in the manner provided by the Act and not otherwise. The bill of sale in this case has not been executed in the manner provided by the Act, and I come to the conclusion that it did not transfer the *St. Roch.*

There remains the question whether Charland bought in good faith and without knowledge of fraud on the part of Rondeau. Charland admits that he has been

(1) 28 T. L. R. 583. (2) [1908] 2 K.B. 484 77 L.J.K.B. 1045 C.A.

a navigator for fifteen years, with the exception of a period of four years immediately preceding his purchasing of the *St. Roch*, and that while he was navigating he knew the *St. Roch* and had always seen plaintiff in charge of her. The price of $850.00 which he paid was not a reasonable price. The *St. Roch* was worth fully twice that sum. At the trial, plaintiff swore that he met Charland in Montreal, about 21st March, 1921, and had some conversation with him concerning Charland's purchase, and plaintiff swore in examination in chief and also in cross-examination, that one of Charland's statements to him was: "Il m'a dit qu'il n'avait pas droit de le vendre, mais qu'il le vendait quand même." It is rather significant that Charland subsequently called as a witness on his own behalf, did not deny this statement. The circumstances surrounding the transaction were sufficient to put Charland on inquiry and it is reasonable to infer that he entered into the transaction knowing that Rondeau was committing a fraud on plaintiff. Rondeau was not examined as a witness, but the evidence shows he knew plaintiff was the beneficial owner of the sloop. All the circumstances of the alleged purchase go to indicate that Charland was not acting in good faith.

The evidence in this case and the principles of law applicable lead me to the conclusion that the plaintiff has established his claim as the real owner of the *St. Roch;* that the bill of sale relied upon by Charland was not executed in accordance with the provisions of the Merchant Shipping Act and is therefore invalid and void as a transfer and that the intervenant, Alcide Charland, did not acquire the sloop in good faith, and there will therefore be judgment pronouncing Jean Baptiste Robillard, the plaintiff, to be

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lawful owner of the sloop *St. Roch*, and that he is entitled to be registered as the sole owner thereof, declaring null and void the bill of sale to Charland, dated 12th May, 1919, and registered 15th August, 1919, and its registration, and that possession of the said sloop be delivered to him by Alcide Charland, with costs against the latter.

Judgment accordingly.

Solicitor for plaintiff: *Conrad Pelletier K.C.*

Solicitors for defendant and intervenant: *Gosselin, LeBlanc & Plante.*

BRITISH COLUMBIA ADMIRALTY DISTRICT

1921
June 13.

STANLEY STEWART STONE, CHESTER ROY STONE, WILLIAM JOHN STONE, ANGUS McKEE, AVERY ARTHUR RHODES AND MACNUS KNUDSEN..... } PLAINTIFFS;

AND

THE S.S. *ROCHEPOINT* AND OWNERS..... } DEFENDANTS.

Shipping and Seamen—Priority of wages as against mortgagee—Seamen part owners of ship mortgaged—Shipping register—True ownership.

The W.C.T. Co. were the registered owner of the S.S. *Rochepoint* and 50% of the stock of this Company was owned by the plaintiffs, S.S., C.R. and W. J. Stone. The other plaintiffs had no interest therein. In 1919, S.S. and W.J. Stone, acting for the company, mortgaged the said ship for $4,000, and personally guaranteed the payment thereof. In February, 1921, the mortgagees took possession, and whilst technically in their possession a writ was issued on behalf of plaintiffs for arrears of wages claiming condemnation of the ship, etc., which was resisted by the mortgagees.

Held, that S.S.S. and W.J.S., Master and Mate respectively of the ship, having personally guaranteed payment of the mortgage, their claim for arrears of wages should not now be preferred or given priority as against that of the mortgagee.

2. That, with respect to the claim of C.R.S. (engineer), as the mortgagees were designedly kept in ignorance of these wage claims, and as the Company as registered owner was being used as a cloak to carry on the operations of the vessel by the three plaintiffs "Stone" as partners behind the screen of registration, this claim for alleged lien was not *bona fide*, and should be rejected.

Haley v. S.S. *Comox* (20 Ex. C.R. 86) referred to.

3. That, to determine the question of true ownership, the Court should not allow itself to be misled by documents, but will resort to all the evidence to extract the truth.

(See *Haley* v. S.S. *Comox* above).

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STONE *et al.* v. THE S.S. ROCHEPOINT AND OWNERS.

Reasons for Judgment.

Martin L.J.A.

ACTION for arrears of wages claiming condemnation of the ship defendant.

April 26th, 1921.

The case was heard before the Honourable Mr. Justice Martin, L.J.A. at Vancouver.

Hume B. Robinson for plaintiffs.

E. C. Mayers for mortgagees.

The facts are stated in the head-note and in the reasons for judgment.

MARTIN L. J. A. now (this 13th June, 1921) delivered judgment.

This is an action for wages by the master, mate and other seamen of the *Rochepoint,* a gasoline fishing vessel of about 76 tons gross, and the preferential lien that they claim is resisted by the mortgagees, the Columbia Salmon Company, which holds a mortgage on the vessel for $4,000 for moneys advanced, dated the 9th of December, 1919, given by the registered owner, the West Coast Transportation Company, Ltd., and the payment of which is also personally guaranteed by W. J. Stone and S. S. Stone, her master and mate respectively, at that time, who signed a promissory note as collateral security for the mortgage, which they have not paid.

It was decided in the *Bangor Castle* (1), that the lien of a master for wages cannot be preferred against the claim of a mortgagee where the payment of the mortgage has been guaranteed by the master, (and see the *Edward Oliver* (2)), and so it was admitted that the master's claim here must give way to the

(1) [1896] 8 Asp. 156. (2) [1867] L.R. 1 A. & E. 379.

mortgagees's. But it is submitted that the claim of the mate is in a different position because he is a seaman and the master is not in theory, (though I note he describes himself as such in his statement of claim) and hence the rule should not be extended to include seamen, who are specially protected or favoured as to exemption from attachments and the revocability of assignments of wages or salvage made "prior to the accruing thereof" by secs. 236-7 of the Canada Shipping Act, cap. 113, R.S.C. The position of the master as to his lien for wages and disbursements was considered by me in *Beck* v. *The Kobe* (1), and he is now upon the same basis in that respect as any seaman, though not a seaman in the technical use of that word, (though he is a "mariner"—the *Johathan Goodhue* (2)), and I am unable to see why a distinction should be drawn between two classes holding a lien of the same description simply because special protection in other respects is given to a seaman. It does not at all follow that because he may properly claim that specified statutory protection or privilege there is any principle which would otherwise entitle him to act less honestly than any other lien holder towards his creditor, and Dr. Lushington said in the *Edward Oliver case,* (3) p. 383, that in the case of a master "it would be manifestly wrong that in defeasance of his own contract he should not only not pay the bond himself, but obtain out of the proceeds of ship and freight payments of his own claims against the owners leaving the bottomry bond unpaid. Hence the rule by which the master's claim is liable, under those circumstances, to be postponed," and so I see no reason why the mate

(1) [1915] 22 B.C. R. 169.
(2) [1859] Swab. 524, 527.
(3) [1867] L.R. 1 Ad. and Ecc. 379.

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STONE *et al.* v. THE S.S. ROCHEPOINT AND OWNERS.

Reasons for Judgment.

Martin L.J.A.

should be less honest than the master in discharging his legal obligations, I am of opinion that the claim of the mate is within the same rule as that of the master and should likewise be postponed to that of their common creditor the mortgagee.

As to the claim of Chester R. Stone as engineer; having regard to all the unusual circumstances it is obviously open to grave suspicion as a lien in conflict with the unquestioned claim of the mortgagees, who, I am satisfied, were designedly kept in ignorance of these wage claims. After an examination, in the light of the other evidence, of the books, (if they can be dignified by that description) of the West Coast Transportation Company, Limited, I can only reach the conclusion that at time material at least the name of that company as the registered owner was being made use of as a cloak to carry on the operation of the vessel by the three Stone plaintiffs as partners behind the screen of registration. But to determine the question of the true ownership the court will not allow itself to be misled by the presence of documents but will resort to all the evidence to extract the truth, as I did recently in *Haley* v. SS. *Comox* (1). Therefore I am of opinion that this alleged lien is not *bona fide*, and is consequently rejected.

With respect to the claims of the three seamen, McKee, Rhodes and Knudsen, I am of the opinion that they are *bona fide* and the delay in asserting their lien has been satisfactorily explained and therefore judgment should be entered in their favour for the respective amounts due them of $301.15; $480.85 and $816.20.

Judgment accordingly.

(1) [1920] 3 W.W.R. 325; 20 Ex. C.R. 86.

MEMORANDA

WOLFE v. THE KING (20 Ex. C.R. 306) affirmed on appeal to the Supreme Court of Canada.

POINTE ANNE QUARRIES, LTD. v. S. S. WHALEN (21 Ex. C.R. 99) judgment varied on appeal to Supreme Court.

CITY SAFE DEPOSIT AND AGENCY CO. v. CENTRAL RAILWAY CO. OF CANADA AND ARMSTRONG (20 Ex. C.R. 346) appeal to Supreme Court dismissed for want of prosecution.

KING, THE v. PETER KARSON ET AL, (21 Ex. C.R. 257). Leave to appeal to Supreme Court refused.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1921
June 18.

THE OWNERS, MASTER AND CREW OF GAS BOAT *FREIYA* . . . PLAINTIFFS;

VS.

THE GAS BOAT *R.S.* . . . . . DEFENDANT.

Shipping—Re-Arrest pending Appeal—Foreign Owners—Special Circumstances.

Plaintiffs sued the *R.S.* on a claim for salvage which was dismissed. They appealed to the Exchequer Court from this decision and moved to re-arrest the ship pending the appeal.

Held: That where the owners, though foreigners, reside within the jurisdiction and carry on their business therein, the Court will not order the re-arrest of the ship pending an appeal to the Exchequer Court of Canada from the decision of the Local Judge in Admiralty, in absence of evidence of removal of the ship out of the jurisdiction, or of other good reasons. The *Abbey Palmer* 8 Ex. C.R. 462, 10 B.C.R. 383 referred to. (1904).

MOTION by Plaintiff in Chambers to re-arrest the ship after judgment had been delivered dismissing the claim of salvage against her and from which judgment an appeal had been taken to the Exchequer Court of Canada.

June 16th, 1921.

MOTION now heard before the Honourable Mr. Justice Martin at Victoria.

J. E. Clearhiue, for plaintiff: The vessel is owned by foreigners (Japanese) and should be held to answer the result of the appeal. See the *Miriam* (1); the *Freir* (2); the *Dictator* (3).

(1) [1874] 2 Asp. N.S. 259. (2) [1875] 2 Asp. N.S. 589.
(3) [1892] P. 304, at pages 321-2.

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THE OWNERS MASTER AND CREW OF GAS BOAT FREIYA v. THE GAS BOAT R. S.

Reasons for Judgment.

E. C. Mayers, for defendant: Though the owners may be foreigners the vessel is within the jurisdiction and is still being operated as a fishing vessel—there must be special circumstances which are not shown here to justify the re-arrest of a ship as there must be to hold the bail bond on appeal. The *Abbey Palmer* (1).

Martin L.J.A.

MARTIN, L. J. A. now, this (June 18th, 1921), delivered judgment.

On the 16th inst. a motion was made before me to cancel the bail bond since judgment had been pronounced in favour of the ship and I acceded to the motion according to the principle embodied in my decision in the *Abbey Palmer*, (1), as no special circumstances were shown in the opposition to the motion and in the absence of these, the bail, which takes the place of *res*, shall not be held in Court pending the result of the appeal.

After the motion was granted the present motion was made upon the same material by special leave and consent and the cases of the *Miriam* and the *Freir* were cited as authority in support of a general right to re-arrest in case of an appeal which, upon the face of it, is not consistent with reason, because if the bail which represents the *res* should not be held at the Court why should the *res* itself be held?—the same thing cannot be regarded in different ways for the purpose of the appeal —but when the cases which are relied upon are closely examined they do not support the application because in the former it was stated by counsel that the ship would 'go at once' (i.e. out of the jurisdiction), if notice of the application were given, and in the latter case the vessel was a foreign one (Dutch) and would leave the country and the plaintiffs would be left without security unless arrested without notice which was ordered.

(1) [1904] 10 B.C.R. 383, 8 Can. Ex. R. 462.

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THE OWNERS MASTER AND CREW OF GAS BOAT FREIYA v. THE GAS BOAT R. S.

Reasons for Judgment.

Martin L.J.A.

Though the former case is not as fully reported as one would want and had to be explained by counsel, it was clear that the principle upon which the respective ships were re-arrested, even though the former was British, is that it appeared to the court that they would not be within the jurisdiction to answer the appeal if the appeal went against them.

This view was supported by the following statement of the Practice in Williams & Bruce Admiralty Practice, 1902, page 521, based upon the above cases:—

"Where the effect of the decision appealed against is that property which had been proceeded against at the instance of the appellant is released from the arrest of the court below, the appellant, if he apprehends that the property will be removed out of the jurisdiction, may, after instituting an appeal obtain a warrant of arrest out of the principal registry under which the property may be kept under arrest until the appeal has been decided."

As there is no evidence of removal from the jurisdiction or other good reasons, see the *Abbey Palmer*, I see no grounds for ordering the re-arrest of the vessel in question. Though the owners may be foreigners yet they reside here and carry on the business in these waters.

The motion will be dismissed with costs.

Judgment accordingly.

1921
Sept. 6.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

JOSEPH TESSIER.....DEFENDANT.

Patent—Novelty—Invention—Old and known device—adapted to new and analogous use.

T. conceived the idea of sticking on a file cover a "pocket adapted to receive and conceal one end of the fastener." The same idea had long been in use in connection with garments.

Held: That the mere carrying forward or applying of an original thought, or of an old and well known principle or device, from one use to another, doing substantially the same thing, in the same manner by substantially the same means, is not such an invention as will sustain a patent. That a patent granted for such a new use does not possess any element of invention and does not involve a creative work of inventive faculty such as is contemplated by the patent law and which the Patent Act intended to encourage and reward.

2. That estoppel cannot be invoked against the Crown.

ACTION on behalf of the Crown, to impeach and annul the patent of invention for "File Covers and Holders" granted to the defendant.

June 23rd, 1921.

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

R. V. Sinclair K.C., for plaintiff.

Harold Fisher and *R. S. Smart* for defendant.

The facts are stated in the reasons for judgment.

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Reasons for Judgment.

Audette J.

AUDETTE J. now (this 6th September, 1921) delivered judgment accordingly.

This is an action on behalf of the Crown, to impeach and annul the patent of invention No. 167,102, for "File Covers and Holders," granted to the defendant, on the 11th January, 1916.

The specification attached to the letters patent describes the "file covers and holders," as follows:

"My invention relates to a file cover with envelope extension flap, being provided with a binder—or clasp-holder and with an adjustable locking attachment, and the objects of my invention are, first, to provide a binding process for a file of papers without the binder or clasp, so used, interfering with neighbouring or adjacent files; second, to provide a holder or envelope for a file of papers without using unnecessary space, and, third, to provide a cover for a file of papers that will not fray and wrinkle up under conditions existing in the average file drawer.

Then, after explaining the drawing, the specification concludes by saying, to wit:—

"I am aware that, prior to my invention, one or more of the devices used in my folder, have been used for securing papers or books; I do not, therefore, claim such devices separately; but

"What I do claim as my invention, and desire to secure by letters patent, is:

"1. A file cover and holder comprising a covering jacket and a strip secured thereto forming a pocket adapted to receive and conceal one end of the fastener used in filing.

"2. A file cover and holder comprising a foldable covering jacket and a strip secured thereto forming a pocket adapted to receive and conceal one end of a fastener used in filing.

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"3. A file cover and holder comprising a foldable covering jacket, a strip secured thereto forming a pocket adapted to receive and conceal one end of a fastener used in filing and means for fastening the folded edges of the covering jacket together.

"4. A file cover and holder comprising a foldable covering jacket, a strip secured at one end thereof forming a pocket adapted to receive and conceal one end of a fastener used in filing and means for fastening the folded edges of the covering jacket together."

By examining exhibit A, which is filed as a sample of the defendant's patented article, it will readily appear that there is nothing new, and that no patent could be claimed for a folding covering jacket, and that what is really claimed by the defendant, as more clearly disclosed by his oral testimony at trial, is the strip forming a pocket which conceals the head of the fastener used in the file, and which is covered by claims Numbers 1 and 2. Then by claims 3 and 4, the same is claimed with this difference that the word "thereto" is used in the second line of claim No. 3, after the word "secured," and that in the 4th claim the words "at one end thereof" is substituted for the word "thereto." But claims 3 and 4 further claim a "means for fastening the folded edges of the covering jacket together," as explained in the drawing by letters E-E which is old and offers no new feature.

The defendant, who is a civil servant employed in the Record room of the Department of Railways and Canals, being in charge of the records of the Department, it was part of his duties, for a number of years to look after the several departmental files. These files, made up of several documents attached together by means of a paper fastener, were placed inside what was called at trial, a backing cover. The defendant

contends that they encountered trouble with such files in that the head of the fastener, exposed on the outside of the cover, used to catch on the other files and cut the paper, and that the head of the fastener would also scratch the tops of their desks and cut their fingers in pulling them out of the drawers. Under such circumstances, he says that when "alone at night" he started to think out a method to overcome these troubles, and that he devised this pocket into which the fastener could be introduced thereby preventing the external exposure of the head of the fastener.

From the claims above described, and what has already been said, it will readily be seen that the patent is in itself very narrow.

In England, the Royal Commission on Awards to Inventors does not give a person who has improved a device for the best use of which he was responsible in the course of his daily duties, such consideration as to a person who invented in his spare time a device which had nothing to do with his duties (1).

Now, under the Canadian Patent Act, s. 7, a patent may be granted to any person who has invented any new and useful art, machine, manufacture or composition of matter; or any new and useful improvement therein, which was not *known* or *used* by *any other person before his invention thereof*, and which has *not been in public use* or sale with the consent or allowance of the inventor thereof, for more than one year previously to the application for the patent.

Therefore, the subject-matter of the letters patent must be a manufacture or device that is new, useful and involving ingenuity of invention. There must be a new art. The primary test is skilful invention.

(1) Moritz's Post War Patent Practice, p. 61.

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Under our patent law a patent is granted as a reward for invention, whereby restraint upon commercial freedom, in respect of the use of the patented invention necessarily results; and a court cannot be too careful in insisting that it is only when the requirements of the law have been satisfied by the patentee that the public will be prevented from using common and well-known articles or devices for a common purpose.

There is no invention in merely applying well-known things, in a manner or to a purpose which is analagous to the manner or to the purpose in or to which it has been previously applied (1).

The ingenuity of invention consists in discovering the thing. A screw being discovered, a patent cannot be granted every time it is applied to several and distinctive things.

In the present case we must enquire whether this alleged combination implies invention and whether the result therefrom has not been anticipated.

All of the devices mentioned in the four claims of the patent are old, and therefore the question is whether this combination involves ingenuity of invention and actually produced something that was new and involved invention.

It is quite clear we had in the trade, long before the patent was ever thought of, "file covers and holders comprising a covering jacket," with documents attached together by a fastener. The same may be said with respect to the tying of the file together as explained by letters E-E in the drawing, and described in the specification in the following language: "The extension flaps of jacket A are then folded up over the file and locked by some suitable means such as shown at E and E 1."

(1) Nicholas, on Patent Law, 23, and cases therein cited.

The paramount element or feature of the folder is the placing of the head of the fastener inside the backing or cover, within the pocket, thereby overcoming the trouble above mentioned.

Now this very feature of the patent has been in use in garments of different kinds long prior to the patent in question in this case. This device, as disclosed by the evidence, has been in use for over 20 years with respect to collar buttons under the shirt band, in trouser flaps, and in summer waist coats, thereby concealing the head of the fastener or button. Therefore there appears to be no ingenuity of invention in the most meritorious part of the patent. There was nothing new, when the patentee applied for his patent, in any of the devices mentioned in his claims. The same process or operation of concealing the head of fastener, in the manner above referred to, had long been in use in the manufacture of garments; and what the patentee has done was only to adopt without invention the old contrivance of a similar nature in the manufacture of file covers and holders.

The adaptation of an old function or contrivance to a new purpose is not invention—there is no subject matter where no ingenuity of invention has been exercised (1).

The case of *Abell* v. *McPherson* (2) abundantly confirms my views concerning the present patent. The head note in that case reads as follows: "The plaintiff had obtained a patent for an improved gearing for driving the cylinder of threshing machines; and the gearing was a considerable improvement; but, it appearing that the same gearing had been previously

(1) Terrell, p. 38.

(2) [1870] 17 Gr. 23 & [1871] 18 Gr. 437.

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Audette J.

used for other machines, though no one had before applied it to threshing machines—it was *held* (affirming the decree of the court below) that the novelty was not sufficient under the statute to sustain the patent."

And using the very words of Mowat, V.C., in the conclusion of that judgment, it must be said that the use of the pocket in a foldable covering jacket concealing one end of the head of the fastener, similar to those in shirt bands, in trouser flaps and summer waist coats, concealing head of fastener, "is thus an old and well known contrivance, applied to an analagous purpose (on a file cover or holder instead of these garments) and the settled rule is that such an application cannot be patented."

Again, in the case of *Harwood* v. *G.N.R. Co.* (1), it was held that: "A slight difference in the mode of application is not sufficient, nor will it be sufficient to take a well known mechanical contrivance and apply it to a subject to which it has not been hitherto applied."

The transfer of a known thing from one use to another, or to an analogous use, is not a good ground for a patent. See also *Bush* v. *Fox* (2), and *Brook* v. *Astor* (3).

The mere saving of labour and expense, and the production of a new and useful result cannot alone support a patent; there must be some "invention" as was held in *Waterous* v. *Bishop* (4).

The placing of known contrivances to a use that is new, but analagous to the uses to which they had been previously put, without overcoming any fresh difficulty, is no invention (5). "There is no patent-

(1) [1864] 11 H.L. Cas. 654; 11 E. R. 1488.
(2) [1854] 9 Ex. 651.
(3) [1857] 8 El. & Bl. 478 & 120 E. R. 178.
(4) [1869] 20 U.C.C.P. 29.
(5) [1914] Re Merten's Patent, 31, R.P.C. 373 & *Layland* v. *Boldy & Sons* [1913] 30 R.P.C. 547.

able invention where the peculiar structure necessarily resulted from the fact that the patentee wanted to combine certain old and familiar elements, and a person skilled in the art would naturally group the 'elements of the combination' in the way the patentee adopted (1).

And in *Blake* v. *San Francisco* (2), Wood, J., delivering the opinion of the court cited the following words of Gray J. in *Pennsylvania Ry. Co.* v. *Locomotive Truck Co.* (110 U.S. 490) with approval, to wit:—

"It is settled by many decisions of this court * * * that the application of an old process or machine, to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not been before contemplated."

The defendant's patent is made up of a group of well known old devices and contrivances, the result of which had long been anticipated or analogous functions in garments and discloses no invention, no ingenuity of invention. No new result is obtained from the patent, save perhaps the display of a function in file covers and holders which was in existence in garments long before, and was thus anticipated (3).

The mere carrying forward or the application of the original thought—the "pocket adapted to receive and conceal one end of the fastener"—from garments to files, doing substantially the same thing in the same manner by substantially the same means even with better results, is not such invention as will sustain a

(1) *Eagle Lock Co.* v. *Corbin Cabinet Lock Co.* [1894] 64 Fed. R. 789.

(2) [1885] 113 U.S.R. 679 at p. 682.

(3) *Acetylene Illuminating Co., Ltd.* v. *United Alkali Co., Ltd.*, [1904] 22 R.P.C. 145; *Grip Printing & Publishing Co.* v. *Butterfield* (1883) 11 Ont. A.R. 145.

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Reasons for Judgment.

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patent. The patent does not possess any element of invention, it does not involve in any sense, a creative work of inventive faculty, such as contemplated by the patent law and which the Patent Act intended to encourage and reward (1).

In the view I have taken of the case a passing word only will be sufficient in respect of the prior state of the art and publication, as well as to the question of estoppel resulting from the payment on one occasion of a small royalty when the Printing Bureau manufactured a few jackets similar to Exhibit "A."

Had I to consider the state of the prior art resulting from the American patents filed by the plaintiff, and especially with respect to Exhibit No. 3, I would be forced to find against the defendant.

The question of estoppel raised by the statement in defence has not been mooted at bar on behalf of the defendant. It will be sufficient to say that it is a well settled principle of law that estoppel cannot be invoked against the Crown (2).

(1) *Hinks* v. *Safety Lighting Co.* [1876] 4 Ch. D. 607; *Smith* v. *Nichols* [1874] 21 Wall (88 U. S.) 112 at p. 118; *Hunter* v. *Garrick* [1885] 11 S.C.R. 300, *Yates* v. *Great Western Railway Co.* [1877] 2 Ont. A.R. 226; *Pickering* v. *McCullough* [1881] 104 U.S.R. 310; *Hailes* v. *Van Wormer* [1873] 20 Wall (87 U. S.) 353; *French et al.* v. *O'Hanlon Co., Ltd.* [1915] 32 R. P. C. 553; *Treo Company, Inc.*, v. *Dominion Corset Co.* [1918] 18 Ex. C.R. *115* (affirmed by S.C. Canada, May 6th, 1919); *Northern Shirt Co.* v. *Clark* [1917] 17 Ex. C.R. 273; (affirmed by S.C., Canada, Nov. 18th, 1918).

(2) *Ontario Mining Co.* v. *Seybold* [1903] A.C. 73, at p. 84; [1899] 31 Ont. R. 386; *Bank of Montreal* v. *The King* [1906] 38 S.C.R. 258; *Queen* v. *Bank of Nova Scotia* [1885] 11 S.C.R. 1; *Peterson* v. *The King* [1889] 2 Ex. C.R. 67; *Humphrey* v. *The Queen* [1891] 2 Ex. C.R. 386, 390; *Robert* v. *The King* [1904] 9 Ex. C.R. 21; *Cunn* v. *The King* [1906] 10 Ex. C.R. 343, 346; Robertsons' Civil Proceedings, 576; Chitty's Prerogatives, 381.

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The defendant's patent, which is wanting in meritorious invention, appears to me to be invalid for want of subject-matter, exercise of inventive faculties or ingenuity of invention; therefore, there will be judgment maintaining the plaintiff's action, annulling the defendant's patent, which is declared and pronounced void and of no effect.

Judgment accordingly.

Solicitor for plaintiff: *R. V. Sinclair.*

Solicitors for defendant: *Murphy, Fisher, Sherwood and Clark.*

1921
Sept. 15.

BETWEEN:

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

AND

THE ROYAL NOVA SCOTIA YACHT SQUADRON, A BODY CORPORATE, THE EASTERN TRUST COMPANY, AND HONOURABLE L. G. POWER, NICHOLAS H. MEAGHER AND W. B. R. WALLACE, TRUSTEES UNDER THE WILL OF PATRICK POWER, DECEASED ..... DEFENDANTS.

Expropriation—Allowance of 10 per cent for compulsory taking.

Where by reason of expropriation by the crown the owners of the property taken suffer materially and are put to great trouble in moving; and where the site so taken was most advantageous and one which suited their purpose to an eminent degree, and it took several years of negotiating before they were able to find a new and suitable place for their operations, the court should add 10 per cent to the fair market value of the property taken, for such contingent losses and inconveniences, in fixing the compensation to be paid for such property. [*The King* v. *Hunting*, 32 D.L.R. 231, followed].

INFORMATION by the Crown to have property expropriated valued by the Court.

September 15th, 1921.

Case now heard before the Honourable Mr. Justice Audette at Halifax and judgment rendered on the bench.

Mr. T. F. Tobin, K.C., for the Crown.

P. T. Macilreith, K.C., for the Royal Nova Scotia Yacht Squadron and the Eastern Trust Company.

AUDETTE J. (15th September, 1921) delivered judgment.

(His Lordship after stating the various interests represented and the point in issue proceeds as follows:)

HIS LORDSHIP: I shall now proceed to give judgment in the case. After hearing the evidence and the argument by counsel for the respective parties, there will be judgment in favour of the defendant, the Royal Nova Scotia Yacht Squadron in the manner hereinafter mentioned. It is convenient to state here that the Eastern Trust Co's. interest has been satisfied, as well as the mortgage of the Power estate, the same being admitted by both counsel.

The usual judgment in expropriation cases will be entered declaring the lands in question as described in the information vested in the Crown. The compensation is fixed at the amount of $30,270.00, with interest from the date of the expropriation to the date of the intermediate payments, if any, made since the expropriation, but no interest is to be allowed further than the present day. There will also be costs to the defendant.

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THE KING v. THE ROYAL NOVA SCOTIA YACHT SQUADRON. ET AL.

Reasons for Judgment.

Audette J.

I now come to the consideration of the only question open before me for determination, that is whether or not to the amount of compensation of $30,270.00 should be added the ten per cent which in certain cases the courts have been disposed to allow for the compulsory taking. I may say there is no text of law allowing this ten per cent for compulsory taking. The text-writers while drawing attention to the fact that there is no law to warrant such payment, state it has been customary in England to allow this ten per cent. There are instances where as much as fifty per cent was allowed in respect of agricultural lands. There are cases cited to that effect in my book, the practice of the court, under section 47 of the Exchequer Court Act.

The Exchequer Court for a number of years has adopted that view, and has allowed ten per cent in quite a number of cases which are cited in the annotation to the report of the case of *The King* v. *Courtney* (1), such as *Dodge* v. *The King* (2); *The King* v. *Macpherson* (3); and *Raymond* v. *The King* (4), and others.

Finally we come to the case of *The King* v. *Hunting* (5), which has not been reported in the Supreme Court reports. I think that, notwithstanding some expressions of opinion, mere obiter dicta, since that case, the *Hunting case* remains the leading case and the last word upon the subject. We find there stated by the Chief Justice, in his reasons for such allowance, the following remark in respect to the ten per cent, viz.: "The allowance of ten per cent for compulsory purchase

(1) [1916] 27 D.L.R. 247, at p. 250; also, 16 Ex. C.R. 461.
(2) [1906] 38 S.C.R. 149.
(3) [1914] 20 D.L.R. 988; and 15 Ex. C.R. 215.
(4) [1916] 16 Ex. C.R. 1.
(5) [1916] 32 D.L.R. 331.

has become so thoroughly established a rule from the innumerable cases both here and in England in which it has been awarded almost as a matter of course, that I certainly should not be prepared to countenance its being questioned in any ordinary case. * * * * The ten per cent allowance does not of course profess to be anything but a covering charge and perhaps there might be cases in which it ought not to be allowed."

Then Mr. Justice Idington in the same case, said:—"I assume that the respective amounts tendered represent what those acting for the Crown concluded were fair market values due each party for her compensation, and that being so, I think there should have been added to each such amount the usual ten per cent thereof in way of compensation for compulsory taking. I agree that there is no rule of law rendering it an invariable consequence of compulsory taking. It, however, in the majority of cases, is no more than justice demands. In the case of men having to find another home, or place of business, it is often less than justice demands. In the case of a man in easy circumstances who holds his property as an investment and desires to replace that form of investment by another of the like character he is put in procuring it, to expense, loss of revenue and inconvenience which those taking should help to bear."

Mr. Justice Anglin, in the same case, states: that something should be added for annoyance of being disturbed in possession, and for the delay in securing other suitable premises. "Compensation should cover not merely the market value of the land, but the entire loss to the owner who is deprived of it. It must, therefore, usually exceed the market value

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THE KING v. THE ROYAL NOVA SCOTIA YACHT SQUADRON, ET AL.

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though it may occasionally be less, as where the land taken is, while in the owner's hands, subject to depreciatory restrictions from which it is relieved when expropriated. The ten per cent allowance is of course independent of and additional to any sum in excess of market-value to which the owner may be entitled because of special adaptability of the expropriated premises to his purpose. * * * * Where the owner is in actual occupation and sustains all this damage, the 'additional allowance' is limited to ten per cent."

I have taken the trouble of citing these extracts to show how the law now stands—and after having stated the law, it now becomes my duty to see whether this is a case which justifies the allowance of the ten per cent under the cases discussed, more especially the *Hunting case*. What strikes me *in limine* on the consideration of the present case is that the expropriation took place in 1913, and that it took seven years for the Yacht Squadron to find new premises. It may be proper to add that my sympathy goes with them in the circumstances.

The object of the Yacht Squadron is the promotion of acquatic sport, with the great corinthian tradition behind it, a sport in which many people have taken great interest. The Squadron has certainly suffered materially from the fact of being disturbed, as shown by the evidence. It has been put to great trouble in moving, and being deprived of a site that was advantageous and which answered their purposes to an eminent degree—and after great delay, and pourparlers and negotiations of several years, they have at last found a place because the Crown came to their rescue and by its benevolence helped them out. But that benevolence is exercised outside of the compen-

sation due the Squadron as owner of the premises taken from them. The Crown comes to their rescue, seeing what an awkward position they are in, and I have come to the conclusion that if ever there was a case where the ten per cent should be allowed, this is one, and to the $30,270.00 there will be added the usual ten per cent.

Judgment accordingly.

T. F. Tobin, solicitor for plaintiff.

J. A. Chisholm, for Hon. L. G. Power et al.

C. F. Tremaine for Royal Nova Scotia Yacht Squadron and the Eastern Trust Company.

1921
July 6.

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN

HERNANDEZ

v.

THE *BAMFIELD.*

Shipping—Tariff—Practice—Marshal's fees on sale by auction—Municipal license.

The tariff of fees in force for marshals and sheriffs provides that "if the marshal, being duly qualified, acts as auctioneer, he shall be allowed a double fee on the gross proceeds."

Held: That the word "qualified" here used must be given its wider sense of competence and ability to perform the duties of auctioneer, and should not be restricted to a person "duly licensed" as such by the municipal authorities; and that where the marshal has such competence and ability, though not a duly licensed auctioneer, he will be entitled to the fees provided for in the said article of the tariff.

APPEAL by marshal for the British Columbia Admiralty District from the decision of the District Registrar disallowing the double fee in the sale by auction of a vessel under order of the court.

July 6th, 1921.

Appeal heard before the Honourable Mr. Justice Martin at Victoria.

The Marshal in person.

S. T. Hanky, contra.

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HERNANDEZ v. THE BAMFIELD.

Reasons for Judgment.

Martin L.J.A.

MARTIN, L. J. A., this (6th day of July, 1921) delivered judgment. This is an appeal by the marshal in person from the taxation by the registrar of his fees and the question is was he right in disallowing the auctioneer's charges made by the marshal in selling the power vessel *Bamfield* by order of the court. The appropriate item in the table of fees, No. 5, declares that "If the marshal, being duly qualified, acts as auctioneer, he shall be allowed a double fee on the gross proceeds."

The registrar ruled that the expression "being duly qualified" should be construed as "duly licensed" as auctioneer by the City of Victoria, in which place the sale was held and as it was admitted that the marshal had not applied for or received an auctioneer's license, therefore his claim for a double fee was disallowed, but, with all due respect to the learned registrar's views, I am of the opinion that "qualified" is here used in the wider sense of competence, or, standard of ability, to perform a duty which it is conceded, had often been adequately performed by the marshal. The sense I think in which the expression is here employed is well illustrated in Crabbs English Synonyms, sub title, "Competent, Fitted, or Qualified," wherein it is said:—"An acquaintance with the matter to be done and expertness in the mode of performing it constitutes the qualification." On this ground alone I am therefore of the opinion that the appeal should be allowed, but it is desirable to note for further consideration when necessary, that I am not unmindful of a further reason in favour of such construction which might be advanced, namely, that it appears to be a strange thing in that any municipal requirement could intervene between the Court and

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Reasons for Judgment.

Martin L.J.A.

its officers in disposing of any matter and by what agency it saw fit to direct of the property within its custody and control. It would seem to be an anomaly, that any officer of the Court who would be, by experience, qualified to dispose of its property throughout its entire jurisdiction over this province, should nevertheless be restricted in the performance of that duty by a local municipality.

Appeal allowed.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1918
Dec. 16.
Argument.

THE PACIFIC GREAT EASTERN RAILWAY COMPANY..... } PLAINTIFF;

VS.

THE *CLINTON*..... DEFENDANT.

Shipping and seamen—Ship wrongfully seized by crew—Redelivery to owner—Security.

Held: That where a ship has been wrongfully seized by her crew the Court will order the marshal to deliver possession to it to the owner upon giving security.

MOTION for writ of possession to restore possession of the *Clinton*, to its owners the plaintiff.

December 16th, 1918.

Motion heard before the Honourable Mr. Justice Martin, L. J. A., at Vancouver.

E. C. Mayers, for plaintiff: This is a cause of possession. The plaintiff's tug "*Clinton*," which has been wrongfully taken possession of by her crew on a dispute concerning wages, was arrested by the marshal on December 13th instant, and I now move that she be released from arrest and that a writ of possession do issue to restore possession to her owner, the plaintiff company, upon giving such security as the Court may order. I rely on the authority of the Quebec case of *The Haidee* (1), which supports such an application,

(1) [1860] 2 Stuart 25, at p. 30.

1918

THE PACIFIC GREAT EASTERN RAILWAY CO. v. THE CLINTON.

Reasons for Judgment.

Martin L.J.A.

not only as between owners, but "at the instance of the real owner against a mere wrong-doer," though I have not found any record of any similar application since that date. No one appears to oppose the motion, but I am authorized to state that it has been consented to by the opposing solicitors that this motion be turned into one for judgment.

MARTIN, L. J. A. (December 16th, 1918) delivered judgment.

The case cited is a sufficient authority for the application, and the remedy sought is an appropriate one to meet the unusual circumstances. See also Williams & Bruce's Adm. Prac., 3rd Ed., 827, 289, 291 (m), 611, 619; Roscoe's Adm. Prac., 3rd Ed., 64, 561, 567, 270. The plaintiff owner is entitled to possession, and a writ of possession directed to the marshal, will issue as prayed, commanding him to deliver possession to it upon giving security, which may be spoken to later.

Order accordingly.

QUEBEC ADMIRALTY DISTRICT.

1918
January 4.
Reasons for Judgment.
Maclennan D.L.J.A.

FREDERICK R. JOHNSON *ET AL* PLAINTIFFS;

VS.

THE SHIP *CHARLES S. NEFF*.... DEFENDANT.

Shipping—Practice—Order for removal from one district to another.

Held: That it is clearly in the discretion of the court to order the removal of a suit from one district to another upon cause shown.

2. That the determining factor in granting such an order is that of general convenience to the parties.

MOTION by defendant to have this case removed from the Quebec Admiralty District to the Toronto Admiralty District on the ground of balance of convenience.

January 4th, 1918.

Motion heard before the Honourable Mr. Justice Maclennan at Montreal.

J. A. H. Cameron, K.C., for plaintiff.

W. B. Scott for defendant.

MACLENNAN, D. L. J. A. now (January 4th, 1918), delivered judgment.

Motion by defendant to transfer this cause to the registry of the Toronto Admiralty District on the ground that the balance of convenience is in favour of having the trial take place in Toronto instead of in Montreal having regard to all the circumstances of the case.

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JOHNSON ET AL v. THE SHIP CHARLES S. NEFF.

Reasons for Judgment.

Maclennan D.L.J.A.

Before the institution of the present action, a suit in respect of the same matter had been instituted in the Toronto Admiralty District and that a suit is still pending and undetermined. It is established by affidavits filed herein that all the witnesses on behalf of the defendant live in the City of Hamilton, Ont., and the City of Milwaukee, Wis., U.S.A.; the plaintiff Johnson lives in Port Colborne, Ont., and Adam Brown MacKay lives in Hamilton; in fact, all the witnesses with one or two exceptions, live at points west of Toronto.

The authority for the removal of the suit from this district is found in the Admiralty Act, R.S., ch. 141, S. 18, sub. sec. 2, which reads as follows:

"Any party to a suit may, at any stage of such suit, by leave of the court, and subject to such terms as to costs or otherwise as the court directs, remove such suit pending in any registry to any other registry.

The order asked for is clearly within the discretion of the court and the determining factor is the general convenience to the parties. The additional expense of bringing the witnesses to Montreal for trial would be considerable, but I think it is proper to take into consideration also personal inconvenience to a large number of witnesses and probably counsel and solicitors of having to travel the additional distance and the time required to attend the trial in Montreal instead of Toronto. Counsel for defendant has undertaken to procure the consent of the surety company which gave the bond for the release of the *Charles S. Neff* to the removal of the suit.

There will be judgment on the motion in favour of the defendant, and the suit including all proceedings had herein to date, will be removed to the Toronto

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JOHNSON ET AL v. THE SHIP CHARLES S. NEFF.

Reasons for Judgment.

Maclennan D.L.J.A.

Admiralty District, costs of the motion to be costs in the cause, but the order of removal will not go into effect until the defendant has filed with the deputy registrar of this district, a consent in writing of the United States Fidelity and Guarantee Company that the bail bond given by it for $105,000.00 shall remain in full force and effect after removal of the suit to the Toronto Admiralty District; all other questions in the suit are to be determined by the judge in the Toronto Admiralty District.

Judgment accordingly.

1917

October 15.

Reasons for Judgment.

Maclennan D.L.J.A.

QUEBEC ADMIRALTY DISTRICT.

FREDERICK R. JOHNSON.....PLAINTIFF;

VS.

THE SHIP *CHARLES S. NEFF*....DEFENDANT.

Shipping—Admiralty—Practice—Security—Non-resident surety.

Held: That in a case where personal surety is offered the person giving such security must reside within the district wherein the action is instituted.

APPLICATION made in a cause instituted in the Quebec Admiralty District to approve of a security given by one surety resident outside of the said district.

J. A. Cameron, K.C., for applicant.

Lafleur, McDougall & Co., contra.

October 15th, 1917.

MACLENNAN, D. L. J. A. this (15th October, 1917) delivered judgment.

The plaintiff, who resides in the province of Ontario and was ordered under Admiralty Rule of Practice 134 to give security for costs, now moves for permission to give the bond of one surety who also resides in Ontario. Both parties have filed affidavits as to the property and means of the proposed surety. Counsel for defendant opposes the motion on the ground that a non-resident of the Quebec Admiralty District cannot be accepted as surety and that in any event his means are insufficient. No authority was

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Reasons for Judgment.

Maclennan D.L.J.A.

cited where a non-resident surety has been accepted as bail for costs in an Admiralty matter. The purpose of furnishing bail or security for costs is to enable a successful defendant to levy execution within the district on the goods and chattels of the surety. Security to be effective must be within easy reach of the successful litigant by the process of the court, and if the successful party has to go afield and beyond the limits of the Admiralty District seized of the litigation, the bond of the surety might be of little value as security. Residence within the district seems essential in the case of a personal surety. There is authority against the acceptance of a non-resident surety; 2 Pritchard Admiralty Digest, 3rd Ed. 1549 (note); *Knight* v. *De Blaquiere* (1). In my opinion, it would be a dangerous precedent and contrary to the principles which govern this matter to accept the bond of a non-resident individual as surety. It would be quite different if the bond offered were that of a company having assets and an office in the district, although its head office might be elsewhere. In the circumstances it is unnecessary to consider the request to dispense with the rule requiring two sureties or the sufficiency of the one offered. The motion must be dismissed with costs.

Judgment accordingly.

(1) [1839] 1 *Ir.* Eq. R. 375; 11 Mew's Digest 378; 19 Cyc. (Pl. and Practice) 386.

1914

March 24.

Reasons for Judgment.

Martin L.J.A.

BRITISH COLUMBIA ADMIRALTY DISTRICT

BROWN *ET AL*.....PLAINTIFFS;

VS.

THE *ALLIANCE No. 2*.....DEFENDANT.

Shipping and seamen—Responsibility of master for gear, etc.

Held: That the master of a fishing vessel carrying only a master, mate, chief and assistant engineer, cook and one seaman (not counting fishermen) must personally account for the property of the owner entrusted to his charge, such as tackle, boats, gear, etc.

ACTION for wages and counter claim.

February 25th, 1914.

Action heard before the Honourable Mr. Justice Martin at Victoria.

J. P. Walls, Jr., for plaintiffs.

P. C. Elliott, for defendant.

The facts are stated in the reasons for judgment.

MARTIN L. J. A. (March 24th, 1914), delivered judgment.

These are consolidated actions for wages against the ship *Alliance No. 2*, an auxiliary gas boat, 95 feet long, engaged in the halibut fishing. Four of the claims are those of fishermen and they were disposed of at the trial, that of Davis being settled when called on for hearing, and judgment being given in favour of Armstrong, William Brown, and Milne for the full amount claimed. I was asked not to give said Brown and Armstrong their costs of suit as their conduct on

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BROWN ET AL v. THE ALLIANCE No. 2.

Reasons for Judgment.

Martin L.J.A.

the vessel had not been satisfactory, and was open to suspicion as regards the missing fishing gear, and their threats against Larsen, the chief engineer, with respect to the same, but though I felt justified in giving them a warning in open court I do not, on further consideration, think I would be justified in taking the extreme step of depriving them of costs.

Judgment was reserved on the claim of the Master, Daniel Brown, but a few days after the trial was over, a motion was made to re-open the case and, in effect, to allow the master to give further evidence to account for the missing gear in his charge which his employers, the owners of the ship, sought to make him liable for. Such an application is an unusual one which should only be granted in a very special case and also in circumstances which would, in any event, not put the other party at a disadvantage or in an unfair position. The matter was fully argued and I have come to the conclusion that the application should be refused in the circumstances before me. The attention of the plaintiff was sufficiently drawn to the point by the pleadings, on the evidence at the trial, and during the argument; there has been no surprise and the fact that the evidence in his favour was not more fully brought out when it might, possibly, have been is not enough to re-open the case; he had the opportunity but did not take advantage of it. The application will therefore be dismissed, with costs.

Then as to his claim and the counter claim. I allow him his wages and give him judgment therefor, but hold him responsible for the value of the missing gear, $349.59, less two skates thereof at $17.00 each, which were lost and tardily accounted for at the trial. I am unable on the evidence to allow any further deduction. The vessel was amply outfitted

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BROWN ET AL v. THE ALLIANCE No. 2.

Reasons for Judgment.

Martin L.J.A.

with fishing gear, new and additional gear to the value of $349.59 having been put on board before sailing, which was admittedly in the custody of the master and which he must account for. In a small vessel of this description which carried only a master, mate, chief and assistant engineer, cook, and one seaman (not counting the fishermen who were not shipped as seamen and therefore did not perform seamen's duties) the master must personally account for the property of the owner entrusted to his charge whatever may be said as to his responsibility in larger vessels where property may be entrusted to the custody of various officers. It would never do for this court to encourage the opinion that a well equipped fishing vessel may leave a port in charge of a master and return with, *e.g.*, missing tackle, boats, gear, etc., and the master escape any responsibility simply by omitting to give any reasonable explanation of what has become of said property; on the contrary it is his duty to give it to his owners at the first opportunity, and in the present case he should have done so when his attention was directed to the shortage in the gear and his wages refused on that account, instead of which he did nothing, treating the matter, in effect, as one in which he had no deep concern.

The result of the adjustment of the accounts and opposing claims is that the plaintiff is indebted to the owners in the sum of $76.52, for which sum said owners will have judgment against the plaintiff over and above his claim against them. The costs of claim and counterclaim will be allowed in the ordinary way, and the reserved costs of the adjournment of the trial will be costs in the cause.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1914
November 23.
Reasons for Judgment.
Martin L.J.A.

THE HUMBOLDT.....PLAINTIFF;

VS.

THE ESCORT No. 2.....DEFENDANT.

Shipping—Salvage services—"Derelict"—Abandonment.

Held: That a ship does not become a "derelict" in law until she has been abandoned by her crew, and as the defendant ship had not been abandoned when the salvage services were rendered the value of such services should be fixed in the ordinary way, and not on the basis of the ship being a derelict.

APPLICATION for salvage services rendered the defendant tug by the plaintiff.

October 30th, 1914.

Action heard before the Honourable Mr. Justice Martin at Vancouver.

C. P. MacNeill, K.C., for plaintiff.

Mr. Alexander, for defendant.

The facts are stated in the reasons for judgment.

MARTIN L. J. A. this 23rd November, 1914, delivered judgment.

This is a claim for salvage services rendered to the tug *Escort No. 2* (137.37 tons gross) which on the 22nd November, 1913, had become disabled owing to her propeller being broken, and had got into such a

1914

THE HUMBOLDT v. THE ESCORT No. 2.

Reasons for Judgment.

Martin L.J.A.

position (a little to the S.E. of Hannah Bank, in the Sea Otter Group, Smith Sound) that she would beyond any reasonable doubt in the state of the wind and tide, have become a total wreck within a very short time, had not the S.S. *Humboldt* come to her assistance at 1.15 p.m. in response to her danger signals. The *Humboldt* finally took her in tow at 2.20 after about an hour's manœuvring which placed the *Humboldt* in a position of peril to an appreciable degree, because when she did make fast to the *Escort* and take her in tow she was between half and three-quarters of a mile from the reef. Owing to the heavy swell it was then impossible to take the master and crew (consisting of 11 souls, all told) off the *Escort* and they had before the arrival of the *Humboldt* made preparations to abandon her and take to their boat and make the somewhat hazardous attempt to reach land at Cape Calvert some 15 miles away which was the most favourable point to reach in the circumstances.

The *Humboldt* is a wooden steamship of 1,075 tons gross, valued at $150,000, with a crew of 46 men all told and had 50 passengers on board and a cargo of $8,725, and gold bullion to the amount of $142,032. She towed the *Escort* to Alert Bay, about 50 miles distant, and the only safe port in the circumstances, at night, arriving there at 4 a.m. the following day, after being further delayed about three hours by fouling the hawser (which had to be cut out of the wheel) in bringing the *Escort* up alongside when nearing Alert Bay. In performing this service the *Humboldt* did not have to diverge from her regular course more than five miles.

A conflict arose as to the value of the *Escort* and much evidence was given on both sides and I have found difficulty in determining this often vexed

question and the conclusion that I can arrive at which is nearest to my own satisfaction is to fix her value at $10,000. As to which see, *Dunsmuir* v. *The Otter* (1); *Vermont S.S. Co.* v. *The Abbey Palmer* (2); *The Iron Master* (3); *The Harmonides* (4); *The Marpessa* (5); and *The Hohenzollern* (6).

It was submitted that the *Escort* should, in the circumstances, be considered to be a derelict as she was in a hopeless position and on the point of being abandoned by her master and crew who were about to take to their boat when succour arrived, and therefore a large award should be given, a moiety being asked for, and the cases of *The Hebe* (7), and *The Livietta* (8), were cited in support of the submission. But they do not assist the plaintiff because it was admitted that the respective vessels were in fact derelicts in each of these cases. I have been unable to find any authority in support of the contention that a vessel should be deemed to be a derelict before it has been abandoned. The general rule is stated in Lord Justice Kennedy's work on Civil Salvage (2nd ed. 1907) at p. 61-2, where the cases are cited:—

"'Derelict' is a term legally applied to a thing which is abandoned and deserted at sea by those who were in charge of it, without hope on their part of recovering it (*sine spe recuperandi*), and without intention of returning to it (*sine animo revertendi*). It is in practice usually applied only to a vessel, but it might properly be used of cargo also apart from a vessel. The question whether a vessel is or is not

(1) [1909] 18 B.C.R. 435.
(2) [1904] 8 Ex. C.R. 446.
(3) [1859] Swab 441
(4) [1903] P. 1; 9 Asp. 354.
(5) [1906] P. 14.
(6) [1906] P. 339; 76 L.J. Adm. 17
(7) [1879] 4 P. 217.
(8) [1883] 8 P. 24.

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to be adjudged a derelict is decided by ascertaining, not what was actually the state of things when she was quitted by her master and crew, but what were their intention and their expectation when they quitted her."

In the case at bar it is therefore clear that from no point of view could the *Escort* be regarded as a derelict as there was no abandonment, and therefore I shall deal with the value of the salvage services in the ordinary way and have decided to award the sum of $2,000 and the value of the damaged hawser, $270, as a fair remuneration therefor, deducting however the amount received from the sale of the damaged hawser, said amount to be proved by the affidavit of Max Kalish, at his company's expense, pursuant to his undertaking given in that behalf. Judgment will be entered accordingly, with costs.

Judgment accordingly.

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January 12.

QUEBEC ADMIRALTY DISTRICT.

PERCY CHARLES BONHAM.....PLAINTIFF;

VS.

THE SHIP *SARNOR*.....DEFENDANT.

Shipping—Practice—Lis pendens—Maritime lien for wages not transferable.

Held: 1°. That it is a fundamental doctrine of all courts that there must be an end to litigation and that parties to an action have no right after having tried a question in issue between them and obtained the decision of one court to litigate the same matter over again in another.

2°. That inasmuch as a lien for wages is not transferable, an engineer who has paid certain seamen cannot claim a lien for such advances against the ship, the law giving no one but the master the right to sue for wages paid to other members of the crew.

MOTION by defendant for an order that the writ of summons and all proceedings in the action be set aside and dismissed with costs on the ground amongst others that the questions between them had already been decided by another court in the province of Ontario.

January 12th, 1918.

Motion now heard this day before the Honourable Mr. Justice Maclennan, D. L. J. A., at Montreal.

J. A. H. Cameron, K.C., for plaintiff.

W. B. Scott, for defendant.

The facts are stated in the reasons for judgment.

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Maclennan D.L.J.A.

MACLENNAN, D. L. J. A., now (this 12th January, 1918) delivered judgment.

The plaintiff, who alleges that he is the chief engineer of the *Sarnor*, a British ship registered at the port of Montreal, instituted an action in this court and arrested the ship on 21st November, 1917, and claims against the ship and her owners $1,127.57 for balance of wages due him; $621.53 for wages paid to the crew; $480.00 for necessaries supplied to the ship; $2,000.00 for repairs done to the ship; a declaration of ownership of 60% of the shares of the ship, an account of her earnings for the years 1916 and 1917, and for bail for the safe return of the ship to the Quebec Admiralty District.

The defendant moves for an order that the writ of summons and all proceedings in the action be set aside and dismissed with costs on the grounds that some of the matters claimed by plaintiff are now pending in a suit instituted prior to the present action and in a competent Court, to wit, the Supreme Court of Ontario, wherein Adam Brown MacKay is plaintiff, and one Frederick R. Johnson and the present plaintiffs are defendants, in which action judgment was rendered on 17th November, 1917, declaring the said MacKay to be the absolute owner of all shares in the ship *Sarnor* and restraining said Johnson and the said plaintiff from interfering with the said MacKay's ownership, management or control of the said ship *Sarnor*, and that the court has no jurisdiction over the other matters included in the plaintiff's claim.

Adam Brown MacKay, Frederick R. Johnson and the present plaintiff entered into an agreement on 1st June, 1916, with respect to the steamer *Sarnor* owned by MacKay, in virtue of which said steamer was to be operated as a lake carrier, Johnson being the Master,

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Reasons for Judgment.

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and Bonham, the present plaintiff, being the chief engineer. The agreement provided for Johnson and Bonham acquiring an interest in the ship upon the payment of certain sums of money. In the meantime the ship was registered in the port of Montreal in the name of Johnson as owner. The real owner was MacKay, and, on 23rd August, 1917, MacKay issued a writ in the Supreme Court of Ontario against Johnson and Bonham claiming an order vesting in him all right and title to the ship and that all shares be transferred to him and that he be registered as owner, an injunction restraining Johnson and Bonham with interfering with his ownership, management and control, his costs of action and such further relief as to the said court might seem meet. Johnson and Bonham filed a defence and all questions of ownership and accounts in connection with the operation of the ship were clearly in issue. The case was tried in the Supreme Court of Ontario, at Hamilton, On 17th November, 1917, in presence of counsel for all parties, and upon hearing read the pleadings and the evidence and what was alleged by counsel, judgment was rendered adjudging and declaring that the plaintiff MacKay was the absolute owner of all shares in the ship *Sarnor*, and the court further ordered and adjudged that the defendants Johnson and Bonham and each of them be and they were restrained from interfering in any way with MacKay's ownership, management or control of the ship.

Four days later, the present action was instituted and the plaintiff Bonham is now endeavouring to raise in this Court precisely the same questions which were litigated in the Supreme Court of Ontario. All questions of ownership, plaintiff's claim for wages, any other claims which he may have had against the ship were clearly before the Supreme Court of Ontario.

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In fact, everything claimed in the present action, with the exception of the claim for $2,000.00 for repairs alleged to have been done to the ship at the port of Montreal during the month of November, 1917, were raised in the Ontario action and disposed of by the judgment therein rendered on 17th November, 1917. It is a fundamental doctrine of all courts that there must be an end of litigation and that the parties have no right after having tried a question between them and obtained a decision of a court to start that litigation over again on the same question; *In re May* (1); *The Phoebe* (2).

The plaintiff claims $2,000.00 for repairs alleged to have been made to the ship in the port of Montreal, in November, 1917. The ship was not under arrest of the Admiralty Court at the time these repairs are alleged to have been made, and the jurisdiction of the court over a claim for repairs only exists, if at the time of the institution of the action the ship or the proceeds thereof are under arrest of the court; and the ship not being under arrest this court has no jurisdiction over the alleged claim for repairs; the Admiralty Court Act, 1861, section 4; *The Lyons* (3); claims for repairs and necessaries do not carry any maritime lien; *The Two Ellens* (4); *The Rio Tinto* (5); *The Flora* (6); Mayers, Adm. Law & Prac. 74. The home port of the ship was Montreal and the owners, whether MacKay alone, or MacKay, Johnson and plaintiff together, were all domiciled in Canada and these circumstances prevent this Court from having jurisdiction over the claims for repairs and necessaries; The Admiralty Court Act, 1861, s. 5; *The Garden City* (7).

(1) 28 Ch. D. 516.
(2) Stuart Admiralty Cases 59.
(3) [1887] 6 Asp. M.C. 199.
(4) [1872] L.R. 4 P.C. 161.
(5) [1883] 9 A.C. 356.
(6) [1897] 6 Ex. C.R. 137.
(7) [1901] 7 Ex. C.R. 94.

As to wages paid to crew, the plaintiff is not the master of the ship. He was in the eyes of the law a mere seaman, and there is no law giving any one not the master the right to sue in this court for wages paid to other members of the crew. Wages carry a maritime lien, but a lien for wages is not transferable; The Admiralty Court Act, 1861, s. 10; *The Petone* (1); Canada Shipping Act, s. 194.

The Court has jurisdiction to decide questions arising between co-owners under The Admiralty Court Act, 1861, s. 8. Plaintiff invokes this right but his affidavit on which the writ of summons issued refers to the judgment in the Ontario action, by which MacKay was adjudged and declared to be the absolute owner of the ship and the present plaintiff was restrained from interfering in any way with such ownership. An appeal from the latter judgment was entered after the institution of the present action, but that does not alter the position. Plaintiff's claim that he was a co-owner when he made his affidavit on the 21st November cannot be sustained, and in any event his claim in that respect formed the principal subject matter of the Ontario action where it was tried and determined, and he cannot litigate the same matter over again in this court.

For the foregoing reasons, I am of opinion that the plaintiff is improperly before this court and that defendant's motion to dismiss the writ of summons and set aside all proceedings herein must be granted with costs.

Judgment accordingly.

(1) [1917] 86 L.J. Adm. 164.

1921
October 20.

BETWEEN

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

AND

THE CORPORATION OF THE CITY OF THREE RIVERS..... DEFENDANT.

Constitutional Law—Dominion Crown—Power of municipality to tax—Water Service—B.N.A. Act, Section 125

The Dominion Crown owned and occupied a Drill Hall in the City of Three Rivers, which was supplied by water from the water works of the city. The city rendered an account for water supplied during 1919, at the rate of 75 cents upon each $100.00 of valuation of the property, to wit $86,000.00, being on the basis charged private citizens. The Crown paid under protest, claiming the amount exorbitant, and by its information sought to recover the difference between the amount admitted as fair and reasonable, and that paid.

Held: That, notwithstanding the provisions of section 125 of the B.N. A. Act exempting property of the Dominion from taxation, where in a municipality a system of water works exists, and water is supplied to property of the Dominion Crown, there is an implied obligation upon it to make a fair and reasonable payment therefor, the amount thereof, in absence of agreement, to be fixed by the court on the basis of a fair and reasonable valuation for the water supplied and service rendered.

Minister of Justice for Canada v. *The City of Levis* [1918] 45 D.L.R. 180; [1919] A.C. 505; 88 L.J.P.C. 33, followed.

2. That the amount payable as aforesaid is not in the nature of a tax; and that therefore the provisions of section 125 of the B.N.A. Act, exempting property of the Dominion from taxation do not apply.

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Reasons for Judgment.

Audette J.

INFORMATION exhibited by the Attorney-General of Canada claiming refund on an amount paid under protest by it for water supplied to the Drill Hall at Three Rivers.

October 5th, 1921.

Case was heard before the Honourable Mr. Justice Audette, at Three Rivers.

A. R. Holden K.C., and *G. G. Heward K.C.*, for plaintiff.

G. Methot for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now (October 20th, 1921) delivered judgment.

This is an information exhibited by the Attorney-General of Canada claiming a refund of $301.89 on the sum of $648.75 paid under protest by the Crown as being excessive, for the supply of water to the Drill Hall at Three Rivers, P.Q., during the year 1919.

It is admitted that during the year 1918 the plaintiff was charged and paid for the water supplied by the city to the Drill Hall, at Three Rivers, the sum of $32.43, upon the basis of 30 cents per 1,000 gallons, under the meter system.

This charge for 1918 appears to be in compliance with sec. 24 of by-law 21, to be found at p. 241 of "La Charte et Règlements de la Cité de Trois Riviéres," handed to the court during the trial.

This by-law 21 was amended in 1918 by by-law No. 356 (exhibit No. 7), which in turn was also amended in 1919 by by-law No. 365 (exhibit No. 8) which both came in force on the dates mentioned on the back of the respective exhibits.

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However, for the supply of water for the year (1919), under the amended by-law, the city rendered the Crown the following account, viz.:—"Pour 12 mois d'approvisionnement d'eau, finissant le 1er janvier, 1920, pour le manège militaire, No. 128, rue St. Francois Xavier, suivant evaluation de $86,000.00 à 75 cents par $100:—$648.75 le règlement No. 356 en force le 1er janvier 1919."

The Crown refused to pay this amount of $648.75. The parties after negotiating having been unable to adjust the matter, the Crown paid the sum claimed under protest, as excessive and as a compulsory payment to avoid the cessation of the supply of water, reserving its rights to have the matter determined by the Courts.

The consideration given by the Crown to the municipality for the use of water from its water supply is not a tax within the exemption and meaning of sec. 125 of the B.N.A. Act and Art. 5729 R.S.P.Q. 1909, as decided by the Judicial Committee of His Majesty's Privy Council in the case of *The Minister of Justice for Canada* v. *City of Levis* (1).

Moreover, Lord Parmour in delivering the judgment of the Court in that case and summing up the whole matter, says (p. 186): "Their Lordships are therefore of opinion that there is an implied obligation on the respondents to give a water supply to the Government building, provided that, and so long as, the Government of Canada is willing, in consideration of such supply, to *make a fair and reasonable payment.* The case stands outside of the express provisions of the statute, and the rights and obligations of the appellant are derived from the circumstances and from the relative positions of the parties."

(1) [1919] A.C. 505; [1918] 45 D.L.R. 180; 88 L.J.P.C. 33; 35 T.L.R. 113.

Therefore, the only question to be determined in the present case is what is a fair and reasonable price for such a commodity as the water supplied to the Crown under the circumstances.

The price asked by the municipality is based upon the valuation of the Drill Hall at the sum of $86,000,— a valuation accepted by both parties—and a percentage thereon of 75 cents for every ($100) hundred dollars of such valuation pursuant to by-law filed as exhibit No. 7 herein, and being the basis of charges also made to the citizens of Three Rivers.

It is obvious that this mode or system of reckoning a rate of charges is not only hypothetical but also arbitrary and inequitable, in that it does not represent in any manner whatsoever, the true or actual quantity and value of the commodity so supplied. Indeed, it is quite clear that a building assessed at $1,000 might consume three or four times more water than a building assessed at $10,000,—and that on account of a multitude of reasons. The $1,000 property may have more taps or outlets, may use more water even with less outlets on account of the special avocation or conduct of its occupants and may even waste more water than the more valuable property did actually use. This system is justified and defended by counsel for the municipality in that, he says, the charge is made in relation to the capacity of the citizen to pay, which would mean that a man of wealth should pay for any commodity,—for his groceries, etc., etc.,—so much more than his neighbour who is a person whose earnings place him in only fair circumstances. This system is clearly inequitable and does not represent a fair and reasonable scale of price for such a commodity.

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In 1918, as already mentioned, the Crown paid under a meter system. Although the municipality did not charge under this system in 1919, the meter was left in the Drill Hall during the whole of such year and duly read by the officers of both parties. From the reckoning of the reading of the meter it has become possible to ascertain pretty accurately the quantity of water supplied to the Crown during the year 1919 at 78,550 gallons, inclusive of the water used for a skating rink, which at 30 cents a 1,000 gallons,—the 1918 rate—would make up a charge of $23.56\frac{1}{2}$ instead of $346.86 offered by the Crown and $648.75 claimed by the city. The sum of $346.86 would represent a rate of $4.41 per 1,000 gallons and the sum of $648.75 a rate of $8.27 per 1,000 gallons.

No use was made of the Drill Hall during 1919, except for the purpose of the rink, the building being occupied by only four persons.

This offer of $346.86 made by the Crown w arrived at in the following manner. The Provincial Government owns in the city of Three Rivers the court house building, which is assessed at $139,000.00 and the jail, assessed at $60,500.00 for which it respectively pays $500 and $300—representing the rate the Federal Crown is also willing to pay.

This charge was made to the Provincial Government under a resolution (Exhibit A) bearing date the 7th April, 1919, wherein, it was, *inter alia*, provided that: "Que l'approvisionnement de l'eau soit fourni aux différentes institutions ci-dessous mentionnées au prix suivant, à compter du 1er juillet, 1918:

"Le Gouvernement de la Province de Quebec paiera $500 pour le Palais de Justice et $300 pour la prison, etc., etc."

The resolution provides also special rates to other institutions.

It was testified at trial, by the clerk of the municipality, that the rate allowed the Provincial Government was arrived at upon representation that the Registry Office, which was formerly in a municipal building, is now installed in the Court House without paying any rent. Be that as it may, such consideration or agreement does not form part of the resolution and the Provincial Government did not enter into any such legal undertaking and could at any time charge for such occupation in the Court House and the municipality would also be at liberty to return to the municipal building if it saw fit.

All of the parties mentioned in the said resolution are charged under a discriminating basis. *The City of Hamilton* v. *Hamilton Distillery Co.* (1); *The Carleton Woollen Company* v. *The Town of Woodstock* (2); *The Attorney-General of Canada* v. *City of Toronto* (3); *Dillon: Municipal Corporation*, Vol. 2, sec. 593; *Langlois* v. *Parish of St. Rock* (4).

The evidence discloses that, making all due allowances for overhead depreciation, sinking fund, waste, etc., all the water pumped, as well as supplied, cost the city about 12 cents a thousand gallons. The charges made to the Federal Government of $648.75 would represent a rate of $8.27 a thousand gallons and the Crown is offering to pay at the rate of $4.41 a thousand gallons, the same rate as the Provincial Government pays for buildings that consume ever so much more water than the Drill Hall does, as clearly disclosed by the evidence, and a rate which allows an unusually large profit on 12 cents.

(1) [1906] 38 S.C.R. 239.
(2) [1907] 38 S.C.R. 411.
(3) [1892] 23 S.C.R. 514.
(4) [1863] 11 R.J.R.Q. (Mathieu) 398.

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There is also in evidence the prices paid for Drill Halls in several other cities with the number of water outlets, which, worth what it may, goes to show that no such excessive prices are paid.

I have come to the conclusion, after duly weighing all the circumstances of the case, that the price offered by the Crown, namely, $4.41 a thousand gallons or $346.86 for the water supplied during the year 1919, is, to paraphrase and use the expression in the case of *The Minister of Justice* v. *City of Levis* (*ubi supra*), "a fair and reasonable 'payment' or price for the said commodity."

Therefore, there will be judgment declaring the amount offered as fair and reasonable and that the plaintiff recover from the defendant the sum of $301.89, the difference between the sum of $648.75 paid under protest and the said sum of $346.86 together with interest and costs as prayed.

Judgment accordingly.

IN THE MATTER OF THE PETITION OF RIGHT OF ANNIE McLEOD HARRIS ..... SUPPLIANT;

1921
October 15

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Railways—Statutory duties—Negligence—Railway yard.

On the 5th August, 1919, H. was, with a helper, unloading mill wood from a car standing on a siding in the railway yard of the Government railways, at Fredricton, into a cart on the platform. The box of this cart extended about 1½ feet behind the wheels and being wider than the door of the car, was backed slantwise, to the sill of the door of the car, the back of the box or dump-cart projecting inside the door a little over 1½ feet, the hind wheel resting against the side of the car, part thereof being inside.

Whilst so occupied H. was warned by a shunting crew that they were coming on that siding to shunt. H. moved his cart, a car of horses was moved from the siding, and H.'s own car was also moved some fifty feet, at his request, and then H. took up his position again as aforesaid. They returned about 15 to 30 minutes after, for some way-freight and backed toward H.'s car, and when a car length away the brakeman, seeing the cart was again backed into the car, signalled the train to stop, and "hollered" a warning to the helper on the wagon who went to the horses' head. After waiting "practically" a minute the train continued shunting in an easy and slow manner to make their coupling. After this shunting, H. was found in the car on his hands and knees bleeding from the nose, ears and mouth, and died shortly after. The helper was not heard as witness and there was no other eye-witness to the accident. H. had marks on both sides of the head and there was also blood marks on the side of the car door and side of his cart opposite each other, at a height where a man's head would come, and when found and asked what had happened, H. said he did not know. The bell of the engine was duly rung. Nothing in the rules provides for giving any warning but the ringing of this bell.

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Held: On the facts, that H. was victim of his own carelessness, the *causa causans* of the accident being the placing part of his wagon in the car; and was not due to any negligence on the part of any officer or servant of the Crown.

2. That even if placing the back of his wagon inside the car was not *per se* negligence, the fact of placing his head between the cart and the car door was reckless negligence which caused the accident. That a wrongful act cannot impose a duty on another.

PETITION OF RIGHT seeking to recover $15,000 damages alleged to have been suffered by reason of the death of suppliant's husband which occurred whilst he was unloading a car load of wood in the railway yard of a Government railway.

September 22nd and 23rd, 1921.

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

Mr. Hughes for suppliant.

Mr. Hanson, K.C., for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 15th day of October, 1921) delivered judgment.

The suppliant, by her petition of right, seeks to recover the sum of $15,000.00 for damages she alleges to have suffered from the death of her husband arising out of an accident occurring in the railway yard of the Government railways, at Fredericton, N.B., a public work of Canada.

On the 5th of August, 1919, Harris, the suppliant's husband, a teamster, who had been for 14 years in the employ of one R. T. Baird, a witness heard herein, was engaged with an Austrian (whose whereabouts, it was

stated at bar, could not be found, and was therefore not heard at trial) in unloading a car of mill-wood stationed in the railway yard, at Fredericton, on siding No. 3.

Harris was driving a double team four-wheel dump cart, with high sides, i.e., about 3½ feet high from the axles and 6 feet from the ground,—the box extending about 1½ feet behind the wheels. The centre of the dumping box was resting upon the axle of the hind wheels which were about four feet and eight inches in diameter. The width of the dump-cart being greater than that of the door of the car, his waggon and team were backed slantwise, to the sill of the door, on the platform adjoining siding No. 3—with the back of the box or dump-cart projecting inside the door of the car from which the mill-wood was being unloaded into the waggon. As the platform was one foot lower than the floor of the car, the back of his waggon projected into the car a little over one foot and a half. The hind wheel was resting against the side of the car one foot from the ground, part of the wheel itself being inside the car.

Between about 3.30 and 4 o'clock in the afternoon, a shunting-train came in the railway yard, and after warning had been given to Harris, moved a car load of horses from said siding No. 3. It also moved Harris's car at his request, about 50 feet. This same shunting-train came back to siding No. 3, about 15 to 30 minutes afterwards to get some way-freight and backed towards Harris's car, under the signal of rear brakeman Hanson. This man was called as a witness by the Crown, and gave his testimony in a most creditable manner. It was frank, honest and truthful,—free from the entanglement and diffuseness which characterized that of some of the other witnesses. I will cite the following excerpt therefrom, viz.:—

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"I am prepared to swear the waggon was backed into the car at the time. There was a man on top of the waggon standing wood on its end. I saw that the waggon was backed into the car. I gave a stop signal to the train, I judge about a car length from where the coupling was to be made. I hollered something to this man, I think it was 'look out, we are going to move those cars,' or 'hit those cars'—some warning. If he made any reply I did not hear it.

HIS LORDSHIP: "How far away were you from him?"

"A. I judge seventy feet,—two car lengths, I imagine. He got off the waggon and went to the horses heads. I waited a matter of practically a minute, and took it for granted that his waggon was clear of the car, and gave a slow signal to back up, and the coupling was made.

"Q. What kind of a coupling was it? A. Very easy. Do you mean the impact, or automatic coupling?

"Q. I mean the impact? A. Very easy.

"Q. Did the coupling push the cars back? A. I don't think a coupling could be made that would not move the cars a little bit. In that case I don't think it moved the cars but very little, because it was an exceptionally easy coupling.

"Q. What happened after that? A. I cannot just remember what it was, what we had to do. I, of course, took my orders from Conductor Arbeau. At least I pulled the pin on the train and we left No. 3 siding.

"Q. Before you left No. 3 siding, was there not another operation? A. That was the operation in its going in there and getting this car.

"Q. Was there not after the coupling took place a further signal given, to back for certain purpose? A. Not my orders.

"Q. You did not give the order? A. No.

"Q. Do you know if the train did back up? A. I do not . . . .

"HIS LORDSHIP: After you moved out that time did you come back again? A. Not that afternoon, not until evening, as well as I can remember. We went right out from there then to run our suburban train to Marysville.

"Q. At that time you saw this cart backed in against the car? A. Yes, otherwise I would not have stopped the train.

"Q. You thought it was in rather a dangerous position. A. I did.

"Q. And if you shoved the train back it would be dangerous? A. Yes.

Q. For anybody who might be there? A. Yes.

"Q. And you don't know that they did move it. You hollered? A. The man I hollered to got off and went to the horses' heads.

"Q. Did he move the cart away? A. I took it he did.

"Q. Did he? A. I am not prepared to swear that. I was standing two car lengths away near the engine.

"Q. Close to the track? A. Right alongside the cars.

"Q. And was your eye on him? A. I looked, yes.

"Q. And you cannot tell whether he moved? A. I am not prepared to swear he did, no."

The evidence of this witness with respect to slow and easy character of the shunting is overwhelmingly corroborated all through the evidence. He is also corroborated by witness Staples with respect to the man going to the horses' head, and as to the dangerous practice of placing the back of the waggon into the cars.

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Now after the operation of this second shunting on siding No. 3, Harris was found in the car on his hands and knees, bleeding profusely from the nose, ears and mouth and he died fifteen to twenty minutes afterwards.

Witness Staples, who was one of the first to come to the car after the accident, asked Harris "what did it" and the latter answered he did not know.

There was no eye-witness to the accident. The theory advanced by some of the witnesses,—and I cannot see any other—is that Harris, at the time of this second shunting, while he was in the car, put his head between the side of the dump-cart and the frame of the door of the car—probably to see what was going on outside the car, with the result that his head became jammed between the two when the car moved in the process of shunting. This is no strained theory and I accept it. Witness Baird, who saw Harris after the accident said he noticed a cut on the temple; marks on both sides of the face; a cut on one side and bruise on the other. Blood was also found on the side of the door, about 5 feet from the floor of the car and blood on the side of the waggon, at a corresponding height.

As established by evidence there is no rule providing that when shunting is going on in the railway yard notice must be given to all or any person loading or unloading cars in the yard; but the rule provides that the bell must be rung when the engine is in motion. Upon this latter question there is in this case the usual conflicting evidence that the bell rang and that it did not ring because I did not hear it. I have had occasion many a time in the past to consider this class of evidence. While in the view I take of the case it may not be necessary to offer any observation upon this

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point, I will, however, state that in my estimation such evidence must be approached with due allowance for the difference between the mental habits of persons in taking cognizance of what is happening in their immediate vicinity, for instance one person may have apprehended perfectly a portion of the phenomena surrounding him at a given time and yet have been insensible to the rest. One witness may answer that he did not hear the bell and whistle of a locomotive although both were sounded and he was near enough to hear them both, the psychological reason being that his attention was engrossed in some other fact. In such a case the evidence of another witness who did see the flagman, hear the bell, etc., must be taken in preference to the negative evidence. Indeed, in estimating the value of evidence one must not lose sight of the rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negatibus;* because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed. *Lefeunteum* v. *Beaudoin* (1).

Having set out so much of the facts of the case as is deemed necessary for its determination there now remains the consideration of its legal aspect.

Harris was a licensee or invitee.

In determining the question of liability in all cases as the one before the court, it is necessary to examine the conduct of both parties in the circumstances, and note the bearing the acts of each had upon the resultant injury. Want of care must be posited as the cause of the injury. Then, whose *incuria* was the proximate

(1) [1897] 28 S.C.R. 89.

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or active cause of the accident? Liability is established where it is shown that the party injured had some legal right to be on the locus of the accident and *did not know of a peril* to his safety that was known to the respondent, but in respect of which he took no care to warn the party injured.

Negligence is want of care in the circumstances and every case must be determined upon its own set of facts.

The legal doctrine applicable to this class of cases is that when a person is on the premises of another upon business in which both are concerned, *the visitor is bound to use reasonable care for his own safety* and is further entitled to expect that the occupier or owner shall on his part use reasonable *care to prevent* damage from unusual danger which he knows or ought to know—*Beven on Negligence*, 3rd Ed., 451, 682; *Indermaur* v. *Dames* (1); *Heaven* v. *Pender* (2); *Pollock on Torts*, 11 Ed. 514; *Southcote* v. *Stanley* (3); *Davies* v. *Mann* (4); *Loiselle* v. *The King* (5); *Cook* v. *G. T. Ry.* (6); *Norman* v. *G. W. Ry. Co.* (7), and see also 53 Can. L. J. 417 et seq., and 21 Hals. 387 et seq., where a general discussion of the question is to be found.

Much stress has been laid on the ringing of the bell when the locomotive was moving in the railway yard,—a statutory duty which, under the evidence, I have found to have been discharged. However, must it not be realized that even if there had been no ringing that Harris would not have been in any worse

(1) [1886] L.R. 1, C.P. 274; 15 W. R. 434.
(2) [1882] L. R. 11 Q. B. D. 503, at 507 et seq.
(3) [1856] 1 H. & N. 247.
(4) [1842] 10 M. & W. 546, at p. 549.
(5) [1921] 20 Ex. C.R. 93, 56 D.L.R. 397.
(6) [1914] 19 D.L.R. 600; 31 O.L.R. 183.
(7) [1915] 1 K.B. 584.

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position. The bell of the locomotive was presumed to be ringing the whole time when moving. Harris must have heard the bell when the shunting took place on sidings No. 1, 2, 4 respectively. The ringing to him was no special warning, and he was not entitled to any more, although the evidence disclosed he did receive special additional warning. Can it be earnestly contended that when at a station, on a passenger train, a car is added or taken off, involving shunting, that the passengers should be notified of such shunting, if it is done in the usual and easy manner? No such duty, no such unnecessary burden is imposed upon the railway company.

There was no trap set by the railway company and Harris was bound to use reasonable care for his own safety and he was not entitled to be protected or insured upon the property in its ordinary state. *Sullivan* v. *Waters* (1).

If it can be said that a trap was set on the premises, that trap was set by Harris himself in placing the back of his waggon inside the car in a way that its high sides could jam his head against the side of the door if the car moved; and by putting his head into such a trap no negligence could be imputed the employees or servants of the Crown acting within the scope of their duties and employment, as provided by sec. 20 of the Exchequer Court Act and its amendments.

Had his waggon not been placed by him in such a dangerous position, it is self-evident that this easy shunting would have had no fatal result. The *causa causans* of the accident was the placing part of his waggon in the car; but the proximate cause, the cause *sine qua non* was putting his head between the casing of the door and the side of the waggon.

(1) [1864] 14 Ir. C. L. 460; [1903] 58 L.R.A. 77 (cited).

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If the placing of the back of his waggon inside the car was not *per se* negligence, and the evidence of both parties state it is a dangerous practice,—the fact of placing his head between the waggon and that car door was reckless negligence which caused the accident. A wrongful act cannot impose a duty on some one else. There is no act of negligence on behalf of any officer or servant of the Crown which caused the injury and there is no breach by the respondent of any duty owed to Harris. The proximate and direct cause of the accident is the obvious *incuria*, want of ordinary care and prudence for Harris to have thus set a trap and to have run his head into it. The accident was the result of his own negligence. Harris has no one to blame but himself. He was the victim of his own recklessness, imprudence and negligence.

Having come to this conclusion it becomes unnecessary to consider the numerous other questions of law raised at bar.

Therefore the accident being obviously the result of Harris's *incuria*, want of elementary care and prudence, he is adjudged not entitled to any portion of the relief sought by the petition of right herein.

Judgment accordingly.

Solicitors for suppliant: *McLellan & Hughes.*

Solicitors for respondent: *Slipp & Hanson.*

BETWEEN

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December 3.

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

AND

THOMAS P. KELLY, AND OTHERS..DEFENDANTS.

Expropriation—Harbour improvements—Previous expropriation—Undertaking to grant easement in mitigation of damages—Undertaking unfulfilled—Subsequent expropriation by the Crown—Assessment of damages in view of undertaking giving an enhanced value to the lands.

A portion of the defendants' lands had been previously expropriated for the improvement of navigation in the harbour of Fort William, Ont. On the trial of the issue of compensation an undertaking was filed by the Crown that the defendants were at liberty whenever they so desired to construct upon such portion of the land expropriated "wharves, docks or piers extending out to and abutting upon the harbour line . . . . subject to compliance with the provisions of the Navigable Waters Protection Act, R.S.C. 1906, c. 115." The Crown further agreed to execute any conveyance or assurance of the right or easement forming the subject of the undertaking as might become necessary to give effect to the purpose of the undertaking. Instead of fulfilling the undertaking the Crown subsequently expropriated the lands of the defendants beneficially affected by such right or easement.

Held: That in assessing the compensation for the subsequent expropriation the Court must have regard not only to all the elements of value inherent in the lands themselves at the time of such expropriation, but also to the value to the owner of the easement in question.

INFORMATION exhibited by the Attorney-General of Canada to have the compensation for property expropriated fixed by the Court.

10th and 11th of November, 1921.

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

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

F. R. Morris for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 3rd December, 1921) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to some of the defendants herein were, under the provisions of the Expropriation Act, taken and expropriated for the purposes of a public work of Canada, namely, the improvement and enlargement of the harbour at Fort William, in the Province of Ontario, by depositing, on the 13th December, 1919, a plan and description of the said lands with the local master of Titles, at the said city of Fort William, in which district the same are situate.

The area of the piece or parcel of land expropriated by the present proceedings is (4·964) four acres and nine hundred and sixty four thousandths of an acre, being the balance of, in round figures, a piece of land of ten acres,—out of which (2·83) two acres and eighty-three hundredths of an acre were expropriated in 1906 and (2·79) two acres and seventy-nine hundredths of an acre were taken under a second expropriation in May, 1909. (See *The King* v. *Bradburn*) (1).

By this present third expropriation, the balance of the property is taken by the Crown for, among other purposes, enlarging the turning basin at the junction of the Mission and Kaministiquia rivers and materially

(1) [1913] 14 Ex. C.R. 419, at pp. 448, 426, 427, 428, 438 and 440.

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improving navigation at this dangerous place, thereby answering the requirements imposed upon it in the public interest. I have had the advantage, accompanied by counsel for both parties, of viewing the *locus in quo* and realized the advisability and necessity of the present expropriation in the interest of navigation in these waters.

For the lands taken by the present proceedings (3rd expropriation) the Crown offers, by this information, the sum of $4,248.29—an amount somewhat lower than $1,000 an acre.

The owners of the lands, the defendants Thomas P. Kelly, John J. Flanagan, Young & Lillie, Limited, Arzelie Rochon, and Esther A. Flanagan, by their statement in defence, claim the sum of $35,000.00.

The Toronto General Trusts Corporation were not represented at trial, but by their statement in defence, state they are judgment creditors, and submit their rights to the Court asking that the compensation moneys be applied to satisfy their claim. The other defendants, be they mortgagees, or judgment creditors as stated at bar, although duly served with the information did neither file any statement in defence nor appear at trial. However, the compensation moneys will be made payable to the proprietors, free from all incumbrances.

The whole property, composed of about ten acres, was purchased in 1906, by some of the present defendants, for the sum of $14,250.00, including the right to the compensation for the piece of land taken by the first expropriation. The property was bought for speculative purpose, and it had from the outset the inherent defect that its very site would work against it, because it would be required as part of the general scheme for the improvement of navigation and in

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fostering the development of industrial sites. However, the owners are entitled to the market value of this property, at the date of the expropriation, in respect of the best uses to which it can be put, taking into consideration any prospective capabilities or value it may obtain within a reasonably near future.

In the case of *The King* v. *Kelly* (1) (see also the case of *The King* v. *Bradburn* (2)), wherein the question of compensation in the two previous expropriations in respect of the two parcels of land taken from these ten acres above referred to, the Crown filed the following undertakings which were embodied in the judgment of the Court, bearing date the 29th August, 1913, affirmed on appeal to the Supreme Court of Canada on the 2nd May, 1916, viz.:—

"The Attorney-General on behalf of His Majesty, being thereunto duly authorized by Order in Council of the first day of July, 1913, undertakes and consents that the defendant and his successors in title may, without further assurance or consent on behalf of His Majesty, construct, maintain and use upon such portions of the lands expropriated and described in the information herein as lie between the expropriation line and the harbour line . . . . . .such wharves, docks, or piers extending out to and abutting upon the harbour line, as they may desire to construct, subject, however, to compliance with the provisions of the Navigable Waters Protection Act, R.S.C. 1906, Chapter 115, and any Acts passed or to be passed in amendment or in substitution thereof, or in addition thereto, and that His Majesty will, as may be reasonably required, execute such further conveyance or assurance, if any, as may be necessary,

(1) [1913] 14 Ex. C.R. 448

(2) [1913] 14 Ex. C.R. 419, at pp. 426, 427, 428, 438 & 440.

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in order to give full effect to this consent or undertaking and in the event of the above permission as to said use of such portions of the lands expropriated as lie between the expropriation line and the harbour line so fixed as aforesaid, being revoked by Parliament or otherwise, or rendered nugatory by future expropriations, the owner of any structures erected upon the same shall be entitled to compensation for such structures, to be determined as usual in expropriation cases."

"The Attorney-General, on behalf of His Majesty being thereunto duly authorized by Order in Council of the first day of July, 1913, hereby undertakes that the lands expropriated and described in the information herein if not already dredged as hereinafter mentioned will be dredged to the harbour line as soon as the work can reasonably be done in connection with the scheme of harbour improvement proposed to be carried out by the Government save and except the natural slope required to protect and safeguard the bank of the channel and unexpropriated property from erosion; and that in the event of docks or other structures being built out to the harbour line the channel will be forthwith dredged clear to such docks or other structures so as to enable vessels to approach to and lie along the same, the whole subject to the Navigable Waters Protection Act."

Great stress has been laid upon these undertakings in the reasons for judgment in the above mentioned case (*The King* v. *Kelly* (1)) wherein the learned judge says: "...in my opinion the effect of the work in question, coupled with the undertaking of the Crown, is to enhance enormously the remainder of the land....." and the judgment gave effect to the

(1) [1913] 14 Ex. C. R. 419, see pp. 448, and especially 427.

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same in the adjustment of the amount of the compensation therein allowed, a set off was allowed in view of the same both under sec. 30 of the Expropriation Act and sec. 50 of the Exchequer Court Act.

Dealing first with the compensation which should be allowed for the (4·964) four acres and nine hundred and sixty-four thousandths of an acre upon which issue the proprietors have adduced evidence placing upon the piece of land a very high valuation, bearing in mind that they were getting the right to build docks and trackage. Witness Lillie puts it in this language "figuring getting the right to build docks and tracks." And witness Paterson "cannot see any reason for refusing right to build dock, on account of maritime interests, my valuation is with clear right to build dock." Witness Duncan says: "My value is based on my right to have the docks and in anticipating no difficulty in getting tracking right."

Witness Lillie testified that they had had an opening enquiry for the purchase of their land, but that it fell through because they had not succeeded in getting from the Crown the leave to build docks under the provisions of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, and the several acts amending the same in 1909, 1910, and 1918. (See also examination on discovery upon this question.)

The proprietors of this land—as appears by exhibit C—applied to the Crown, under the statute, for leave to build docks on the said property and the Crown never acquiesced in such petition or demand.

The defendants had no legal right or franchise to build such wharves or docks and nothing but a legal right can form or be the subject of an element of

compensation. See upon this question *Raymond* v. *The King* (1); *The King* v. *Bradburn* (2); *Gillespie* v. *The King* (3)—all three cases confirmed on appeal to the Supreme Court of Canada; *The Central Pacific Railway Co.* v. *Pearson* (4); *Corrie* v. *MacDermott* (5); *Benton* v. *Brookline* (6); *May* v. *Boston* (7); *Lynch* v. *City of Glasgow* (8); *Cunard* v. *The King* (9); *Wood* v. *Esson* (10).

Therefore, the valuation by the defendants' witnesses at figures ranging from $50 to $70 a foot frontage for 807 feet on the Kaministiquia bears on its face an apparent fallacy and being adduced upon a wrong basis, a wrong principle, leaves the Court without any help therefrom. The numerous sales referred to at trial always covered the right to erect docks and piers.

The Crown, on the other hand, rests upon the price paid for the Hamilton property, a sale much commented upon. But here again it is obvious that this sale was made under such special circumstances that it makes it impossible to use it as a criterion of the market value of property in that neighbourhood at the time. Dr. Hamilton when disposing of his properties was very ill and was seeking to sell at his price with the view of liquidating and settling his estate before his death, which, according to the statement of counsel at bar, happened shortly afterwards. Furthermore, that sale was made in 1917, before the termination of the war.

(1) [1916] 16 Ex. C.R. 1 at p. 15; 29 D.L.R. 574; affirmed 49 D.L.R. 689.
(2) [1913] 14 Ex.C.R. 419, at p. 437.
(3) [1909] 12 Ex. C.R. 406.
(4) [1868] 35 Cal. 247.
(5) [1914] A.C. 1056, at 1065.
(6) [1890] 151 Mass. 250.
(7) [1893] 158 Mass. 21.
(8) [1903] 5 Ct. of Sess. Cas. 1174.
(9) [1910] 43 S.C.R. 88.
(10) [1883] 9 S.C.R. 239.

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In the result that would leave the Court with very little help or evidence upon the question of value, but for the statements of two of the proprietors when examined on discovery. Indeed both defendants Lillie and Kelly testified on discovery, which was filed at trial, that this property, without the right to build docks, was worth in 1919 about $2,000 an acre. I will accept their figure for the value of the solum for the land actually taken—which had become improved industrial lands as a result of the government works on the river and the construction of the bridge between the main land and the island—namely (4·964) four acres and nine hundred and sixty-four thousandths of an acre at $2,000 an acre, $9,928.00.

However, there is more in the present case. To the land so taken was attached a most valuable easement resulting from the above undertakings, in favour of the owners of the land so taken. Indeed, the owners of the land expropriated herein, had the "right to construct, maintain, and use—upon the lands adjoining and taken by the two previous expropriations, as lie between the expropriation line and the harbour line . . . such wharves, docks or piers extending out to and abutting upon the harbour line, as they may desire to construct, subject, however, to compliance with the provisions of the Navigable Waters Protection Act."

In other words, while they were not *eo nomine* proprietors of the lands expropriated in 1906 and 1909, they had—under the undertakings, the right to build piers upon the same, as if they had been owners thereof—subject however—alike the balance of the land left to them and expropriated by the present proceedings—to obtaining, as a condition precedent the right to do so under the Navigable Waters Pro-

tection Act. These undertakings, thus creating an easement, are a charge on the land formerly expropriated for the benefit of the lands taken by the present expropriation. The rights resulting from such undertakings including the dredging mentioned in the second paragraph thereof are most valuable rights and were considered so in the case in which the undertakings were given and deduction and set off were made and allowed in fixing the compensation to be paid therein.

As a result of these undertakings, the Crown has on the one hand granted valuable rights to the proprietors upon the lands so taken in the former cases and on the other hand, by the present expropriation the Crown has taken them away.

I have come to the conclusion to place upon this easement, resulting from the undertaking, the value of $1,000 an acre for the rights the defendants had and still retained upon the lands taken by the previous expropriations.

That is to say for the (2·83) two acres and eighty three hundredths of an acre and (2·79) two acres and seventy nine hundredths of an acre above referred to, making a total of (5·62) five acres and sixty-two hundredths of an acre—I will allow $1,000 an acre, namely, $5,620.00.

The total compensation will then be: for
the land or solum taken by the
present proceedings..... $ 9,928.00
and for the so called easement..... 5,620.00

making the total sum of..... $15,548.00

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

1°. The lands and the easement attached thereto expropriated herein are declared vested in the Crown from the date of the expropriation, namely, the 13th December, 1919.

2°. The compensation for the said lands and easement expropriated herein is hereby fixed at the total sum of $15,548.00 with interest thereon at the rate of 5 per cent from the 13th December, 1919, to the date hereof. The whole in full satisfaction for the land and easement so taken and for all damages whatsoever resulting from the said expropriation.

3°. The defendants-proprietors of the said lands, upon giving and delivering to the Crown, a good and valid title free from all incumbrances and sufficient release or releases of all claims, liens, charges, mortgages, or incumbrances of any kind or nature whatsoever which existed upon the said lands at the date of the expropriation herein—are entitled to recover from the plaintiff the said sum of $15,548.00 with interest thereon, as above mentioned. Failing the said proprietors to discharge the said incumbrances, the compensation moneys will be used to satisfy the same, and the balance, if any, will be so paid to the said defendants-proprietors.

4°. The defendants are further entitled to the costs of the action.

Judgment accordingly.

W. A. Dowler, K.C., solicitor for plaintiff.

Morris & Babe, solicitors for the owners.

Payne & Bissett, solicitors for General Trusts Corporation.

HIS MAJESTY THE KING.....PLAINTIFF; 1921 December 3.

VS.

THE GLOBE INDEMNITY COMPANY OF CANADA AND E. T. HINCHLIFFE.....DEFENDANTS.

AND

W. H. BARBER *et al*.....THIRD PARTIES.

Judgment—Motion to vary—Jurisdiction of trial Judge—Practice.

Where the court in pronouncing judgment has dealt with all the questions of law and fact in issue between the parties, including the right of a defendant to bring in third parties to respond any judgment which might be entered against such defendant, the Court will refuse a motion to vary the judgment by finding, contrary to the actual finding of the trial judge, that the Court had jurisdiction in the third party proceeding; or, in the alternative (thereby raising a new point of law after judgment) that the judgment be varied by finding that the Court or such trial judge had no jurisdiction under the Canada Grain Act, and amendments, to grant the relief sought by the Crown in the information.

In refusing the motion, the Court held that in so far as the motion savoured of an appeal it was irregular; and, on the other hand, that if it were to be treated as a new proceeding between the parties the subject-matter of the motion was *res judicata*.

MOTION on behalf of defendant the Globe Indemnity Company of Canada to settle the jurisdiction of the Court to decide the issue between the plaintiff and defendants as well as between defendants and third parties, and to vary the judgment previously rendered in this case.

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THE KING
v.
THE GLOBE INDEMNITY COMPANY OF CANADA AND HINCHLIFFE AND BARBER.

Reasons for Judgment.

Audette J.

November 9th, 1921.

Motion heard before The Honourable Mr. Justice AUDETTE at Winnipeg.

E. L. Taylor K.C., for plaintiff.

J. B. Coyne K.C., for defendant, the Globe Indemnity Company of Canada.

J. C. Lamont, for third parties.

The questions of law raised and the facts necessary to the decision thereof are stated in the reasons for judgment.

AUDETTE J. now this (3rd day of December, 1921) delivered judgment.

This is a motion made on behalf of the defendant the Globe Indemnity Company of Canada to settle the jurisdiction of this honourable Court or of the Honourable Mr. Justice Audette to decide the third party proceedings herein and to give the relief asked for in the information herein; and to vary the judgment of the Honourable Mr. Justice AUDETTE pronounced in this cause on the twelfth day of May, A.D. 1921 on the grounds:

"(a) that this Court has jurisdiction in the third party proceedings.

"(b) that by reason of the order permitting the issue of the third party notice served upon the third parties and not moved against and the subsequent conduct of the third parties, they are precluded from setting up want of jurisdiction.

"(c) that in the alternative, by the conduct of the third parties and this defendant and the hearing of the merits of the issues raised in the third party proceedings, jurisdiction was conferred on the Honourable Mr. Justice Audette to decide the issues raised in said third party proceedings.

"(d) that in the further alternative, if the Court or the Honourable Mr. Justice AUDETTE has no jurisdiction in the third party proceedings, neither have they jurisdiction to grant relief to the Crown on the information.

"(e) and on other grounds appearing in the proceedings and as counsel may advise.

"and for a judgment against the third parties as claimed in the third party notice, or a judgment dismissing the information with costs, and in the alternative for a variation of the order for costs against this defendant in respect of the third party proceedings."

After hearing counsel for all parties, suffice it to say that by and under my judgment of the 12th May, 1921, all the issues and questions raised by the written pleadings, by the evidence and by the argument of counsel for all parties, inclusive of the contract resulting from the bond given by the Globe Indemnity Company of Canada, have been duly considered and passed upon, and such issues or questions have now become *res judicata*. It is axiomatic that there must be finality in litigation before the courts; and that a trial judge ought not to sit on appeal from his own judgment. In *Charles Bright & Co.* v. *Sellar* (1)

(1) [1904] 1 K.B. 6 at p. 11.

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Audette J.

Cozens-Hardy L. J. said:—"Since the Judicature Act no judge of the High Court has jurisdiction to re-hear, such jurisdiction being essentially appellate." If the motion here is to be treated as tantamount to a substantive and new proceeding then clearly I cannot in such proceeding vary or add to a judgment already given in another case. See case cited *supra* at p. 12.

The motion is dismissed with costs.

EXCHEQUER COURT IN ADMIRALTY

1921
December 24.

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT.

ROSS R. PEERS *et al* (PLAINTIFFS) . . APPELLANTS;

AND

THE SHIP *TYNDAREUS* (DEFENDANT) . . . . . RESPONDENT.

Shipping—Collision—Tow—Negligence.

The S.S. *Tyndareus* was on a course due west and the *Alcido*, with raft in tow, though apparently on a course due east magnetic undoubtedly deviated therefrom to take advantage of the tide and travelled south or possibly south-west at times, going across the course continually travelled east and west by other vessels, thus placing her crib across the fairway.

Held, on the facts, (affirming the decision of Martin, L. J. A.) that the *Alcido* by her movements created a risk of collision and must bear the damages suffered by her.

Observations on the inadequacy of the provisions of Article 32 of the International Rules of the Road.

APPEAL from the judgment of the Local Judge of the British Columbia Admiralty District rendered on the 26th April, 1921 (1) dismissing the plaintiff's action.

October 26th, 1921.

Appeal heard before the Honourable Mr. Justice AUDETTE at Vancouver.

(1) See page 93 ante.

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v.
THE SHIP TYNDAREUS.

Reasons for Judgment.

Audette J.

E. C. Mayers & R. L. Maitland, for appellants.

D. A. McDonald, K.C., for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (December 24th, 1921) delivered judgment.

This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District, pronounced on the 26th day of April, 1921, dismissing the plaintiffs' action.

The facts involved in this case are clearly stated in the learned trial judge's reasons for judgment and this will relieve me from entering into a detailed statement of them. (1)

The action is to recover damages, for the loss of a crib of shingle-bolts resulting from the collision which took place at about one o'clock on the morning of the 15th August, 1920, off Point Atkinson, B.C., between the S.S. *Tyndareus* (length, stated by chief officer, 520 feet over all; tonnage 14,000) and the crib in tow of the tug *Alcido* (length about 70 feet).

This crib is described by witness Seely as being 90 feet long, 40 feet wide and 13 feet deep and the top of the shingle-bolts being about 15 feet above the water. The crib has its poles on the sides and the shingle-bolts or logs are stowed inside of it.

Now on the night of the accident, the weather being dark but clear and overcast, as stated by witness Buller, the *Alcido* was proceeding from Scuttle Bay to Vancouver with this cumbersome crib in tow, at a speed of one knot an hour.

(1) See page 93 ante.

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Captain Seely says the *Alcido* passed Point Atkinson at 12 o'clock, midnight, and contends that he steamed east (magnetic) towards False Creek and English Bay, to get the benefit of the first of the incoming tide. He remained on deck until 12.35 o'clock, when he went below.

On the other hand the steamer *Tyndareus* bound from Vancouver, on leaving the Narrows contends that from off Prospect Bluff, she steered a straight course, true west.

Both vessels had all their regulation lights.

The look-out on board the *Tyndareus* was as good and complete as could be asked. They had a man at the forecastle head and three men on the bridge, with glasses, all intent on their work.

After she left Prospect Bluff a light was seen on her port bow. The look-out at the forecastle-head reported it, the midshipman reported it and the second officer reported it to the pilot. That light was all the time taken by them to be the stern light of a vessel,—the stern light of the *Alcido*. However, proceeding on her course, the *Tyndareus* ran into this crib of shingle-bolts in the manner described by the trial judge.

The crew of the *Alcido* testify that there was a white light on the centre of the crib—the crew of the *Tyndareus* denying the same and saying they saw no light whatsoever on the crib.

Under the International Rules of the Road there is no obligation or provision requiring a light on a raft or crib in tow; while, however, under article 32 thereof a bright fire has to be kept burning on rafts at anchor or drifting. The wisdom of the article which requires a fire on a raft drifting or at anchor, and yet fails to provide for any light on a raft in tow at night—usually moving at very slow speed—seems difficult to appreciate. In view of this it would appear that the interests of navigation demand that the article should be amended.

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There was no obligation to place a light on the crib. However, having chosen to place a white light on it and to place it in the centre of the crib, it becomes very questionable whether or not the *Alcido* did not thereby do an unwise thing. A white light seen by itself might very reasonably be taken to be a stern light, as contended by the *Tyndareus;* and placed as it was in the centre of the crib, instead of at the stern, could it not deceive an approaching vessel, and thus become by itself the very cause of an accident? To place such a light at the stern might be useful to ships navigating in the vicinity of the raft, or indeed to have both a bow and stern light—but I cannot understand why it was placed in the centre.

The impossibility of arriving at any satisfactory conclusion with such conflicting evidence as was presented in this case is too obvious to need any comment. But it is possible that the variance in the evidence offered by the opposing parties might be accounted for by the light in question being tied as it was to a boat-hook, the handle of which, untied, was run down between the logs and so subject to displacement by slipping—did actually slip down on the starboard side of the raft while burning and so could not be seen by the *Tynderaus* coming on the port side, although visible to those on board the *Alcido.*

However, that may be, there was, I must repeat, no obligation on behalf of the *Alcido* to have a light on the crib and the want of such a light could not be invoked against her.

Under the evidence I am forced to find, and I do so find, that the *Tyndareus* on the night of the accident was proceeding on a course due west after leaving Prospect Bluff and that she was then following a proper course, the most advantageous course for her.

It is unconceivable that a large steamer like the *Tyndareus* could have gone north, in this hazy and smoky atmosphere, nearer the north shore, to get the small benefit of a weak tide, as contended by the plaintiffs, and that she would have afterwards come from the north shore almost due south to strike the crib travelling east. When the evidence is conflicting the court will be guided by the probabilities of the respective cases which are set up, and it is quite evident which of the two vessels, under the circumstances, would be the one that would change her usual course to take some advantage from the tide. Common sense and truth are near akin. *The Mary Stewart* (1); *The Ailsa* (2).

Reverting to the course of the *Alcido* I am of opinion that intent as she was on taking the full benefit of the sweep of the incoming tide—a very important consideration with such a clumsy and cumbersome tow—that while her course on the map might be stated as east magnetic, she took quite a different course on these waters, she deviated from such a course on the night in question and with advantage travelled south-east, towards the Spanish Bank to assure herself the benefit of the tide. Witness Forsyth, an expert mariner called on behalf of the plaintiff, testified as follows:—

"Q. The further you get towards the Spanish Bank the more benefit you would get from the tide coming in? A. Yes, that is right.

"Q. And if you had that crib in tow you would naturally make as much as possible towards the Spanish Bank in order to get the incoming tide coming into the Narrows? A. Yes."

Here is an expert, called by the plaintiffs themselves, who puts the question quite clearly.

(1) [1844] 2 Wm. Rob. 244. (2) [1860] 2 Stuart's Adm. 38.

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While the course of the *Alcido* should apparently have been east magnetic, she certainly deviated from it for the purpose of gaining the advantage derivable from the tide and travelled on to the south or perhaps even south-west at times and by thus deviating from her apparent course in these waters—by going across this course continually travelled east and west by other vessels, she thereby created the risk of collision—by showing her stern light on a course towards the Narrows—coupled with the placing of her crib across the travelled fairway. *Ambient* v. *Saragosa* (1).

Has the *Tyndaerus* become an overtaking vessel by thus travelling toward the *Alcido's* stern light? But is not deviation on the part of an overtaken vessel only excusable in special circumstances to avoid danger? Should she not follow her course when other vessels are seen in the neighbourhood? Or finding herself crossing a much travelled course with this long stretch of the tug, the tow line and the crib why could she not have attracted the attention of the other vessels by showing a flare up light as provided by Article 12? (See also articles 22 and 32). Since she was being supposed to travel east and since she was only showing her stern abaft the funnel, would it not be a proper case to show a flare up light—considering she had a tow which was dangerous to navigate and hard to be seen upon the waters? Could it be said she was a vessel following a course which might possibly appear unusual to other steamers, although justified by special reasons? Does she not then do so at her own risk and ought she not signal her intentions, for the others have a right to assume she will

(1) [1892] 7 Asp. M.C. (N.S.) 289.

conform her course to the ordinary rule? *The Richelieu & Ontario Nav. Co.* v. *The Cape Breton* (1); *The Lancashire* (2).

I do not think the *Tyndareus* became, under the circumstances, an overtaking vessel and had she become so, again without negligence on her behalf, she would have collided with the crib after having taken all necessary precautions according to nautical skill and care, and been thereby freed from any liability.

The *Tyndareus* had complete and numerous look-outs, all intent upon their duties on the night of the collision; and if she did not discover the crib in time to avoid the impact it was not through her neglect to keep proper look-out, or the neglect of any precautions which might be required by the ordinary practice of seamen (Art. 29).

It is not sufficient for the appellants to establish—even if they could do so—that their raft, on the night in question, might have been discovered by extraordinary care and skill. It is incumbent upon them to prove that a competent seamen exercising reasonable care and skill would have discovered it.

Having found that the *Tyndareus* kept a proper look-out and that she is free from the neglect of having taken any precaution which might be required by the ordinary practice of good seamanship, and being unable to find her at fault, the damages must be borne by the party on whom it happens to alight.

The appeal is dismissed with costs.

(1) [1904] 9 Ex.C.R. 67, at p. 116; [1905] 36 S.C.R. 564 at 579; [1907] A.C. 112.

(2) [1874] 2 Asp. M.C. (N.S.) 202.

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November 28.

NEW BRUNSWICK ADMIRALTY DISTRICT.

ALBERT KOUAME.....PLAINTIFF;

AND

STEAMSHIP *MAPLECOURT* AND OWNERS.....DEFENDANTS.

Shipping and seamen—Exchequer Court in Admiralty—Jurisdiction—Canada Shipping Act, R.S.C. 1906, *ch. 113, section 191—Seaman's wages—Amount of recovery under $200.00.*

Held, that, subject to the exceptions mentioned in section 191 of the Canada Shipping Act, (ch. 113, R.S.C. 1906), in an action for seaman's wages, earned on a ship registered in Canada, where the amount of recovery is less, although the amount sued on is more than $200.00, the Exchequer Court in Admiralty is without jurisdiction.

The Savoy and *The Polino* (1904) 9 Ex. C. R. 238, referred to, and *Cowan* v. *The St. Alice* (1915) 17 Ex. C. R. 207 followed.

THIS was an action for seaman's wages and extras commenced by a summons *in rem*. The endorsement claimed the sum of $277.28 for wages due as cook, and also a sum of money by way of viaticum to enable him to return to his home in Newport News. There was a further claim to have an account taken.

November 24th, 1921.

The case was now tried without pleadings before the Honourable Mr. Justice Sir Douglas Hazen, L.J.A., at St. John.

The facts and points of law involved are set out in the reasons for judgment and the argument of counsel.

F. R. Taylor, K.C., for defendant.

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Argument of Counsel.

The action is premature, in that the shipping master has not approved of the amount due the plaintiff and the Captain has not refused to discharge him. If, however, the Court is of the opinion that the action is properly brought, the plaintiff cannot recover more than $200.00. In that event the action will not lie. *The Harriett* (1); Mayer's Admiralty Law and Practice, 100, 101 and 102; R.S.C. (1886) C. 75, Sections 57-58 *Cowan* v. *The St. Alice* (2); *The Savoy* and *The Polino* (3); *Beck* v. *The Kobe* (4).

J. F. H. Tweed, for plaintiff:

It is true that R.S.C. 1886, Cap. 75, sec. 56 provides that no suit for wages under the sum of $200.00 shall be instituted by any seaman, but the following section, 57, provides that where suit is instituted for seamen's wages, and it appears that the plaintiff might have had as effectual a remedy by a complaint to the stipendiary magistrate then a court shall certify to that effect and thereupon no costs shall be awarded to the plaintiff. In this action as the original claim was beyond the jurisdiction of a magistrate, the claimant was obliged to proceed in the Admiralty Court or a superior court. The Admiralty Court therefore had jurisdiction, notwithstanding it should be found that less than $200.00 is owing, and the plaintiff is at least entitled to judgment for the amount due whether or not he is entitled under the section to costs. It is true that the plaintiff took his discharge in England, but did so on condition he would be signed on again,

(1) [1861] Lush 285.
(2) [1915] 17 Ex. C.R. 207; 21 B. C.R. 540.
(3) [1904] 9 Ex. C. R. 238.
(4) [1915] 17 Ex. C.R. 215; 24 D. L.R. 573.

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and when it was found he was not qualified under the rules existing in England for signing on as cook, the discharge became inoperative, and the voyage for which he had originally signed on at Newport News revived and would not terminate until arrival at a Canadian port.

HAZEN L. J. A. now this (28th November, 1921) delivered judgment.

The claim as endorsed on the summons *in rem* was for the sum of $277.28, for wages due the plaintiff Albert Kouame, as cook. And the plaintiff also claimed a sum of money by way of viaticum to enable him to return to his home in Newport News, and it was stated that his claim also included a claim to have an account taken. No evidence was given under the claim for money by way of viaticum, but at the trial the amount actually claimed by him was not $277.28, but $335, and it was understood that the statement endorsed on the summons *in rem* would be amended in that respect.

[His Lordship here sets out the facts and discusses the evidence as to the amount to be allowed and finally decides that the amounts to be deducted from the amount claimed reduces the claim of the plaintiff below the sum of $200 and His Lordship then proceeds].

The question arises whether under those circumstances the plaintiff is entitled to recover at all in this court. Section 191 of the Canada Shipping Act, R.S.C. 1906, Cap. 113, is as follows:

"No suit or proceedings for the recovery of wages under the sum of two hundred dollars shall be instituted by or in behalf of any seaman or apprentice

belonging to any ship registered in any of the Provinces, in the Exchequer Court on its Admiralty side, or in any superior court in any of the provinces unless—"

Then follow certain exceptions, none of which are of importance in the present case.

This matter has received consideration at the hands of other Canadian courts. In 1909 in the case of *The Savoy* and *The Polino* (1), it was held that subject to the exceptions mentioned in sec. 56 of the Seamen's Act (R.S.C. 1886, Cap. 74) the Exchequer Court on its Admiralty side has no jurisdiction to entertain a claim for seamen's wages under the amount of $200 earned on a ship registered in Canada.

Attention was called by the learned counsel for the plaintiff to the fact that in *The Savoy case* (1), the amount claimed was under $200, and that in that respect it was different from the present case in which the amount claimed was in excess of that amount.

In 1908 in the case of *The Christine* (2), judgment was given by Mr. Justice Hodgins, the Local Judge of the Toronto Admiralty District, in which he refers to the conflict of decisions between the Admiralty Court for Ontario and that for Quebec respecting seamen's wages, and points out that in Ontario it was held that the Admiralty Act of 1891 having conferred upon the court all the jurisdiction possessed by the High Court in England, it could try any claim for seamen's wages, including claims below $200 and that the limitation in R.S.C. has been repealed by implication. This view, however, has not been taken by other judges in Canada, and in the year 1915 in the British Columbia Admiralty District in the

(1) [1904] 9 Ex. C.R. 238. (2) [1907] 11 Ex. C. R. 167.

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case of *Cowan* v. *The St. Alice* (1), it was held by Mr. Justice Martin, local judge of the British Columbia Admiralty District, that the jurisdiction of the Exchequer or Admiralty Court under the Canada Shipping Act (R.S.C. 1906, c. 113) the section of which I have previously quoted, over claims for seamen's wages depends upon the amount of recovery, not the amount sued on. Where the amount of recovery is less, although the amount sued on is more than $200, the court, it was held, is without jurisdiction. I agree with this judgment of Mr. Justice Martin, for the reasons given by him. He points out that in that case it was urged on behalf of the plaintiff, as has been urged in this case, that where a plaintiff *bona fide* believes he is entitled to recover a sum above the statutory amount he is entitled to invoke the aid of the court to determine that matter and there is no lack of jurisdiction. The learned judge made a most careful examination of a very large number of authorities bearing directly and indirectly upon the point, one of which cases was *The Harriett* (2). In regard to that he says:

"That was a case where a mate sued for wages as being over the prescribed amount (£50) under the corresponding section 189 of the Merchant Shipping Act of 1854 (which is essentially to the same effect as our sec. 191, except that the prescribed amount is greater), but at the conclusion of the hearing the amount due him was found to be below £50, whereupon the court said:

'I regret that this decision not only deprives the plaintiff of wages which he has justly earned as purser, but must also bar him from recovering in this court the

(1) [1915] 21 B.C.R. 540; 17 Ex. C. R. 207. (2) [1861] Lush. 285.

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wages he has earned as mate. His claim, reduced to a claim for mate's wages only, does not amount to the minimum of £50 which the statute requires for a proceeding for seamen's wages in a Superior Court, except in certain contingencies, which are not applicable to this case. It is true that the words are 'No suit or proceeding for the recovery of wages under the sum of £50 shall be instituted,' and that here a claim, and a *bona fide* claim, has been made for a sum exceeding £50, but I must interpret the statute to require a recovery of £50. I dismiss the case but I do not give costs.' "

I think that in following the decision of Doctor Lushington the judge of the local court in British Columbia is standing on safe ground and I concur entirely in the conclusions which he has reached. That being the case I have decided that the action in the present case should be dismissed.

Judgment accordingly.

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January 7.

EXCHEQUER COURT OF CANADA IN ADMIRALTY
ON APPEAL FROM THE BRITISH COLUMBIA
ADMIRALTY DISTRICT.

BETWEEN

THE OWNER, MASTER AND CREW OF GAS BOAT *FREIYA* (PLAINTIFFS)..... } APPELLANTS;

AND

GAS BOAT *R.S.* (DEFENDANT)..... RESPONDENT.

Shipping—Salvage services—Custom and local usage—Ignorance of custom—Reasonableness, thereof.

In the defendant's plea to an action for salvage services, it was alleged that it is the custom amongst those engaged in the cannery and fishing business in certain parts of the British Columbia coast, to render reciprocal services to each other in times of need without thereby creating any obligation on the part of the party to whom such services are rendered either by way of salvage or as a contractual liability.

Held: (Reversing the judgment of the Local Judge in Admiralty for the British Columbia Admiralty District), that, even if the alleged usage or custom was valid and binding between cannery people and people engaged in fishing, it did not extend to persons who did not fish but limited their business and avocation to buying fish; nor could it operate to the detriment of the positive rights enjoyed by those outside the class of cannery people and people engaged in fishing.

2. A local usage or custom need not have existed from time immemorial, yet it must be notorious, certain and above all things reasonable, and it must not offend against the intention of any legislative enactment. *Nelson* v. *Dahl* (1879) 12 Ch. D. 568; and *Devonald* v. *Rosser & Sons* (1906) 2 K.B. 728 referred to.

3. That the plaintiff in this case having been ignorant of such usage, and not coming within its reasonable application, he could not be assumed to have acquiesced in it.

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APPEAL from the judgment of the Local Judge in Admiralty of the British Columbia Admiralty District (1).

October 27th, 1921.

Appeal heard before the Honourable Mr. Justice AUDETTE at Vancouver.

D. A. McDonald, K.C., E. A. Bennett, for appellants.

E. C. Mayers, for respondent.

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

AUDETTE J. now (this 7th day of January, 1922) delivered judgment.

This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District, pronounced on the 26th April, 1921, dismissing the plaintiffs' action.

On the afternoon of the 28th July, 1920, while Mr. Matthews, the manager of the Anglo-British Columbia Packing Company, was travelling on board the *Fir Leaf,* on his way to the cannery at Glendale Cove, he "sighted the gas boat *R.S.*, sunk and submerged, with just simply a part of the pilot-house showing and the mast, with a big seine, floating around which prevented them from getting alongside of her. There was a very bad west wind blowing at the time and the sea was very choppy." He then decided to go to the cannery to get some gear and salve the boat, and on his way kept looking on the beach for the crew who had necessarily left this submerged craft. The *Fir*

(1) See page 87 ante.

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Leaf found part of the crew, took three of them on board, leaving two on the beach to watch the *R.S.*, which they did until it got dark. Three of them had already started for the cannery in a small skiff and she picked them up on her way.

The *R.S.* at the time was, as shewn by exhibit 2, under charter for a period of thirty-five days to the Glendale Cannery for fishing purposes.

When the *Fir Leaf* arrived at the Glendale Cove, and while proceeding to load the necessary gear, including the taking of a scow and winch, they related all about the mishap and condition of the *R.S.*, and Mr. Matthews sent the night boss for Matthew Wilson, the skipper of the *Freiya,* which was lying at the cannery wharf, having been there engaged for three or four days in loading fish purchased from the cannery. Wilson came to the wharf at Mr. Matthew's request, and becoming acquainted with all the circumstances of the mishap of the *R.S.* asked Mr. Matthew (who was much concerned about losing his seine, says witness Ford) if he wanted his services and Mr. Matthew answered "yes," and said he thought two boats were better than one and Wilson pulled off on board the *Freiya* at about 9.30 p.m., whilst the *Fir Leaf* followed about half an hour afterwards, both in search of the sunk and submerged *R.S.*

At the time they left the cannery it was blowing heavy from the west and it *fined away* at about 2 o'clock in the morning.

After steaming full speed all night, from 9.30 o'clock on the evening of the 28th, the *Freiya* between 5.30 and 6 o'clock a.m. of the 29th found the *R.S.* She was all under, submerged, only just about one foot of her pilot house and the mast out, with the seine net all the way around her, impossible to get alongisde

of her with their boat on account of this 300 fathoms of seine around her. The *R.S.* was lying under water at an angle of about 45 degrees to the port side, with nobody on board.

The *Freiya* lowered a small boat and the captain, accompanied by one of his crew, made a line fast on her and proceeded to tow and after towing for some little time, the seine strung out straight behind the *R.S.* That was the state of things when the *Fir Leaf* came to them at between 6.30 to 6.45 or 7 o'clock on the morning of the 29th.

Witness Matthews testified that, at 6 o'clock in the morning Captain Jackson came to him and said he thought the *R.S.* "*had gone,*" was lost; but on his advice they went to look for her in Hoeya Sound and when coming out, rounding Boulder Point, they sighted the *Freiya* at a distance of 2½ to 3 miles.

They proceeded towards them and after circling around they succeeded in picking up the seine and hauling it on board the scow. They then moved the scow alongside of the *R.S.* and stretched the derrick wire to the step of the mast, but it parted. Then both with the scow and their boat they placed the *R.S.* in what they called crutches, and the *Fir Leaf*, after that tried her power, but she had to stop it as she was thereby driving the *R.S.* under water.

From that time on the *Freiya* towed the whole gathering, that is the *R.S.*, the scow and the *Fir Leaf* to Glendale Cove, arriving there at about one o'clock, p.m. For such services the *Freiya* claimed the sum of $6,000.

To this claim the defendant sets up, *inter alia*, a denial of any salvage services and in the alternative says that "it is the custom amongst *those engaged in*

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the cannery and fishing business of the coast, and in the inlets of British Columbia for the various *fishing boats, cannery tenders*, etc., and their masters and crews to render reciprocal services to each other in times of need without thereby creating or intending to create any obligation on the part of the party to whom such services are rendered either by way of salvage or as a contractual liability." And in further alternative, the defendant paid into court and tendered to the plaintiffs for their services the sum of $250, reserving the question of costs and submitting that such tender was sufficient.

The evidence spread upon the record by the defendant upon this alleged custom is composed of the testimony of one John MacMillan, a perfectly disinterested witness, and that of witnesses Walker and Matthews, two managers of the Anglo-British Columbia Packing Company in question and which held the *R.S.* under charter, at the time of the accident.

Witness MacMillan limits that custom to cannery tenders and cannery boats, and adds that it does not mean the salvors would not be entitled to claim, but that it is not the custom to claim. He further says that (p. 83) the custom does not apply to outside people who have nothing to do with the cannery people, strangers, owners of separate boats, and who (p. 84) have nothing to do with fishing business. And by "outside people" (p. 84) he says he understands people who are not interested with the canneries, that is those who are not chartered—whose boats are not chartered to the canneries and which are not owned by the canneries, but are independent of the cannery people. The custom is confined to cannery owners and those engaged in *fishing* business—it is restricted to the *fishing* business.

Witness Walker states it has been the custom of all canneries and any one interested in the fishing business, and "*interested*" means *engaged* in the fishing business, to abide by this custom. There is no difference between vessels owned *by the cannery companies or chartered by them*, or in their employ by *fishermen attached* to them. Adding: (p. 92) that is: fishing vessels which are attached to one cannery during the season will give mutual assistance to all other vessels gratuitously. In the course of his examination by counsel for the plaintiffs, he is asked:—

"Q. Suppose he was not a neighbour, but travelling up the *coast buying fish*, and he drops into a cannery which suits him best, would you consider him bound by that custom? A. *Well no.* I wouldn't consider any one bound, it is just—I am simply *giving the feeling of the cannery*—of the fishing people as a rule.

"Q. But you don't know of any instance where a man such as I have described, who wasn't under any contract with the cannery. A. We have been blessed with fish buyers *in the last year or so*, but that hasn't come under my ruling.

"Q. Yes—but would you say they were within this custom or not? A. I wouldn't say at all. I couldn't say."

Yet, when this witness ceases to be examined on behalf of the plaintiffs and falls into the able hands of counsel for the defence, he answers the following *leading question*, in direct contradiction of what precedes, viz.:—"Q. So that the man who did travel in that way from cannery to cannery buying fish is—in substance, would be within the area of the custom that you have mentioned? A. Yes, he would."

In the result this witness swears black and white. He has, however, laid the premises for the answer he first gave and not for the second answer.

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Passing now to the evidence, upon this subject of custom, of witness Matthews, another manager of the same company interested as having the *R.S.* under charter, again answering briefly another leading question—which always has a tendency to impair the value of the answer given by the witness, viz.:—

"Q. You agree, do you, that the custom as far as you have known of it during your 12 years experience includes all those who are in any way connected with the industry, the fishing industry of the province. A. I do, yes."

And that is all the evidence adduced in support of such alleged custom.

The place and function of "Custom" are elementary matters in the law and need not be discussed at any length here. But it will serve the interests of clarity in arriving at the grounds of my judgment, to state the distinction between "custom" proper and "local usage." Coke, C. J. in *Rowles* v. *Mason* (1), quaintly says:—

"Prescription and custom are brothers and ought to have the same age, and reason ought to be the father and congruence the mother, and use the nurse, and time out of memory to fortify them both." That observation is of course confined to "Customs" proper. However, there is no pretention in the case before the court that the usage or understanding in question here amounts to a custom that has existed from time immemorial, or that it has been built into the common law by judicial decision. At best it is only a local usage, but taking it at that, while the alleged usage need not have existed from time immemorial, yet it must be *notorious, certain,* and above all things *reason-*

(1) [1612] 2 Brownl. 192.

able, and it must not offend against the intention of any legislative enactment. See per Jessel, M. R. in *Nelson* v. *Dahl* (1), and per Farwell, L. J. in *Devonald* v. *Rosser & Sons* (2).

In *Dashwood* v. *Magniac* (3) Kay, L. J. speaks of custom and usage as follows:— "A great deal has been said in argument for the defendants about 'custom;' but, in my opinion, the word has been strangely misused. A custom which controls the law of waste must be a custom to do that which would be waste but for the custom. Waste in law is destruction of a part of the inheritance by a limited owner, such as a tenant for life or years. The custom which would exonerate him from the consequences must be a custom for a limited owner to do the act in question without being subject to any legal liability.

Littleton, in sect. 169, states that "a custome, used upon a certaine reasonable cause, depriveth the common law," and in sect. 170, "and note that no custome is to be allowed, but such custome as hath been used by title of prescription, that is to say, from time out of minde." Coke's Commentary confirms this statement of the law, quoting *Consuetudo praescripta et legitima vincit legem:* Co. Litt. (Page 113 a.).

"But this must not be confounded with such customs or rather usages as are imported into commercial contracts, or into contracts between landlord and tenant, as in *Wigglesworth* v. *Dallison* (4). In that case an immemorial or prescriptive custom was pleaded; but other authorities have recognized that evidence of immemorial usage in such cases is not required; (see per Mr. Justice Blackburn in *Crouch*

(1) [1879] 12 Ch.D. 568 at p. 575.
(2) [1906] 2 K.B. 728 at 743.
(3) [1891] 3 Ch.D. 306 at 370.
(4) [1779] I-II Doug. 201.

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v. *Crédit Foncier of England* (1), and *Tucker* v. *Linger* (2). But such usage, however extensive, would not prevail against positive law, whether by statute or decision; per Chief Justice Cockburn, in *Goodwin* v. *Robarts* (3)."

Every usage must have acquired, such notoriety in the business or amongst the class of persons affected by it that any person in that business, or amongst that class, who enters into a contract affected by the usage, must be assumed to have intended that the usage should form part of the contract. See *R.* v. *Stoke-upon-Trent* (4); and re *Goetz, Jonas & Co., ex parte the Trustee* (5); *Holderness* v. *Collinson* (6).

No one who is ignorant of an alleged usage can be bound by it if it appears to be unreasonable, and he can only be assumed to have acquiesced in a reasonable usage. *Neilson* v. *James* (7); *Scott* v. *Irving* (8).

In the case before the Court, the party against whom the alleged custom is asserted cannot be bound by any assumption or inference that he acquiesced in it when entering upon the salvage service. On the contrary, Captain Carson, the owner of the *Freiya*, swears positively that he had never heard of any custom of waiving salvage.

No usage can prevail if it be directly opposed to statute law. To give effect to a usage which involves a defiance of positive law would be to subvert fundamental principle. *Goodwin* v. *Robarts* (9); *Neilson* v. *James, ubi supra,* at p. 551.

(1) [1873] L.R.8 Q.B.374 at p. 386.
(2) [1882] 21 Ch.D.18; 8 App. Cas. 508.
(3) [1875] L.R. 10 Ex. 337.
(4) [1843] 5 Q.B. 303.
(5) [1898] 1 Q.B.D. 787.
(6) [1827] 7 B. & C. 212 at 216.
(7) [1882] 9 Q.B.D. 546 at 552.
(8) [1830] 1 B. & Ad. 605 at 612.
(9) [1875] L.R. 10 Ex. 337.

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Having said so much and approaching the consideration of the question in the light of these elementary principles I am led to find that the custom in question or usage applied only to cannery people and the people engaged in fishing, and not to persons, who did not fish but only limited their business and avocation to buying fish. Are we to include all merchants buying and selling fish, in or outside cities, into this custom because they own vessels engaged in buying fish for them, and which they afterwards sell to wholesalers? Could they thereby become bound by this alleged understanding among the cannery and fishing people—people actually engaged in fishing? Stating the case is answering it. Our city fruit dealers are not fruit growers. Our city fish merchants are not people engaged in fishing.

The plaintiffs, under the evidence submitted do not come within the ambit of this alleged custom. The defendant has failed to prove the custom could apply to a person engaged exclusively in buying fish, and who was not engaged in actual catching or canning fish. This custom cannot be imposed upon outsiders who are not engaged in either the business of fishing or cannery.

A general understanding, or custom, such as alleged cannot be extended beyond what the evidence *clearly* shows to be the limits of its sphere, and beyond what cogent evidence shows to have been the originating principle giving rise to the same. It may be that a custom or usage of the sort might have arisen among cannery and fishing people—distinguished as a class by themselves—as a policy or measure of *local* co-operation between members of the class. But what might be valid and binding as between them, could not operate to the detriment of positive rights enjoyed by people outside of the class.

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Sec. 759 of the Canada Shipping Act (R.S.C., ch. 113) reads as follows:—

"759. When, within the limits of Canada, any vessel is *wrecked*, abandoned, stranded or in *distress*, and services are rendered by any person in assisting such vessel or in saving any wreck, there shall be payable to the salvor by the *owner* of such vessel or wreck, as the case may be, a reasonable amount of salvage including expenses properly incurred."

(See also sec. 827 thereof).

In the view I have taken of the case, upon the evidence submitted, it becomes unnecessary to decide whether or not a custom such as alleged, being in clear derogation of the statute, could claim any validity and could be enforced in a court of law. See *Girdlestone* v. *O'Reilly* (1); *Darling et al* v. *B. T. Hitchcock et al* (2); *Cossman* v. *West* (3); *Neilson* v. *James* (*ubi supra*); *Daun* v. *City of London Brewery Co.* (4).

There were a number of minor but interesting questions raised at bar, but it would carry us too far afield to enter into the consideration of the same especially since the view I have taken of this appeal makes it unnecessary to do so. I will, however, casually cite on this question as to what is necessary to allege in the pleadings the Rule of Court 64, which limits such allegation to facts only.

Quantum.

Request was made at bar that in the event of the appeal being allowed, the Court should assess and the judgment should also include the amount the plaintiffs would be entitled to recover, thus saving costs and expenses to all parties.

(1) [1862] 21 Up.C.Q.B.R. 409.
(2) [1866] 25 Up.C.Q.B.R. 463.
(3) [1888] 13 A.C. 160.
(4) [1869] L.R. 8 Eq. 155.

Acceding to such request, I will point out that the *R.S.*, on the 28th and 29th July, 1920, came within the ambit of sec. 759 of the Canada Shipping Act. She was in such state that no one could remain on board, she being sunk and submerged. As to being abandoned, it is well to bear in mind some of the crew was left on shore to keep an eye on her, but that could not be done during night. Captain Jackson, the captain of the *Fir Leaf* on the morning of the 29th had almost given up hope of finding her.

However that may be, the *R.S.* on those two days was in great danger of becoming a total loss. Had she drifted near the shore, it is self-evident the seine would have caught on the beach or on the rocks near the beach and would have been pulled down and become a total loss. Both the seine and the craft were rescued and saved.

Whether the *Freiya* undertook to look for the *R.S.* of her own free will or at the bidding of others makes no difference. (Williams & Bruce, Admiralty Practice, 3rd Ed., p. 128). She actually steamed out in search of the *R.S.* when she heard of the mishap. She was free to do so or not. She was out at night when it was blowing hard with choppy sea. She was out all night, using her searchlight and she finally sighted and found this submerged craft and was in the act of towing her quietly when the *Fir Leaf* arrived and indeed extended great help. The *Freiya* did not rescue her alone although she might have done so according to the evidence—*she was materially assisted by the Fir Leaf and her scow.* But the *Fir Leaf* on the previous day had not attempted to salve her alone in plain day time.

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Taking all the circumstances of the case into consideration I have come to the conclusion that the sum of $250 tendered for such services is insufficient, and that the plaintiffs are entitled to recover for all she has done, the sum of $500.

Therefore, there will be judgment allowing the appeal and condemning the defendant in the sum of $500. The whole with costs in both courts against the defendant.

BETWEEN

1922
January 14.

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

AND

THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND AND THE PARTS ADJACENT IN AMERICA, COMMONLY CALLED THE NEW ENGLAND COMPANY; AND EDMUND SWEET, TRUSTEE UNDER THE LAST WILL OF THE REVEREND ABRAHAM NELLES, DECEASED ..... DEFENDANTS.

Crown lands—License of occupation—12 Vict. (Prov. Can.) c. 9, sec. 1—16 Vict. (Prov. Can.) c. 159, sec. 6—Interpretation—Powers of commissioner of Crown lands exercised by Governor General—Validity.

By 12 Vict. (Prov. Can.) c. 9, sec. 1 and 16 Vict. (Prov. Can.) c. 159, sec. 6, the Commissioner of Crown Lands was empowered to issue, under his hand and seal, a license of occupation to any person wishing to purchase and become a settler on any public land, such settler upon the fulfilment of the terms and conditions of the license to be entitled to a deed in fee of the land. By sec. 15 of the last mentioned Act the Governor in Council was authorized to extend the provisions of this Act to the Indian lands under the management of the Chief Superintendent of Indian Affairs and when such lands were so declared to be under the operation of the Act, the Chief Superintendent was entitled to exercise the same

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powers as the Commissioner of Crown lands had in respect of the Crown lands. The Governor General, on the 7th April, 1859, purported to grant a license of occupation in respect of certain Crown lands to N. "for and on behalf of" the defendant company, under his hand and seal at arms.

Held, that inasmuch as the license in question was granted by the Governor General under his hand and seal at arms instead of by the Commissioner of Crown lands, such license did not comply with the provisions of the statutes in that behalf, and was therefore invalid and conveyed no legal right or interest in the lands to the defendant company.

INFORMATION of Intrusion exhibited by the Attorney-General of Canada seeking to recover possession of lands granted to the defendants under License of Occupation.

December 20th, 1921.

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

R. V. Sinclair K.C. and *A. G. Chisholm, K.C.*, for plaintiff.

W. S. Brewster, K.C., for The New England Company.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 14th January, 1922) delivered judgment.

This is an Information of Intrusion exhibited by the Attorney-General of Canada, whereby the Crown, *inter alia*, seeks to recover possession of the lands mentioned in the said information, and which have been in the possession of the defendants for upwards of sixty years, under the *license of occupation* hereinafter referred to.

Counsel at bar waived and abandoned the claim of $10,000 for issues and profits from the 7th April, 1859, and further declared and expressed their willingness that the defendants be at liberty to remove, at their expense, all buildings erected upon the said premises.

In consideration of the yeoman services rendered to Great Britain by the Six Nations Indians during the war of the Revolution, the British Crown felt, when the war was over and when these Indians had thereby been thus deprived of the lands of their habitat—in what is now the United States—that these loyalists (so to speak) Indians should be given some lands within the Canadian territory and six miles on each side of the Grand River was granted them, after having obtained a surrender of the same by the Mississagua Indians.

On the question of title it suffices to say that the origin of the same goes as far back as 1784 and 1792 and that the title—the *license of occupation*—of part of the lands above mentioned upon which the whole case turns, bears date the 7th April, 1859—long before Confederation.

The whole case rests upon the validity of this *License of Occupation*, and it is found unnecessary to go beyond the date of the same for the disposal of the present issues under controversy and as set out in the pleadings—and if I were—a consideration which would carry us far afield—I would again be led to find in favour of the plaintiff under the titles produced and filed.

This license reads as follows, namely:

"Province of Canada.

"By His Excellency the Right Honourable Sir Edmund Walker Head, Baronet, one of Her Majesty's Most Honourable Privy Council, Governor of British North America and Captain General and Governor

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in Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward and Vice Admiral of the same, etc., etc., etc.

"To all to whom the presents shall come. Greeting.

"Know ye that I have granted and do hereby grant unto the Reverend Abraham Nelles, of the town of Brantford in the County of Brant, for and on behalf of the New England Company for all that parcel of land . . ." Here comes the description of the premises and then the habendum clause which reads as follows:

"The said license of occupation being granted on the express condition that the New England Company shall hold possession of the same so long as they keep up Manual Labour School for the use of the Six Nations Indians, and no longer.

"Given under my hand and seal at arms at Toronto, this seventh day of April, in the year of Our Lord one thousand eight hundred and fifty-nine and in the twenty-second year of Her Majesty's Reign."

By Command.

(Sgd.) Edmund Head.

(Sgd.) C. Alleyn.

Secretary.

The defendant Sweet, trustee under the last will of the Reverend Abraham Nelles—in the said license mentioned—having filed no defence to the Information, judgment by default was entered against him on the 15th March, 1921.

Under the provisions 12 Vict., ch. 9, sec. 1 (1849) and 16 Vict. ch. 159, ss. 6, 15 (1853) (1) it is, among

(1) *Reporter's Note:*—By sec. 15 of the last mentioned Act the Governor in Council was authorized to extend the provisions of the Act to the Indian lands under the management of the Chief Superintendent of Indian Affairs; and when such lands were so declared to be under the operation of the Act the Chief Superintendent was entitled to exercise the same powers as the Commissioner of Crown Lands had in respect of the Crown lands.

other things, enacted that a license of occupation shall be issued by the Commissioner of Crown lands. Therefore, the issue of a license by the Governor General "under his hand and seal at arms" is in direct contravention to the statute and it must therefore be found that the license was *ab initio* invalid and that nothing passed thereunder. This license of occupation, which the Governor General assumed to issue under his seal at arms could not, in violation of the statute, constitute a legal and binding document. *Doe ex Dem. Jackson* v. *Wilkes* (1); *Doe Dem. Sheldon* v. *Ramsay et al* (2); *The Queen* v. *Clarke* (3).

By this license of occupation the lands in question, as was contended at bar, became practically tied up in perpetuity and it being found to be detrimental to the Indians, the present information of intrusion has been resorted to with the object of using these lands to a better advantage for the Indians. *The Queen* v. *Hughes* (4).

On the other hand during the whole period that the defendants have been in occupation, that is for over 60 years, there is not a tittle of evidence establishing they ever failed to discharge their part of the obligation arising out of the license.

Have not, however, the Indians the right to represent to their trustees that their land could be used to better advantage to them? Should a trustee be allowed to tie up lands for an indefinite period to the detriment of the *cestui que trust* when the law would afford a remedy to cure such detriment?

It would seem that land vested in the Crown can only be dealt with either by a patent under Great seal or under statutory authority.

(1) 4 Up. C.Q.B. 142, 149, 150.
(2) 9 Up. C.Q.B. 105.
(3) 7 Moore P.C. 77.
(4) L.R. 1 P.C. 81.

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Audette J.

There will be judgment ordering and adjudging that nothing passed under the said license of occupation and that the plaintiff recover possession of the lands in question.

No costs are asked by the prayer of this information and this is, however, a case where there should be no costs to either party.

It having appeared at trial that some of the lands covered by the license of occupation had been since its issue, about 63 years ago, disposed of and sold under expropriation for railway purposes or otherwise, the judgment will apply only to such part now in the hands of the defendants. If the parties fail to agree as to the metes and bounds of the said lands, leave is hereby reserved to either party to apply, upon notice, for further direction in respect of the same.

The judgment by default obtained against the trustee Sweet will go no further than the condemnation against the defendant company.

The defendants are furthermore at liberty, at their expense, to remove from the premises in question all buildings thereon erected.

Solicitor for plaintiff: *A. G. Chisholm, K.C.*

Solicitors for defendant, The New England Company: *Brewster & Heyd.*

NOVA SCOTIA ADMIRALTY DISTRICT

1921
December 31.

VENOSTA, LIMITED.....PLAINTIFF;

v.

THE SHIP *MARY MANSON GRUENER* AND HER CARGO AND FREIGHT } DEFENDANT.

Shipping and seamen—Salvage services—Towage.

On the 8th November, 1921, the defendant ship was lying anchored by her port anchor in the breakers near the Cape Breton shore at the northern entrance of the Strait of Canso, very near to the beach, and in shallow water, the wind blowing at from 50 to 60 miles an hour from the north west. She had previously been through rough weather and her sails were in bad condition. She was in a position of great peril, and was only kept from stranding by the back-wash from the beach.

At 9.45 a.m. on the same day the plaintiff steamer hearing of defendant's difficulties, left Port Hastings and went to her assistance, and, at considerable danger to herself, as the schooner could only be approached from the port side, sent two lines aboard the schooner and succeeded in making fast two steel hawsers, finally towing her to safety. No other means of salvage was reasonably available at the time.

Held, on the facts, that the services so rendered were in the nature of salvage and not of mere towage.

ACTION by the plaintiff ship claiming the sum of $25,000 for salvage services rendered to the ship *Mary Manson Gruener* on or about the 8th day of November, 1921, on the shore of Cape Breton, near the strait of Canso, Nova Scotia, which said service consisted of the pulling of said ship off the rocks on said shore and towing said ship in safety to Port Hawkesbury.

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VENOSTA v. THE SHIP MARY MANSON GRUENER AND HER CARGO AND FREIGHT.

Statement of Facts.

December 24th, 1921.

Case now heard before the Honourable Mr. Justice Mellish, L.J.A., at Halifax, N.S.

W. A. Henry, K.C., and *Thomas Notting, K.C.*, for plaintiff.

L. A. Lovett, K.C., for defendant.

The evidence of the plaintiff showed that the plaintiff's steamer the *Venosta* was a steam trawler of 350 tons gross, and in the month of November, 1921, was fishing out of Port Hawkesbury and up in the North Bay in the Gulf of St. Lawrence.

In the morning of November 8th, 1921, the *Venosta* left Port Hawkesbury for Port Hastings intending to coal at the latter place before proceeding on her usual fishing trip. At Port Hastings the Captain learned of the defendant's ship being in distress about seven miles north and without taking in coal, left to render her assistance, with only enough coal on board for twenty-four hours. Steaming north of the Gut of Canso, she reached the plaintiff's schooner, which was lying in the breakers with her anchor down, a little north of Cape Jack on the Nova Scotia side of the strait.

The plaintiff's Captain was asked by the Captain of the defendant's ship "to take the latter's ship out as quick as he could."

The first boat launched from the plaintiff's vessel in the attempt to put the hawser on defendant ship filled and sank.

Later, at about one o'clock that day, the steel hawser was got aboard and made fast. In starting the tow boat one of the hawsers of the plaintiff strained and parted.

As plaintiff's ship was drawing 16 feet of water and as the water at this place was only 19 feet in depth, she bumped on the bottom three or four times, during the start in towing.

She did not have the weight of the defendant ship then, but had the weight of the steel cable on the starboard quarter and was moving ahead broadside to the wind and the lee shore right along side and quite near the breakers. The defendant ship was lying 10 or 15 feet from the rocks on her quarter with her sails all torn or lost. Port Hawkesbury was reached that night about dark, and they anchored in a place of safety, in the range of the harbour, for the night, and the next day the defendant ship was moved to a better anchorage.

The towing began about 1.30 p.m., and was finished shortly after 4 p.m. on the same day.

When the hawser was attached, the plaintiff ship took up her anchors and started ahead to get the weight on her hawser. The wind was then northwest and the defendant schooner was heading up N.N.W. right along the beach, with a terrible tide running at the time. When plaintiff's anchors were taken up, the ship was turned to get the wind on the port bow and to sheer in to the shore as close as possible, so as to start ahead as straight as possible, the wind then blowing boisterously, and the breakers quite near them.

Mr. Lovett, K.C.: This is a case for a towage award and the amount should not be large. The plaintiff's ship was never in peril, but could at any time when in danger from getting on the rocks have shipped her anchor and avoided them. Also it was not a case for percentage award in the value of the plaintiff's and defendant's ships.

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VENOSTA v. THE SHIP MARY MANSON GRUENER AND HER CARGO AND FREIGHT.

Argument of Counsel.

Cited *Brister* v. *S.S. Bjorgviu* (1); *Die Deutsche Amerikanische* v. *S.S. Berwindmoor* (2); *Mayers Admiralty* (3).

Mr. Henry, K.C.: All the elements were present in this case for a substantial salvage award, viz.: the danger to the plaintiff's ship when being attached to the defendants' schooner in close proximity to the rocks and in shallow water, the danger to her crew on account of the storm then raging and the dangerous position of the defendant ship being then amongst the breakers and in the event of a change in the direction of the wind would become a complete wreck. Also that plaintiff's ship being specially equipped for such salvage operations, should have a substantial award.

Cited, *Kennedy on Salvage*, 133; *Pritchard's Digest*, Number 76,435 and 525.

MELLISH, L. J. A. now (this 31st December, 1921) delivered judgment.

This is an action for salvage brought on behalf of the owners of the S.S. *Venosta* and the crew against the schooner *Mary Manson Gruener* and her cargo and freight.

On the morning of 8th Nov. last the schooner was lying in the breakers near the Cape Breton shore at the northern entrance to the strait of Canso a little north of Cape Jack on the Nova Scotia side.

The wind was blowing from 50 to 60 miles per hour from the N.W.

(1) 15 Ex. C. R. 105. (2) 14 Ex. C. R. 23.
(3) 177 and 184.

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VENOSTA v. THE SHIP MARY MANSON GRUENER AND HER CARGO AND FREIGHT.

Reasons for Judgment.

Mellish L.J.A.

The schooner had her port anchor out; she was not heading directly to the wind but N.N.W., being apparently kept in this position by the strong tide or current which was running along said shore and southerly through the strait. As I understand the evidence the anchor was grounded at a point on her starboard bow. She had been through rough weather previously and her sails were in bad condition. She was very near the beach and was only kept from stranding by the back wash from the beach, and was in my judgment in a position of great peril. The value of the schooner has been appraised at $15,000, her cargo at $16,500, and her freight at $3,134.81. Under the foregoing conditions the trawler *Venosta* a steamer of 350 tons gross and appraised at $45,000, came to the assistance of the schooner. The steamer was apparently an easy one to handle and in respect of engine power equipment and strength of build seems to have been well fitted for the purpose.

The steamer left Port Hastings on the salvage service about 9.45 a.m. on the 8th day of Nov. and proceeded to where the schooner was lying 6 or 7 miles away and took steps to bring the schooner to a place of safety by towing. Two steel hawsers from the steamer were made fast to the schooner. To enable this to be done lines had to be sent aboard the schooner. This involved considerable danger especially as the schooner could only be approached on the port side. In salving the schooner the steamer had one steel hawser broken and strained. This hawser cost new $1,000. She also had ropes damaged to the extent of $100 and a boat and equipment damaged to the same extent. The schooner was brought to Hawkesbury about 4 p.m. and moved to a safe anchorage by the steamer on the following morning.

1921

VENOSTA v. THE SHIP MARY MANSON GRUENER AND HER CARGO AND FREIGHT.

Reasons for Judgment.

Mellish L.J.A.

I am not satisfied that any other means of salvage was reasonably available at the time. The details of the salvage operations, I need not mention further than to say that they appear in the testimony of the steamers' masters, which I see no sufficient reason to describe.

I award $4,000 salvage, which will be apportioned as agreed at the trial after hearing counsel, and costs.

In regard to the method of appraisement, I was requested by counsel to give some opinion.

I think I can only usefully say, that whatever may have been the practice heretofore, there appears to be no authority under the rules for the appointment of appraisers by the parties.

Judgment accordingly.

BETWEEN:

1922

January 25.

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

AND

PETER KARSON AND WILLIAM KARSON, FORMERLY CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF "KARSON" AND THE SAID WILLIAM KARSON..... } DEFENDANTS.

Revenue—Special War Revenue Act, 1915, as amended by 11 Geo. V., c. 50—Excise tax on sales by manufacturers—Interpretation—"Manufacturer."

Defendants were carrying on a confectionery and café business in Ottawa on the 10th day of May, 1921, when the Act 11-12 Geo. V., c. 50, amending the Special War Revenue Act, 1915, came into force. In the interests of their business they were manufacturing candy as stated below. By such legislation, an excise tax of 3 per cent was imposed on sales and deliveries by manufacturers, etc. Defendants occupied two stories of a commercial building. On the first floor they had a factory with modern plant and equipment for the manufacture of candy in large quantities, with a capacity in excess of that required for the period in question. In this factory they manufactured candy which was sold by retail to consumers. The staff of employees in the factory varied according to the demands of the season and the trade. The sale of the candy by retail to consumers took place in their store on the ground floor of the building occupied, where they sold a varied assortment of candies, ice-cream, lunches and soft drinks to consumers. It was proved that during the period in question the total trade of the defendants amounted to $65,000.00 a year, of which 1-5 represented the sale of candy manufactured by them. The defendants had taken out a sale tax license and a manufacturer's tax license for the fiscal year 1920-21 and paid the tax for that year; but did not renew the licenses and failed to pay the tax for the current fiscal year.

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THE KING
v.
KARSON.

Held That the defendants were "manufacturers" within the meaning of the Special War Revenue Act, 1915, as amended as aforesaid. *The King* v. *Pedric et al* (1921) 21 Ex. C.R. 14 distinguished:

(2) That it is the plain and literal meaning attaching to the word "manufacturer" that should govern in construing the statute; and that when it is proved, as it was here, that the sense in which people engaged in the trade accept a word corresponds with its literal meaning, the construction of the statute is freed from difficulty. The literal construction of the word is also supported where it is not shown that the framers of the Act had any intention of departing from the meaning of the term in question as generally accepted.

(3) That the construction of a statute should not be obscured by assuming complexities of administration that may never arise. Reasonableness must be attributed to the officials who administer the law when hardships arise; and in such matters the courts must deal with actualities and not remote possibilities.

INFORMATION exhibited by the Attorney-General of Canada seeking to have it declared that the defendants are "manufacturers" within the meaning of the Special War Revenue Act, 1915, and liable to the tax imposed upon such.

January 12th, 1922.

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

W. D. Hogg, K.C., and *F. D. Hogg*, for the plaintiff.

T. A. Beament K.C., for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 25th January, 1922) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought, *inter alia*, to have an account taken of all confectionery and candy, etc., manufactured and sold by the defendants

from the 10th May, 1921, and for the payment upon the same of the tax on sales payable under the provisions of sec. 19 b.b.b. of the Special War Revenue Act, 1915 (5 Geo. V., ch. 8) as amended by 11-12 Geo. V., ch. 50. This latter amendment came into force on the 10th May, 1921.

As a prelude to the consideration of the present controversy it is well to state that the present case is distinguishable and must be distinguished from the *Pedric Case* (1)—a case recently decided by me and cited at bar—for the obvious reasons that the facts are materially different and further that the law has since been amended and changed.

The defendants Peter Karson and William Karson were on the 10th May, 1921, carrying on the business of confectioners and candy manufacturers, on Sparks Street, in the City of Ottawa.

On the 6th of July, 1921, the defendants dissolved their partnership, and William Karson continued the business alone on Sparks street, while Peter Karson started a similar business on Rideau street, in the City of Ottawa.

Under the provisions of this sec. 19 b.b.b. (11-12 Geo. V., ch. 50) a section too lengthy to be here recited, it is, among other things, enacted that upon "sales by manufacturers to retailers or consumers, etc., etc., the excise tax payable shall be three per cent, etc." The section furthermore provides for the manner in which this tax shall be levied.

Now, the nature of the business carried on at 200 Sparks Street, which is the subject of the present controversy, consists of a retail store on the ground

(1) [1921] 21 Ex. C. R. 14.

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floor, where candies of almost every kind, ice cream, lunches, soft drinks are sold, including the operation of a soda fountain. However, besides this specific retail trade, the defendants have a candy factory on the second floor of this Sparks street establishment, where their candy is manufactured in large quantities and thereafter is sold through their retail store on the ground floor.

They have in the factory on the second floor a considerable and improved plant or equipment for such manufacture with a staff of employees varying from time to time, as required by the season and the trade.

The defendants were in possession of a sale tax license and manufacturer's tax license for the fiscal year 1920–1921; but have failed to renew the same for the current fiscal year and have failed to pay to the Crown the statutory taxes.

The evidence discloses that their plant is capable of manufacturing much more than they actually did manufacture. The evidence also discloses that in the course of his examination in the present case, Peter Karson frankly admits that his firm *manufactures* candy and states how they *manufacture* the same; that the Bunnell factory, in the City of Ottawa, with a very much smaller plant and machinery, selling to retailers, etc., but not retailing its goods, takes out the license and pays the tax. Furthermore that the Ardis Company, on Sussex street, with a plant almost equal in quantity but with less improved and modern appliances than those of the defendants, like the Bunnell factory, takes out the license and pays the tax.

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It has further been established that large manufacturers, such as the "Laura Secord" concern, having extensive factories in Montreal and Toronto, yet selling and retailing their goods, also take out a license and pay the tax. Moir & Company, of Halifax, Goodwin & Co., of Montreal, Eaton Co., of Toronto, also manufacture their own candy and retail it in their own stores, take out licenses and pay the statutory tax. The evidence shows, too, that there are other firms, manufacturing in a similar manner and retailing also in a similar manner, that take out the license and pay the tax.

Discrimination alone would not of itself be a sufficient reason to make them liable. It is quite true that the fact that all these concerns carry on a similar business to that of the defendants and pay tax, will not of itself be a reason to exact the tax from the defendants if the law does not make them liable therefor; but this fact goes to show what is the custom of the trade and how traders understand the word "manufacturer" as used in our statute. It is the meaning attaching to the word "manufacturer" in its plain and literal sense that should govern us in construing the statute, and when it is proved, as it was here at the trial, that the sense in which the people in the trade accept it corresponds with that literal sense, the construction of the statute is freed from difficulty.

It is also to be observed that there is nothing to show that the framers of the Act had any intention of departing from the meaning of the term in question as generally accepted. See in this connection 24 Hals. 619.

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Much stress has been laid by the defendants on the difficulty in collecting the tax when selling from 10 cents worth of candy at a time, and therefore trying to show the impossibility of complying with the requirements of the statute, in that when selling 10 cents worth of candy, they would have to collect at least one cent, equal to 10 per cent of the sale. This argument lacks in soundness. Indeed, taking the sale of candies for the sum of $100,000.10 can it be said the tax cannot be levied because on the last 10 cents, at least 10 per cent would have to be collected? Under our Canadian currency, we have no coins smaller than one cent and that has to be collected when a fraction thereof is collectible. Stating the proposition is solving it.

It is futile to becloud so clear a case of construction by assuming complexities that need never arise in the practical administration of the Act. The courts must deal with actualities and not remote possibilities in deciding cases before them involving the construction of statutes. Reasonableness must be attributed to the officials who administer the law when hardships arise. The defendants were wise in the course they first pursued in taking out a license and paying the tax for 1920-21; they have seen fit to risk the consequences of a departure from that course the following year, and must therefore accept the full burden of that risk.

I have no hesitancy in reaching the conclusion that the defendants are "manufacturers" selling to consumers, and that they are liable to pay the above mentioned tax. They have a factory, they manufacture candies and they sell them to consumers, thus necessarily coming within the ambit of the section.

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Having found the defendants liable, the next question is that of fixing the amount collectible. At the opening of the trial when a general statement of the case was made, it was understood that the Court was to decide the question of liability and that there would be a reference to take account. However, as the case proceeded, it was elicited both on behalf of the defendants and on behalf of the Crown that the sale of candy so manufactured by the defendants represented one - fifth (1-5) of their total trade of $65,000 for the year. Under the circumstances, I fail to see the necessity of going to the expenses of a reference to establish a fact which is proved by both sides respectively, and I will accept that ratio and mode of operating in arriving at the amount of the tax.

Therefore there will be judgment ordering and adjudging the defendants liable to pay this above manufacturer tax of 3 per cent, and if there is any difficulty in arriving at the actual amount of the condemnation leave is hereby reserved to apply to the Court for further direction in respect of the same.

The liability of the defendant Peter Karson is limited to the period between the 10th of May, 1921, to the 6th July, 1921.

The whole with costs in favour of the Crown.

Judgement accordingly.

1922
January 27.

IN THE MATTER OF THE PETITION OF RIGHT OF R. G. LONG COMPANY, LIMITED..SUPPLIANT;

AND

HIS MAJESTY THE KING.....DEFENDANT.

Contract—Obligation of Crown as bailee—Reasonable care—Tort—Contractual relationship.

By a contract under seal, entered into between the suppliant and the Crown, suppliant agreed to deliver a certain number of gauntlets for the use of the R.C.M. Police, equal in every respect to the sample submitted by them. These were delivered, and upon examination, a large proportion thereof were rejected as not up to sample.

The rejected gauntlets were marked with an ordinary lead pencil mark, easily removed, and shipped back to suppliant, who returned them to Ottawa because so marked. This mark was removed by the employees of the Crown and in some instances the surface of the leather was injured in the process.

Held: That the Crown in the right of the Dominion of Canada may be liable as a bailee, and that after the rejection of the gauntlets herein it became an involuntary bailee, liable only for want of reasonable care. That its employee having chosen to erase the marks in question it became liable for whatever damage arose by reason of the way in which the erasing was done. *Brabant & Co. v. The King.* (1895) A.C. 632 applied.

2. That in this case the damage arose out of something done by an officer and servant of the Crown under a contract, and that the Crown is liable to make good any damage arising out of its contractual relations with the subject.

PETITION OF RIGHT on behalf of suppliant herein seeking to recover from the Crown the sum of $1,858.41 with interest, as compensation for the damage done to the gauntlets delivered by them to the Crown and rejected by the Crown.

November 10th and 11th, 1921.

Case was now tried before the President at Ottawa.

Harold Fisher and *L. P. Sherwood*, for the suppliant.

E. F. Newcombe and *H. H. Ellis*, for respondent.

The facts are stated in the reasons for judgment.

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

This is a Petition of Right on behalf of R. G. Long Company, Limited, a corporation having its head office in the City of Toronto. It is necessary to refer to some of the allegations set out in this petition. It alleges that by a contract under seal, dated the 19th July, 1920, entered into between the suppliant and His Majesty represented therein by the Honourable the President of the Privy Council of Canada, the suppliant agreed to deliver free of all charges at the Royal Canadian Mounted Police Store House at Ottawa, one thousand pairs of brown leather gauntlets equal in every respect to an accepted sample submitted by the suppliant, and His Majesty agreed to pay to the suppliant $3.50 for every pair of gauntlets accepted in accordance with the conditions in the said contract contained.

The 4th allegation is: "That His Majesty, by his servants, returned to your suppliant, 529 pairs of the gauntlets so delivered, but the said gauntlets were found by your suppliant to have, whilst in possession of His Majesty, been so defaced by markings of blue crayon or some similar substance as to be rendered valueless and unsaleable."

"5th That your suppliant therefore refused to accept the said gauntlets and returned the same to His Majesty."

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The President

"6th That subsequently, His Majesty's servants in undertaking to remove the said markings so injured the substance and destroyed the colour of the said gauntlets that they remain of no substantial commercial value."

And the suppliant claimed the sum of $1,858.41 with interest.

In this petition the right of the Crown to reject the number of gauntlets in question does not seem to have been disputed. The ground of complaint is that the gauntlets so rejected had been so defaced and injured while in the possession of the Crown as to entitle the suppliant to damages. The damages being claimed as at the value of the contract price for these five hundred odd pairs of gauntlets.

The case came on before me for trial at Ottawa, on the 10th November, 1921. It was proved before me beyond reasonable doubt that the rejected gauntlets were not up to the sample, and were not in accordance with the terms of the contract. It was shown, however, that instead of these gauntlets being marked with a blue crayon or some similar substance so as to be rendered valueless and unsaleable, the mark was made with an ordinary lead pencil which could be easily removed, as shown by the witness Hackett, when one of the marks was removed within the space of a minute or so in my presence. The rejected gauntlets were shipped back to the petitioner at this time. Had the petitioner acted as they should have acted, they could easily have removed these pencil marks which would have left the gauntlets in the same state as when they were shipped to Ottawa. Instead of that, however, they returned them to Ottawa, and according to the evidence of the witnesses for the Crown the pencil marks were erased and the gauntlets returned.

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At the trial three or four samples of gauntlets which were claimed to have been injured were produced to me, showing that in the process of removing the marks some slight injury had been done to the surface of the leather of which the gauntlets were made. I was not satisfied to determine the case on these samples, and directed that all the gauntlets that were rejected should be sent to Ottawa, and the gauntlets examined in my presence. Two large boxes of gauntlets were opened on the 13th January, 1922, and an examination was made on that day, and on the following day, January 14th. It appeared that in box Number 1, three hundred and thirty-one pairs of gauntlets were examined. Of these three hundred and thirty-one pairs of gauntlets, I found that two hundred and twenty-six pairs showed no appreciable indications of damage or injury. One hundred and five pairs were selected by the Counsel for the petitioner for further examination. I think it is quite clear that while with a minute scrutiny some of these one hundred and five pairs had the appearance of having been injured in the process of removing the pencil mark, it would have been an easy matter to have restored the gauntlets to their original condition when first received by the Mounted Police.

In the other box, one hundred and eighty-three pairs of the gauntlets were examined, and one hundred and sixteen pairs were placed aside for further examination.

It was conceded before me that the Crown can be held liable as bailee, and I think this concession is in accordance with the law. This was so determined in the case of Brabant & Co., *v* The King (1).

(1) (1895) A.C. 632.

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It was contended by Mr. Newcombe on behalf of the Crown that if any injury was done to the gauntlets, it was in the nature of a tort, and the Crown would not be liable for tort committed by its officers or servants. My opinion is, while in the ordinary case between subject and subject an action might have been brought in tort, nevertheless in this case the obligation of the Crown rests upon a contract, and the Crown is liable to make good any damage arising out of its contractual relations with the subject.

After the examination which I have referred to on the 13th and 14th January, I desired to have Hackett recalled with the view of enabling me to arrive at the quantum of damage. I am of the opinion that the damage was trifling. But, I wished to be assisted in arriving at the measure of damage. I therefore suggested that Mr. Hackett should be recalled, and that he should go over these gauntlets which had been put aside for further examination, and I appointed the Monday following for this purpose. I thought, as I stated, that the alleged defacement could be remove at very slight expense, but on Monday I was notified by counsel for the petitioner that they declined to appear or to agree upon any examination by Hackett or by any other person, and they claimed the right to have the matter left as it was left at the trial with the subsequent examinations to which I have referred. On this state of facts any further investigation ceased, as I could not take upon myself to have Hackett or any other person assist me in the matter of arriving at the amount of damages that should be allowed.

In my opinion, after a fairly exhaustive examination of the authorities, I think the Crown after the rejection of the gauntlets became what the sixth edition of

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Benjamin on Sales relying on the case of Okell *v* Smith, (1) describes as an involuntary bailee and they were only liable for want of reasonable care. Benjamin on Sales, 6th ed. p. 889 may be looked at.

The Crown having chosen to erase these marks and there being some slight damage, I think they are liable (1) but the damage is trifling. I think that if the petitioner is allowed the sum of fifty dollars that it will be more than ample to have covered any damage to these rejected gauntlets.

I therefore allow the petitioner the sum of fifty dollars, and under the circumstances of the case I think there should be no costs to either party.

Judgment Accordingly.

(1) (1815) I, Starkie, 107; Benjamin on Sales 6th ed. p. 870.

1922
February 7.

BETWEEN:

THE CITY SAFE DEPOSIT AND AGENCY CO. LTD..... PLAINTIFF;

AND

THE CENTRAL RAILWAY COMPANY OF CANADA..... DEFENDANT.

In re C. N. Armstrong's Claim.

Railways—Receivership—Fund in the Exchequer Court—Proceedings in the Provincial Court against fund—Concurrent jurisdiction—Comity.

After proceedings had been instituted in the Exchequer Court of Canada by the trustee for the bondholders of the company defendant for the recovery of the amount due on the unpaid bonds of the company a Receiver was appointed and an order made for the sale of the assets. Thereafter moneys representing purchase price of certain property or assets of the company was paid into the court. In order to distribute the fund, creditors of the company were duly notified to file their claims before the Registrar, acting as Referee. Armstrong thereupon filed his claim, which was contested by plaintiff, and after full inquiry was dismissed by the Referee in his report. The report was subsequently confirmed by this court. From this judgment Armstrong appealed to the Supreme Court of Canada, such appeal being afterwards dismissed for want of prosecution. In the meanwhile Armstrong had sued the defendant company in the Superior Court of the Province of Quebec on substantially the same claim, and obtained judgment by default for a large sum and a declaration that the same was privileged as "working expenditure" under the Railway Act. The plaintiffs having applied for the payment out to them of the balance of the fund in the Exchequer Court after satisfying the claims of the privileged creditors, Armstrong opposed the application, filed the judgment in his favour of the Provincial Court, and asked that such balance in the Exchequer Court of Canada be not paid over to the plaintiff as trustee for the bondholders until the said judgment in his favour in the Provincial Court had been satisfied out of the said fund.

Held: On the facts, that the fund in Court, representing the proceeds of certain assets of the company, was exclusively under the judicial control of this court; and no other court could interfere with it.

2. That even if the Superior Court, of Quebec had concurrent jurisdiction with the Exchequer Court in the matter, the latter being first seized thereof, the former should, by comity of Courts, hold its hand.

Semble: The Central Railway Company of Canada not being a railway or section of a railway wholly within one province, the Exchequer Court of Canada alone has jurisdiction to appoint a receiver thereto, to settle and determine the claims and priority of creditors, in respect of the proceeds of the assets of defendant company so sold and constituting the said fund in Court.

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Statement of Facts.

PETITION by claimant C. N. Armstrong for an order that the fund in Court be not paid to the plaintiff, as trustee for the bondholders, until the judgment obtained by him against the said Company before the Superior Court, Province of Quebec, had been satisfied.

Petition heard before the Honourable Mr. Justice Audette at Ottawa, February 7th, 1922.

E. W. Westover, for claimant.

John W. Cook, K.C., for plaintiffs.

The facts are stated below and in the reasons for judgment.

At the instance of the plaintiff herein, trustee for the bondholders, a Receiver was appointed to the defendant Company and an order made for the sale of the assets of the said Company, and a certain sum deposited in court, proceeds of a sale of certain rails. The creditors of the Company were then called by advertisement and the claimant C. N. Armstrong duly filed his claim along with others. A Referee was appointed to enquire into the claims and report to the Court. The claim of the said C. N. Armstrong was contested

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Statement of Facts.

by plaintiff, and after hearing all parties was dismissed by the Referee. Armstrong then appealed from the said report to the Court and his appeal was dismissed. From this decision he appealed to the Supreme Court of Canada and, after several months had elapsed without proceedings being taken therein, said appeal was dismissed for want of prosecution.

Subsequent to the appeal taken from the report of the Referee and to the judgment therein, C. N. Armstrong took an action in the Superior Court for the District of Montreal, Province of Quebec against the Company for substantially the same claim as had been filed before this Court, and been fully gone into as aforesaid. Judgment was obtained in the said Court, by default, for the full amount of his claim, declaring the same to be privileged as "working expenses."

Upon plaintiff moving before this Court, for an order that the balance of the fund in Court be paid to them as trustee for the bondholders, after the payment of the privileged claims, Armstrong filed the present petition before this Court asking that the fund in court be not paid to the said plaintiff unless and until the judgment obtained against the Company by default in the Province of Quebec as aforesaid, was first satisfied. Armstrong also took out a seizure by garnishment after judgment in the Superior Court, aforesaid which was served upon the Registrar of this Court ordering him to declare what moneys were in his hands or under his control belonging to the defendant, etc. To the said judgment and siezure the plaintiff filed an opposition, and obtained an order thereon from a Judge of the said Superior Court staying execution which opposition became a plea to the action.

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

I do not think this is a matter in which I should reserve judgment for further consideration. I feel that I have all the facts before me, and I can dispose of it this morning.

Dealing first with the petition of Mr. Armstrong claiming to be collocated, under the judgment of the Superior Court of Quebec, District of Montreal, I may say that the present fund—realized from the proceeds of the sale of the rails—is entirely under the judicial control of the Exchequer Court of Canada, and no other court has any right or will be permitted to interfere with it. A Receiver having been appointed by this Court to the defendant Company, all of the assets of the said defendant Company—the Central Railway Company of Canada—and more especially the proceeds of the rails—became vested in the Receiver and out of the control of the said Company, pursuant to the judgment appointing the Receiver. Moreover, the defendant Company being a railway not only within one province and not having a special section thereof alone in any one province, it would seem the Exchequer Court of Canada alone has jurisdiction in the matter. Mr. Armstrong has not suffered and is not aggrieved. When these proceeds were realized, all the creditors of the defendant company were called, and claimant Armstrong, as well as the other creditors, filed his claim which was duly enquired into upon evidence adduced, and finally it was disposed of under judgment of this Court. There was then an appeal taken from the same to the Supreme Court of Canada, which appeal was afterwards abandoned after a certain time and dismissed by the latter Court; so that he is not in the position

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of a creditor appealing to the indulgence of the Court to be heard after delays. He has been heard. He chose to go to another court that had concurrent jurisdiction and present to it the same claim and obtained judgment by default upon it and he now claims priority thereunder,—a real travesty of justice. It is a well established jurisprudence that whenever any fund of an insolvent defendant is under the control of a competent court, no other court should interfere with it.

This is the principle that has found its way into the Winding up Act, under sec. 22 R.S.C. ch. 144,—and we have had in this Court, in the past, in respect of railway matters a number of those applications made, and that jurisprudence has always been observed by all the courts of the Dominion. I might cite some recent cases upon the point which came to my knowledge quite casually in the course of my reading a day or two ago. *Re Fairweather* (1); *Stewart* v. *LePage* (2); *Brewster* v. *Canadian Iron Co.* (3); *Baxter* v. *Central Railway Company* (4). The text books on Receivers are also unanimous in consecrating the same principle upon that question.

However, that may be, I have no hesitation in coming to the conclusion to dismiss, with costs, the application of claimant C. N. Armstrong, his rights having been already considered and disposed of by the Court. The application savours of the nature that can be qualified as vexatious, impertinent and irrelevent.

Coming now to the motion made on behalf of the plaintiff, subject to the undertaking by its counsel at the opening this morning—that the trustee will take care of those amounts allotted in the Referee's

(1) 21 O.W.N. 150;
(2) 53 S.C.R. 337;
(3) 7 O.W.N. 128;
(4) 22 O.R. 217.

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report in the passing of the Receiver's account, that is, will take care of the amount mentioned in the columns that allot a certain amount to the bondholders, another to the Receiver himself, and another to the Ottawa Navigation Company,—I see no reason why the balance of the fund available in court should not be paid to the plaintiff, saving and excepting however, the sum I think of $1,500 which should be kept in court to cover any costs that might be thrown upon the Receiver as defendant in the case now pending in Montreal between the trustee and the Ottawa Valley Railway and the Receiver. The whole with costs.

Judgment accordingly.

1922
February 21.

BETWEEN:

THE DETROIT FUSE AND MANUFACTURING COMPANY..... PLAINTIFF;

VS.

METROPOLITAN ENGINEERING COMPANY OF CANADA, LTD.. DEFENDANT.

Patent for invention—The Patent Act, sec. 24—Surrender of Patent Re-issue—Effect of surrender on judgment based on original patent—Contempt of Court—Practice.

A judgment had been obtained in this court by consent declaring Canadian Letters-patent No. 160043, valid as between the above mentioned parties, and that the defendant had infringed certain claims thereof. The usual injunction against further infringement was also granted. Subsequently plaintiff obtained a re-issue of the patent, alleged to contain everything that the original did and something more. More than 6 years after judgment, plaintiff moved to commit the President and Manager of defendant company for contempt of court in disobeying the terms of the judgment.

Held: 1. That as the judgment had not been served upon the officers against whom the contempt proceedings were taken, the application must be dismissed.

2. Applications for Court process involving the liberty of the subject are taken *strictissimi juris*, and all conditions or requirements antecedent to the right to obtain such process must be strictly fulfilled and satisfied.

3. A judgment for infringement of a patent for invention that has been subsequently surrendered and a re-issue obtained, is inoperative and cannot be enforced by process of contempt after the surrender of the original patent.

MOTION on behalf of plaintiff for an order to commit the president and the manager of the defendant for contempt of Court in disobeying a judgment pronounced in this case on the 9th October, 1915.

February 18th, 1922.

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Reasons for Judgment.

Audette J.

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

George F. Henderson, K.C., for plaintiff;

R. C. H. Cassels, K.C., for defendant.

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

AUDETTE, J. now, this 21st February, 1922, delivered judgment.

This is a motion made on behalf of the plaintiff for an order that the President and Manager of the defendant Company be committed to jail, by reason of their contempt of the judgment pronounced herein on the 9th day of October, 1915.

Applications of this nature which involve the freedom and the liberty of the subjects of the Crown, are matters *strictissimi juris*, requiring the utmost strictness in procedure and which the Court will be jealous to observe and maintain.

A preliminary step in all such proceedings is the proof by affidavit of the service of the judgment relied upon and which is alleged to have been held in contempt. See *Oswald, Contempt of Court*, 210 et seq.; and cases therein cited.

There is no evidence of such service. Upon that ground and that ground alone the application must be dismissed.

My decision in the matter needs go no further. However, I was asked by Counsel for the respective parties to pass upon the other questions raised in this

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argument. To exhaust all these questions would carry me too far afield, but with reluctance, I will, however, accede to the desire of both parties, and express an opinion upon the question of the re-issue of the Patent,—a question of interest and moment to the parties,—with the view of avoiding further costs and multiplying litigation. (*Dudgeon* v. *Thomson* (1).

The judgment *a quo* is one obtained by consent whereby it was, *inter alia*, held that the Canadian Letters Patents of Invention No. 160,043 were good, valid and subsisting as between the parties herein, and that the defendant infringed claims 7, 8, 10, 11, 12, 14 and 15 thereof and finally granting the usual injunction.

However, since the pronouncing of this judgment, which does not appear to have been served upon the defendant, the plaintiff has sought and obtained a re-issue of the above mentioned patent.

Section 24 of The Patent Act, dealing with re-issue, reads as follows, viz:—

"24. Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention, for any part or for the whole of the then unexpired residue of the term for which the original patent was, or might have been, granted.

(1) [1877] L.R. 3 A.C. 34.

"2. In the event of the death of the original patentee or of his having assigned the patent, a like right shall vest in his assignee or his legal representatives.

"3. Such new patent, and the amended description and specification, shall have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if the same had been originally filed in such corrected form before the issue of the original patent.

"4. The Commissioner may entertain separate applications, and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a re-issue of such re-issued patents."

From the perusal of that section it will be seen that Patent No. 160,043, mentioned in the said judgment has been *surrendered* and that a *new* patent has been issued with a description and specification materially amended and changed. The language is different, the distribution of the claims is different and there is something added thereto. Counsel for the plaintiff in answer to questions by the Court stated, in analysing the new patent, that it contained everything that was in the original patent and a little more; that the re-issue embodied the claims or clauses of the original patent, but numbered and distributed in a different way, not word for word the same, but covering everything.

Giving effect to what appears to be the plain language of the statute, the new, the re-issued patent would seem to have taken the place of the original one which from the issue of a new patent disappears and is replaced by the re-issue. The original patent being extinguished from the date of the re-issue, the judgment that was obtained by consent upon the original

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could only be said to be an accessory to such patent. If the original patent is the principal,—the objective of the judgment— the judgment, being only an accessory thereto, must disappear and be extinguished when the patent goes and must thereby become inoperative, therefore a committment for want of observance of the same could not at this stage issue.

The general similarity of the patent law between the Canadian and the American Statutes,—as stated by Patterson, J. in *Hunter* v. *Carrick* (1), will be a justification to seek support upon that ground from the American authorities. In re *Allen* v. *Culp* (2) it was held that "when a patent is thus surrendered (for a re-issue) there can be no doubt that it continues to be a valid patent until *it is re-issued, when it becomes inoperative.*" See also Walker on Patent, 3rd Ed. 214 et seq.

The same principle obtains in England. "It is a complete answer", says Frost, Patent Law, 2nd Ed. p. 597, "to a motion for committal for breach of a perpetual injunction restraining infringement of a patent to show that..... since the injunction was granted, the specification has been amended and so the injunction has become inoperative." See also *Dudgeon* v. *Thomson* (3).

The motion is dismissed with costs.

Judgment accordingly.

(1) [1884] 10 O.A.R. 449, at p. 468; (2) [1897] 166 U.S. 501, at p. 505; (3) [1877] L.R. 3 A.C. 34.

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

1922
February 25.

VS.

THE ATTORNEY GENERAL OF THE DOMINION OF CANADA, } DEFENDANT.

Constitutional law—Construction of Statutes—Importation of alcoholic liquors by a Province for sale—11 Geo. V (B.C.) c. 30—B.N.A. Act 1867, sec. 125.—"Taxation"—Customs duties—Exemption.

The Government of the Province of British Columbia in the exercise of its powers of control and sale of alcoholic liquors under the *Government Liquor Act*, 11 Geo. V (B.C.) c. 30 cannot import such liquors into the Province for the purposes of sale without paying customs duties thereon to the Dominion of Canada.

2. The provisions of sec. 125 of the *British North America Act, 1867* exempting the lands or property of a Province from "taxation" do not enable any Province to import into Canada goods for the purpose of carrying on a business or trade free of any customs duty chargeable on such goods.

ACTION by the Crown in right of the Province of British Columbia to have it declared that it could import liquors into Canada for purpose of sale pursuant to the provisions of Government Liquor Act, 11 Geo. V c. 30 (B.C.) without paying the customs dues imposed by the Crown in right of the Dominion of Canada upon the importation thereof.

December 19th, 1921.

Case now heard before the Honourable The President at Ottawa.

The Honourable *John Wallace de Beque Farris*, K.C., and *Eugène Lafleur*, K.C., for plaintiff;

E. L. Newcombe, K.C., and *C. P. Plaxton* for defendant.

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The questions of law raised in this action are stated in the reasons for judgment.

THE PRESIDENT now, this 25th February, 1922, delivered judgment.

This case was argued before me on the 19th December, 1921. The Honourable John Wallace de Beque Farris, K.C., Attorney-General for the Province of British Columbia, and Eugene Lafleur, K.C., appeared for the plaintiff, and E. L. Newcombe, K.C., and Mr. Plaxton for the defendant.

There was no evidence adduced. It was stated by Mr. Lafleur that the question was one of law. Mr. Lafleur states: "It is a test case to decide whether the importation of liquors by the Province of British Columbia are liable to customs and excise duties."

On the opening of the case I suggested that the other Provinces should be represented on the hearing, Mr. Lafleur informed me that he had communicated with the Attorney-General's office in Quebec, and the reply was that while he, the Attorney-General, was very much interested in the question and considered the advisability of intervening in the case, subsequently a telegram was received from him stating that on consideration the Quebec Government had determined not to intervene at this stage of the case.

There seems to be little dispute in regard to the facts as stated in the pleadings. Counsel for British Columbia objected to one statement which is given at the top of page 2 of the defence, and which reads as follows:

" * * that in pursuance of the requirements of the said Act as amended, and in particular of section 25 thereof there was delivered to the Collector of Customs and Excise at Victoria, B.C., by His Majesty as represented

by the Province of British Columbia, or by the Liquor Control Board at Victoria, B.C., or by an officer of the Government of the Province of British Columbia acting for or on behalf of His Majesty, as so represented as consignee of the said case of whisky (hereinafter referred to as "the importer") an invoice of the said case of whisky, containing the information required by paragraph (a) of said section 25 of the Customs Act, and thereupon a bill of entry on Customs form "B 16—Amended" covering "Entry of small collections for home consumption" was made out in conformity with paragraph (b) etc.,

Mr. Lafleur stated that this was not quite an accurate statement of what occurred, that in fact there was no such invoice at all delivered in pursuance of the Act. There was an invoice delivered when a claim was made for the delivery of the goods, and this invoice was attached to the claim in order to identify the goods.

Whether this difference is material or not, the statement of the facts as stated by Mr. Lafleur was conceded by Mr. Newcombe.

The case was very fully and ably argued by counsel for both sides, and if I err in the conclusions that I have arrived at it certainly is not attributable to any lack of assistance on the part of counsel.

As stated by Mr. Lafleur in the quotation which I have referred to, the case before me is brought as a test action, and on the argument it was argued both by Mr. Newcombe, and by Mr. Lafleur in reply, on broad grounds, namely, the right of the Province of British Columbia to import spirits from Great Britain and to become practically the sole vendors of the spirits in the Province of British Columbia.

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The legislation of the Legislative Assembly of British Columbia is contained in the statute of 1921, Cap. 30. This legislation has been held to be *intra vires* by the Board of the Privy Council in the case of the *Canadian Pacific Wine Co.* v. *Tuley* (1), (July 21st, 1921). It also had been held to be within the powers of the legislature by Mr. Justice Clement in the case of *Little* v. *Attorney-General of British Columbia* (2). These cases set out the provisions of the statute of British Columbia which, as I have stated practically give to the Province the sole right to import for sale, and to sell spirits, etc., within the Province of British Columbia.

As I have mentioned the case was argued before me on broad lines. On reading over the statement of claim the allegation is that James Patterson, the duly appointed purchasing agent under the Government Liquor Act, acting in pursuance of the provisions of the said Act, and in the name and on behalf of His Majesty the King in the right of the said Province, purchased in Great Britain one case of Johnnie Walker Black Label Whiskey, which was shipped from Glasgow and consigned to the purchaser His Majesty King George Fifth, in the right of the Province of British Columbia, etc.

While, as I have stated, the broad question as to the right of the Province to import for the purposes of sale, as provided by the statute, is intended for the consideration of the court, it is open to the contention that the pleadings only deal with one case of whiskey imported for governmental purposes. I therefore directed a notice to be served on counsel for both parties suggesting that either the pleadings should be

(1) [1921] 2 A.C., 417. (2) [1921] 60 D.L.R. 335.

amended so as to cover the broader question, namely, whether British Columbia importing wholesale for the purpose of becoming the sole vendors as provided by the statute could so enter into the trade and procure the whiskey from Great Britain free of customs as contended by the Province.

Pursuant to my suggestion, the following admission of facts has been filed, signed by counsel for both parties.

"It is hereby admitted, for all purposes of this action, that the case of Johnnie Walker 'Black Label' Whiskey which was purchased and consigned to His Majesty King George the Fifth in the right of the Province of British Columbia, care of Liquor Control Board, Victoria, B.C., as alleged in par. 1 of the Statement of Claim filed herein, was so purchased and consigned to meet the requirements of the Government liquor stores established in British Columbia under the Government Liquor Act, chapter 30 of the Statutes of British Columbia, 1921, and for the purpose of sale at said Government liquor stores pursuant to the provisions of the said Act."

The contention of counsel for British Columbia is that under section 125 of the B.N.A. Act, 1867, [which reads: "No lands or property belonging to Canada or any Province shall be liable to taxation,"] notwithstanding the fact that the whiskey and other liquors were imported by the Province, not for their own governmental purposes but for the purposes of trade, they are entitled to import them without payment of the Customs dues imposed by the Dominion. The question is one of very grave importance.

If the decision is in favour of the Province, and any Province is to be at liberty to import any goods without payment of custom dues, then the Provinces

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can enter upon trade of any description. They might import, for illustration, harvesting machinery from the United States, and escaping payment of customs dues undersell Canadian manufacturers. The practical effect would be, if the Provinces chose to avail themselves of this alleged right, that the revenues of the Dominion requisite for the purpose of carrying on the Government of the Dominion might be depleted to such an extent as to render it impossible for the Dominion to meet the heavy obligations cast upon them under the terms of the Confederation Act. It certainly is a startling proposition put forward for the first time since Confederation, 1867.

The distribution of legislative powers between the parliament of the Dominion and Provincial legislatures are set out in sections 91 and 92 of the B.N.A. Act, 1867. By sub-sec. 2 of sec. 91, of said Act, the Dominion, is assigned exclusively: "The Regulation of Trade and Commerce"; and by sub-sec. 3: "The raising of money by any mode or system of taxation."

To the Provincial Legislatures, by section 92, subsection 2, "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes."

Section 118 provides for large sums to be paid yearly by Canada to the several Provinces for the support of their governments and legislatures, and it is unnecessary to repeat that the Dominion has to raise very large sums of money.

The sections 122, 123 and 124 of the B.N.A. Act of 1867, are important, more particularly sec. 124 which provides that: "Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues, * * * *."

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Section 146 of the B.N.A. Act provides for the admission of other Colonies, and amongst those named is the Province of British Columbia. "It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies * * * (including British Columbia) to admit those Colonies or Provinces, or any of them, into the Union, * * * on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve * * * ".

On the 16th May, 1871, an Order of Her Majesty in Council admitting British Columbia into the Union was passed, "and from and after the 20th July, 1871, the Colony of British Columbia shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the hereinbefore Addresses."

Referring to the Address of British Columbia, Section 7 provides:

"It is agreed that the existing Customs tariff and Excise duties shall continue in force in British Columbia until the railway from the Pacific Coast and the system of railways in Canada are connected, unless the Legislature of British Columbia should sooner decide to accept the Tariff and Excise Laws of Canada. When Customs and Excise duties are, at the time of the union of British Columbia with Canada, leviable on any goods, wares or merchandizes, in British Columbia, or in the other Provinces of the Dominion, those goods, wares and merchandizes may, from and after the Union, be imported into British Columbia from the Provinces now composing the Dominion, or into either of those Provinces from British Columbia, on proof of payment of the Customs or Excise duties leviable

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thereon in the Province of exportation, and on payment of such further amount (if any) of Customs or Excise duties as are leviable thereon in the Province of importation. This arrangement to have no force or effect after the assimilation of the Tariff and Excise Duties of British Columbia with those of the Dominion"

Sub-sec. 3 of sec. 2 of the Customs Act, as enacted by Cap. 15 of the Statutes of Canada, 1917 (7-8 George V.), reads as follows:

"The rates and duties of custom imposed by this Act, or the Customs Tariff or any other law relating to the Customs, as well as the rates and duties of customs heretofore imposed by any Customs Act or Customs Tariff or any law relating to the Customs enacted and in force at any time since the first day of July, one thousand eight hundred and sixty-seven, shall be binding, and are declared and shall be deemed to have been always binding upon and payable by His Majesty, in respect of any goods which may be hereafter or having been heretofore imported by or for His Majesty, whether in the right of His Majesty's Government of Canada or His Majesty's Government of any province of Canada, and whether or not the goods so imported belonged at the time of importation to His Majesty: and any and all such Acts as aforesaid shall be construed and interpreted as if the rates and duties of Customs aforesaid were and are by express words charged upon and made payable by His Majesty:"

Then comes the proviso:

"Provided, however, that nothing herein contained is intended to impose or to declare the imposition of any tax upon, or to make or to declare liable to taxation, any property belonging to His Majesty either in the right of Canada or of a Province."

While it may be true that customs duties may be described as taxes in a broad sense, I do not think that at the time of Confederation it was ever considered or intended under the words contained in sec. 125, "No lands or property belonging to Canada or any Province shall be liable to taxation," that a Province should be at liberty to procure spirits, etc., for the purpose of sale, without payment of the customs dues.

Elmes, on the Law of Customs, at page 4, states, as follows: "There is a distinction to be observed between taxes and duties although both taxes and duties as commonly understood are embraced in the generic term 'taxes.' "

In *Bank of Toronto* v. *Lambe* (1) Lord Hobhouse, pronouncing the judgment of the Board of the Privy Council, in discussing the frame of the Quebec Act, uses the following language, referring to the tax imposed in the case before the Board:

"It is not like a customs' duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded."

(1) [1887] 12 A.C. 575 at p. 583.

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There are very strong cases in the Supreme Court of the United States, and also in the Commonwealth of Australia cited by counsel on the argument before me. In the case of *Brown* v. *Maryland* (1) Chief Justice Marshall at page 437, uses the following language:

"An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed."

In *United States* v. *Perkins* (2), Mr. Justice Brown was dealing with a case in which the facts were that one Merriam had devised and bequeathed all his estate both real and personal to the United States Government, and the question was whether personal property bequeathed by will to the United States was subject to an inheritance tax. On page 628 he quotes from the Court of Appeals in Maryland the following language:

"Possessing, then, the plenary power indicated, it necessarily follows that the State in allowing property to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitation named, are, consequently, wholly within the discretion of the General Assembly. The Act we

(1) [1827] 12 Wheaton (25 U.S.) 419. (2) [1896] 163 U.S. 625.

are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment, in other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent into the treasury of the State. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution."

And at page 630:

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

South Carolina v. *United States* (1). In the head note of this case it is stated as follows:

"The State may control the sale of liquor by the dispensary system adopted in South Carolina, but when it does so it engages in ordinary private business which is not, by the mere fact that it is being conducted by a State, exempted from the operation of the taxing power of the National Government."

(1) [1905] 199 U.S. 437.

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While it may be that the decisions of the Supreme Court of the United States are not binding upon this court, they are entitled to very great weight, and Mr. Justice Brewer, who delivered the judgment in this case (South Carolina v. United States) had a high reputation as a judge. On page 454, he states as follows:

"The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercock Co.* (No. 1) (1). The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.

"More than this. There is a large and growing movement in the country in favour of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government? We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to

(1) [1898] 170 U.S. 438.

the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the State is carried to the extent suggested, and with it relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*. (Supra p. 431) for a complete answer."

I quote this language as I think it is pregnant with common sense, and very applicable to the present case.

At page 457, he uses the following language quoting Chief Justice Nott:

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"Moreover, at the time of the adoption of the Constitution there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plant of a body politic to take up the work of the individual or body corporate. * * * * * Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'legion of mercenaries', had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's Amendments."

"Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it."

At page 461 Mr. Justice Brewer uses the following language:

"These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

At page 463 he again states:

"It is reasonable to hold that while the former (the national government) may do nothing by taxation in any form to prevent the full discharge by the

latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the nation."

The Board of the Privy Council have used very similar language in two cases: *Farnell* v. *Bowman* (1), and *The Attorney-General of Straits Settlement* v. *Wemyss* (2),—in which the Board indicate their views, viz., that if a State chooses to embark upon private business in competition with other traders, they should be liable just as other persons engaging in trade.

The case of *New South Wales* v. *The Collector of Customs* (3), and the case of *The King* v. *Sutton* (4), deserve very close consideration. They are powerful pronouncements by able judges. I agree with the Attorney-General for British Columbia in his statement before me as to the difference between taxation and a tax. As the Attorney-General states, "I am not relying very strongly upon that phase of the argument." He thinks the distinction is rather subtle and thin; so do I.

After very carefully considering all the cases referred to by counsel, and a good many others, I have formed the opinion that if the Province of British Columbia import goods for the purpose of carrying on a business or trade, they must pay the custom dues charged by the Dominion for the privilege of importing such goods. I think it would startle anyone who has any knowledge of the manner in which business has been carried on in the Dominion and the Provinces for the last fifty odd years, if such a claim as that put forward could be sustained.

(1) [1887] 12 A.C. 643 at p. 648;
(2) [1888] 13 A.C. 192.
(3) [1908] 5 C.L.R. 818.
(4) [1908] 5 C.L.R. 789.

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The Attorney-General suggested that the customs dues might still be imposed on the purchases from the Government of British Columbia. I fail to see how that is feasible. If the goods are admitted duty free, they are duty free in the hands of the purchaser from the importer. It would practically be impossible to collect customs dues from each individual purchaser of a bottle of whiskey.

Another question strongly pressed upon me by Mr. Newcombe was that under the rule applied of *ejusdem generis,* the word "property" in section 125 of the B.N.A. Act should be limited to property of a kind similar to lands. I was referred by Mr. Newcombe to the cases set out in Maxwell on the Interpretation of Statutes, 6th ed., p. 574. There are a large number of cases cited some of which come very near supporting his contention. The words of section 125 are, "Lands or Property." The word "lands" embrace the whole genus, and the word "property" has a much more extensive meaning than the word "lands."

The case of the *Sun Fire Office* v. *Hart et al.,* (1), was an appeal from the Court of Appeal for the Windward Islands. The condition in the policy of insurance was that it should not apply to any portion of the subject of insurance which should, by reason of some act done after its date without the consent of the insurers, be exposed to increased risk of fire, or removed to a building or place other than that described in the policy; second, that the insurers might terminate it by notice if "by reason of such change, or from any other cause whatever," they should desire to do so. Lord Watson, who delivered the judgment of the Board used the following language, at page 103:

(1) [1889] 14 A.C. 98.

"It is a well known canon of construction, that where particular enumeration is followed by such words as "or other", the latter expression ought, if not enlarged by the context, to be limited to matters *ejusdem generis* with those specially enumerated. The canon is attended with no difficulty, except in its application, Whether it applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms, subject-matter, and context of the clause under construction. In the present case there appears to their Lordships to be no room for its application. The theory upon which the ruling of the presiding judge and its affirmance by the majority of the Court of Appeal, proceeds, appears to be this, that the words "by reason of such change" are equivalent to an enumeration of certain particular changes or causes specified in the preceding condition; and that the following words "or from any cause whatever", must be confined to causes *ejusdem generis* with these. The antecedent context does not contain a mere specification of particulars, but the description of a complete genus, if not of two genera. The first of these is any and every act done to the insured property whereby the risk of fire is increased."

The Judgment of the Court below was reversed.

In Beal on Legal Interpretation, second ed. pp. 311 and 312, it is stated, if the particular words exhaust the whole genus, the general words must refer to some larger genus.

It was also argued before me by Mr. Newcombe that if the Province of Alberta owned lands, say situate in the Province of Saskatchewan, the Province of Saskatchewan would have the right to tax these lands. It is not necessary to determine this point, and I prefer not to pass any opinion upon it until the case arises.

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I think under the circumstances of this case, it being a test case, there should be no costs to either party.

Judgment Accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1921

September 2.

CROMBIE *et al*.....PLAINTIFFS;

VS.

CANADIAN GOVERNMENT MERCHANT MARINE LTD.....DEFENDANT.

Shipping and seamen—Ship's articles—Termination of voyage—Discretion of master in regard thereto.

By articles signed at Halifax plaintiff agreed to serve on board the S.S. "Canadian Carrier" * * * on a voyage from Halifax, N.S. to New York, U.S.A., thence to any port or ports between certain degrees of latitude to and fro, as required, for a period not to exceed 12 months. Final port of discharge to be in the Dominion of Canada.

The ship sailed from Halifax on March 4th 1921 and after calling at New York and other points in the United States sailed for Honolulu and from there to Vancouver, arriving June 3rd, 1921. After taking a cargo to Nanoose Bay, V.I., she returned to Vancouver where she completed her cargo and sailed for Montreal, on June 20th 1921, via Panama, arriving August 7th 1921, and finally discharging cargo and paying off the crew at this point which was the final discharge and termination of the voyage. The plaintiff, boatswain, asked to be paid off when the ship first reached Vancouver and when refused left the ship against the master's order,

Held: On the facts, that the voyage contemplated was a 12 months tramp within certain limits, as required by the master and was not terminated till Montreal was reached. That plaintiff being required by the master was, under his Articles, obliged to complete the voyage and to go on to Montreal.

That the fixing of the port which shall be the termination of the voyage is within the discretion of the master,

ACTION by plaintiff to recover wages against the Company defendant claiming that after the ship first reached Vancouver the voyage was at an end, that port being, as he contended, the final port of discharge in Canada.

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CROMBIE
v.
CANADIAN GOVERNMENT MERCHANT MARINE LTD.

Reasons for Judgment.

Martin L.J.A.

August 31st, 1921.

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

Milton Price for plaintiffs;

E. C. Mayers and *A. R. McLeod* for defendant.

The facts are stated in the reasons for judgment.

MARTIN, L.J.A., now this 2nd September 1921 delivered judgment.

According to articles signed at Halifax, N.S., on the 2nd February, 1921, the plaintiff agreed to serve on board the S.S. "Canadian Carrier" ..... on a voyage from Halifax, N.S., to New York, U.S.A., thence to any port or ports between the limits of 75 degrees north, and 65 degrees south latitude to and fro as required for a period not to exceed twelve months. Final port of discharge to be in the Dominion of Canada.

The ship, which is registered at Montreal, sailed from Halifax on 4th March for New York, where she loaded part of her cargo for Callao, completing her cargo at Baltimore, and sailing on the 17th March for Callao via the Panama Canal, arriving at Callao on 2nd April, where she discharged cargo and left for Iquique, (via Arica) arriving on 19th, where she loaded cargo for Honolulu arriving there on 15th May, where she discharged cargo, and took on cargo for Vancouver arriving there on 3rd June and discharged cargo; left Vancouver on 5th June for Nanoose Bay, V.I., loaded part of cargo there and returned to Vancouver on 14th June where she completed cargo for Montreal and

sailed on 20th for Montreal, via Panama, and arrived there on 7th August, 1921, when she finally discharged cargo and paid off her crew, which, according to the evidence of the captain, was the final discharge and "termination" of the voyage.

The plaintiff was the boatswain and claimed the right to be paid off after the ship first reached Vancouver, though only about 4½ months of the 12 months time specified in the articles had expired, on the ground that the voyage was at an end there, that port being, he contended, the "final port of discharge" in Canada, but after discussion his claim was eventually refused by the master, upon instructions from his owners, and so the plaintiff left the ship against the master's orders before the 18th of June, when she was on the point of sailing for Montreal.

The main question is, was he right in his contention, and therefore entitled to the wages he claims? The answer depends upon the true construction of the articles applied to the particular facts and I have been referred to several authorities more or less applicable but, as might be expected, based upon circumstances more or less varying. It is difficult to apply to such a vast country as Canada fronting upon two oceans thousands of miles apart, the separated coasts of which are most readily reached through a canal owned by another nation, some of the reasons upon which English decisions are based which apply to an island having relatively only a small and all-enveloping, accessible coast line. In *Quinn* v. *Leathem*, (1) Lord Chancellor Halsbury emphasized the point that decisions must be interpreted by the facts upon which they are pronounced, and in the very instructive recent case upon fixtures of *Travis-Barker* v. *Reed* (2)

(1) 1901 A.C. 495 at p. 506. (2) 1921 3 W.W.R. 770.

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the Alberta Court of Appeal drew attention to the care that must be taken in "adopting the decisions of the English Courts on the question of fixtures in view of the very different conditions of this new country and the very different manners and methods of construction of buildings and very different customs and habits of the people living here, especially their readiness to move from one place to another, and the not infrequent removal even of large buildings, pointing out that what might be considered a very serious injury to the soil in England, might well be regarded here as quite trivial and negligible." Per Beck, J.A., and *cf.* Stuart, J. A., at pp. 773, 776.

Considering these articles, then, upon the geographical and nautical facts before me, I am of opinion that the voyage contemplated was a twelve months "tramp," one "to and fro" within certain latitudes as "required", *i.e.* by the master. The articles do not in essentials differ from those which were under consideration in the *Board of Trade* v. *Baxter*, the *Scarsdale*, (1) which when carefully examined supports the defendant's submission though invoked by the plaintiff in support of the view that the voyage ended upon arrival at Vancouver, being the first Canadian port touched at since leaving Canada at the beginning of the voyage. But I am unable to see why the plaintiff was not under these articles called upon to go on to Montreal as "required" by the master just as the fireman was called upon to go on to Cardiff as required by the master in the *Scarsdale* case; indeed, this case is if anything a stronger one against the plaintiff because in the *Scarsdale* after the cargo had been discharged at Southampton the ship went on in ballast only to Cardiff as the loading port for the next cargo, whereas here the

(1) 1907 A.C. 373.

ship took on a cargo from Vancouver to Montreal, the master fixing that point as the "termination" of the voyage, and the leaving of that discretion to the master was declared to be legal in the *Scarsdale* case (1); I refer particularly to the judgment of Lord Collins on that point, and cite his observations on pp. 384-5:— "Now it is not disputed that the adventure contemplated by this agreement is properly described as a voyage (see per Bargrave Dean J., Vaughan Williams and Stirling L. JJ.), though it covers many possible distinct subordinate adventures involving the discharging and receiving of cargoes at many different points "trading in any rotation". The maximum period, viz., one year, is named, and the places or parts of the world to which the voyage or engagement is not to extend are defined. Nor was exception taken to the provision giving discretion to the master to name the port within home trade limits at which the voyage, treating that word as concerned with the transit and delivery of cargo only, was to end. How, then, was the suggested element of illegality introduced into the discussion? With the greatest deference to the eminent counsel who argued for the appellants, be it said, simply by begging the question. On the assumption that the voyage ended at the port where the last cargo was delivered a provision that the master might order the ship on to a fresh destination might involve the commencement of a new voyage and so sin against the statute; but if the voyage did not end till the ship had reached her destination at the home port required by the master, there is nothing upon which to found an implication of illegality. I agree with the contention of Mr. Hamilton, which was adopted by the Court of Appeal, that the voyage contemplated for the cargo

(1) 1907 A.C. 373.

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need not be co-extensive with that contemplated for the ship, though it very often is. I think it is very much to be deprecated that the Court should be subtle to find implications of illegality having the effect of hampering freedom of contract in business matters where no express prohibition can be found."

And these observations have added force in favour of the defendant in view of the geographical differences between Canada and England already referred to.

Being of this opinion it is unnecessary to consider the other questions raised and therefore the action must be dismissed with costs, and it follows that the defendant is entitled to judgment upon the counter-claim, the small amount of which is not disputed.

Judgment accordingly.

AYMAR JOHNSON,.....PLAINTIFF; 1922 March 6.

VS.

THE SS. *BELLA*.....DEFENDANT.

Shipping—Judicial sale of vessel—Jurisdiction—Status of purchaser at sale—Bad faith— Claim for expenditures on ship against person seeking to recover possession.

Held: That a judicial sale of a vessel under the decree of a Court without jurisdiction to order such sale, is an absolute nullity.

2. That a purchaser of a vessel at judicial sale is chargeable with notice as to whether or not the Court ordering the sale had jurisdiction in the matter, and if it is without jurisdiction, as in the present case, he becomes a trespasser on the property which he purports to acquire, and subsequent expenditure by him on or in respect of said property so purchased is made at his own peril, and he is not entitled to any compensation therefor.

3. The inadequacy of the price paid by a party at a sale, any false description of himself to the marshall, his flight with the ship without usual clearance, knowing that his title had been attacked, are inconsistent with good faith on his part.

ACTION *in rem* to recover possession of the S.S.*Bella* which had been sold under an order of a court of the State of New Jersey which was subsequently declared to be without jurisdiction in the matter, and a warrant of attachment and further proceedings taken thereon vacated.

February 6th and 7th 1922.

Case now heard before the Honourable Mr. Justice Maclennan, L.J.A. at Quebec.

Alfred C. Dobell K.C. and *H. H. Breland* (of New York Bar) for plaintiff;

A. C. M. Thomson for defendant.

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

MACLENNAN, L.J.A. now (this 6th day of March 1922) delivered judgment.

This is an action *in rem* to recover possession of the Steamship *Bella*.

The pleadings in the action are very lengthy and their material allegations are substantially as follows:—

The plaintiff alleges that he purchased the SS. *Bella* on 31st December, 1919, by bill of sale, warranting the ship to be free and clear from all liens, at New York from the Campanhia Metallurgica De Rio de Janeiro; that he thereupon took possession and removed the vessel to Ulrich's Basin at Edgewater, New Jersey; that in the course of his usual business he went to England in the latter part of May and returned in the latter part of August, 1920, when he discovered to his surprise that the ship had disappeared during his absence, and he subsequently discovered that one W. J. Thompson had taken possession of her and removed her to Quebec, and plaintiff claims that he be declared the true and lawful owner and be put in possession of the ship.

The defence filed by W. J. Thompson, is that he purchased the ship from a marshall of the United States of America for the District of New Jersey at a judicial sale ordered by the District Court of the United States for the District of New Jersey for the sum of $1,560.00 under a bill of sale from said marshall dated 4th August, 1920; that in virtue of said purchase made legally and in good faith he became the owner of said vessel and has since laid out and expended on

her in the Port of New York approximately $6,579.00 and at the Port of Quebec a further sum of $4,167.09, which increased the value of the vessel by at least the amounts so expended, and defendant concludes by claiming that he should be declared the true and lawful owner of the vessel, that his possession be declared legal, that he be placed in possession of the vessel and, reserving all further recourse, he asks for the dismissal of plaintiff's action with costs and for such other and further relief as may be found just in the premises.

The plaintiff by his answer to the defence alleges that the sale by the United States marshall to defendant was null and void, because the District Court of the United States for the District of New Jersey was without jurisdiction to issue the writ of *venditioni exponas* by virtue of which the marshall purported to sell the vessel, and the said Court quashed and annulled the said writ and the sale and ordered that the bill of sale given by the marshall be returned for cancellation and that the said Thompson return the vessel, and subsequently said action was dismissed for want of jurisdiction in the said Court.

The defendant by his reply admits that the United States District Court for the District of New Jersey, which ordered the sale of the said vessel, acted without jurisdiction; that he bought the vessel at a public sale, received a title which he was advised by American Counsul was good; that he made extensive repairs believing he was the true and lawful owner and that since the answer to plea was filed he offered without prejudice to allow the plaintiff to take the vessel on being refunded the purchase price and the money disbursed by him and by others on his account, which offer was refused.

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The plaintiff by a reply to defendant's reply alleges among other matters that the defendant, having purported to buy the said vessel at an alleged sale by a Court which was wholly without jurisdiction to make said sale, acquired no right or title of any kind whatsoever to said vessel, the said alleged sale being void and of no effect; that any expenses, repairs or improvements in connection with said vessel after she left New York were made and done by defendant with notice of plaintiff's claim to said vessel and that defendant in so doing was a trespasser upon the plaintiff's property, and that reimbursement to defendant of sums expended by him cannot be claimed from plaintiff either as a condition to surrender of the vessel or otherwise; that the purchase price paid by defendant for said vessel was not paid to plaintiff and has never been received by him, and plaintiff further alleges that it was impossible for him to tender the cost of repairs before beginning this action as the amount thereof was unliquidated and cannot be ascertained until the same has been proved and determined by a Court of competent jurisdiction.

This vessel was built at Hull, England, in 1896, was 98.4 feet long 20.5 feet wide, 11 feet deep, had a gross tonnage of 146.44 tons, triple expansion engines, a speed of $9\frac{1}{2}$ knots, was classed in Lloyd's Register 100A 1 steam trawler; she was originally known as the Screw Steamship *Jamaica* and, on 20th April, 1912, became Brazilian property and her name was changed into *Bella*. The plaintiff purchased her in New York on 31st December, 1919, from a Brazilian corporation as already stated. In April 1920, he had her placed in storage at Edgewater, New Jersey, and, on 25th May, 1920, left for Europe and returned 26th August, 1920. During his absence and without any

notification to him or to the previous owners or to any one on his behalf the Morse Dry Dock and Repair Company entered an action in Admiralty against the SS. *Bella* in the United States District Court for the District of New Jersey on an alleged claim for wharfage charges against said steamer and, on 6th July, 1920, obtained an interlocutory order for the sale of the vessel by the marshall and an order that a writ of *venditioni exponas* issue, and upon said writ the marshall of the Court purported to sell the vessel for $1,560.00 to "W. J. Thompson of the City of New York, County of New York and State of New York", and said marshall issued a bill of sale to the said Thompson on 4th August, 1920. On plaintiff's return from Europe, on 26th August, 1920, he found that the ship had disappeared and subsequently discovered she had been sold at marshall's sale, on 26th July previous, to satisfy the claim of Morse Dry Dock & Repair Company, of which he had never had notice, to one W. J. Thompson of the City of New York, according to the records of the marshall. One of plaintiff's Attorneys in New York was informed by the marshall that on the sale of the vessel both W. J. Thompson and one Charles H. McKinney were present and that the bill of sale, in accordance with instructions given at the time of the sale, was mailed to W. J. Thompson, in the care of McKinney, Room 406, 30 Church Street, New York City, and upon inquiry at said room, which was McKinney's place of business, no W. J. Thompson could be found and McKinney, who was Thompson's broker and paid agent in the matter, refused to give any information about his principal. The plaintiff, on 17th September, 1920, upon application to a Judge of the United States District Court for the District of New Jersey obtained an order in the action

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therein pending of the Morse Dry Dock & Repair Company, libellant, against the Steamship *Bella*, that the said Company and the said W. J. Thompson and the said McKinney and all other persons claiming an interest in the SS. *Bella* show cause before one of the Judges of said Court at a stated term thereof to be held in the Court House at Newark, New Jersey, on the 27th day of September, 1920, why an order should not be entered vacating the order of the Court made on 6th July, 1920, which directed that the SS. *Bella* be sold and that a writ of *venditioni exponas* issue, and that the said persons further show cause why said writ should not be quashed and the sale of the vessel set aside and the order of the Court confirming said sale vacated and the bill of sale of the said vessel cancelled and the purchaser directed to return the ship to the marshall, and the said McKinney and W. J. Thompson and each of them were enjoined from removing said vessel out of the jurisdiction of said Court pending the determination of said application and that all proceedings be stayed. A copy of said order was directed to be served upon the proctors for the libellant and upon W. J. Thompson and upon McKinney and, in the event that the latter could not be found so that personal service could be made upon them, leave was given to mail copies of said order addressed to the post office address given to the marshall at the time of the sale of said vessel. Service of this order was duly made upon McKinney and upon W. J. Thompson and, on 23rd September, Joseph P. Nolan, Attorney at law of the City of New York, was consulted by W. J. Thompson with reference to said order served as aforesaid and instructed to appear for said purchaser, and on the following day said Nolan filed an appearance in writing, his appearance stating that: "I

hereby appear in this proceeding specially on behalf of W. J. Thompson, purchaser of the SS. *Bella*, for the sole purpose of contesting the jurisdiction of the Court", and on the same day the said Nolan filed notice of exception to the order dated 17th September, 1920, and the affidavits upon which the same was granted, upon the ground,—1st that the said affidavits do not contain the necessary jurisdictional allegations binding either this appearant or any person or corporation mentioned in said papers; *2nd*, that it appeared from the moving papers that the proceeding is an attempt to vacate a decree or order of the Court made on July 6th, 1920, and that the said proceeding to vacate the same is not made within the term. Under the same date Nolan also filed an appearance in the proceeding as proctor on behalf of McKinney. Notice of exception was also filed by Nolan on behalf of McKinney. Affidavits were filed in the United States District Court by McKinney, by the Assistant Superintendent of the Morse Dry Dock & Repairing Company, but none was filed by W. J. Thompson. Johnson, the plaintiff in the present action, was allowed to file a petition contesting the claim of the Morse Dry Dock & Repairing Company and praying that the interlocutory order of 6th July, 1920, and the sale of said vessel be vacated and that he be permitted to file a claim to the vessel and that Thompson be directed to return the vessel to the marshall to be held by the latter subject to the further order of the said District Court. The District Court having heard Counsel for the present plaintiff, for the Morse Dry Dock & Repairing Company and for McKinney and W. J. Thompson rendered judgement cancelling the bill of sale to W. J. Thompson directing him to return the vessel, and a formal order of Court was entered

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on 18th October, 1920, cancelling the interlocutory decree of July 6th, 1920, and setting aside and vacating the sale of the vessel to W. J. Thompson and ordering the bill of sale to be returned to the marshall for cancellation and ordering W. J. Thompson and any agent or agents of his including the said McKinney to deliver the said vessel, her tackle, engines, apparel and furniture to the present plaintiff at Ulrich's Basin, at Edgewater, or at such other place within or without the district of New Jersey as may be agreed upon by the present plaintiff and the said W. J. Thompson. This order was not obeyed by Thompson. Subsequently the cause was heard by the District Court on the pleadings and proofs and, having been argued and submitted by Counsel of the respective parties, a final decree was entered in said District Court on 17th May, 1921, in which it was adjudged that the wharfage alleged to have been furnished to the vessel by the Morse Dry Dock & Repairing Company was not of the character and kind which entitled that Company to a maritime lien therefor against the vessel, and that the Court was without jurisdiction to issue the warrant of attachment or to make the interlocutory decree of 6th July, 1920, or to issue the writ of *venditioni exponas* and that the marshall of said Court was without jurisdiction to sell the vessel and the Court was without jurisdiction to confirm the sale, and it was further ordered, adjudged and decreed that the libel in the cause be dismissed with costs; the warrant of attachment, the interlocutory decree of 6th July, 1920, the writ of *venditioni exponas* and the sale of the vessel made by the marshall on 26th July, 1920, and the order confirming said sale, were each and all vacated and set aside upon the ground, in addition to that upon

which the order of October 18th, 1920, was based, that said Court was without jurisdiction to issue the said writ or to direct the sale of the vessel or confirm the sale thereof, and the said bill of sale given by the marshall to the present defendant for said vessel was cancelled and said defendant was ordered to forthwith return the said bill of sale given by the marshall to the present defendant for said vessel was cancelled and said defendant was ordered to forthwith return the said bill of sale to the marshall for cancellation and to forthwith return and deliver to the present plaintiff, the said vessel, her tackle, engines, apparel and furniture and that the disposition of the monies paid by said W. J. Thompson to said marshall as the purchase price of said vessel as well as any claim which the said W. J. Thompson may wish to assert, in the event that he complies with said order and delivers possession of said vessel to the present plaintiff as therein directed, that there should be repaid to him any monies which he may have expended for the repair, improvement, upkeep and care of the said vessel since the alleged sale thereof to him by said marshall be and the same were reserved for the further order of the Court. This final decree of the District Court has been ignored by the present defendant and no attempt has been made by him to conform thereto.

It was established by the evidence at the trial that by the law of the United States, Defendant, when he appeared at what purported to be a judicial sale conducted by the marshall of the District Court of the United States for the District of New Jersey and became a bidder, and also by the appearance filed

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on his behalf by his Attorney Nolan, become a party to the action and was affected with notice of all subsequent proceedings relating to the purchase and title to the S.S. *Bella* The Circuit Court of Appeals in the case of *State of Tennessee* vs *Quintard*, (1) states:—"It is also settled that the purchaser, by his "bid, becomes a quasi party to the suit and is affected "with notice of every step subsequently taken in the "case relating to the purchase and title acquired "thereby." The opinion of the Court cites in support of that proposition the following cases decided by the Supreme Court of the United States—*Davis* vs *Trust Company*, (2); *Kneeland* vs *Trust Company*, (3); *Stuart* vs *Gay*, (4) and *Blossom* vs *Railroad Company*, (5). Although the appearance filed by the Attorney Nolan for defendant may have been intended as a special appearance for the purpose of alleging that the Court had no jurisdiction over the person of defendant, on the authority of *Thames & Mersey Marine Insurance Company, Ltd.* vs *United States*, (6) decided in 1915, and other cases, the appearance was a general appearance in the action, because exceptions and a factum or brief were filed by Nolan on behalf of his client raising questions on the merits of the application made by the present plaintiff to set aside the sale of the vessel. The merits of the present plaintiff's proceedings in the District Court to recover possession of the ship were put in issue by the purchaser. I therefore come to the conclusion, on the evidence and on the authorities referred to, that defendant, by his bid and by the actions of his attorney, became a party to the action and was affected with notice of

(1) [1897] 80 Fed. Rep. 829 at p. 835.
(2) [1893] 132 U.S. 590 at p. 594.
(3) [1890] 136 U.S. 89.
(4) [1888] 127 U.S. 518.
(5) [1863] (1 Wall.) 68 U.S. 655.
(6) [1915] 237 U.S. 19.

all the proceedings subsequently had, including all interlocutory orders and the final decree in the District Court, and that he was bound thereby having been a party to the action in the District Court.

What is the effect of the sale of a ship by order of a Court which had no jurisdiction in the matter?

This question came up in the case of the *Steamer Canadian-Kerr* vs *Gildersleeve*, (1) in which title was claimed under a sale upon a warrant of distress issued by Justices of the Peace, and it was decided by Mr. Justice Badgley, that the Justices of the Peace had no jurisdiction, power or authority to order an amount of wages to be levied by distress upon the vessel and that such order was absolutely null and void, as was also the adjudication of said vessel and that no legal right or title of property in or to said vessel passed by reason of said adjudication. In *Attorney General* vs *Lord Hotham*, (2) it was decided that, where a tribunal determines in a matter not within its jurisdiction, the decision is a nullity; and 9 Halsbury's Laws of England, page 14, says:—"Where a limited Court "takes upon itself to exercise a jurisdiction it does not "possess, its decision amounts to nothing". In Abbott on Shipping, 14th ed., p. 32, it is stated:—"A sale "taking place under the orders of a court, or of officials "having no authority to order the same, cannot, by "reason of such orders, be upheld as against the "original owners". Many decisions of the Court of Admiralty in England can be cited to the same effect and among others the following:—The *Flad Oyen* (3) where an English prize ship was taken to Bergen,

(1) [1858] 8 L.C.R. 266. (2) [1827] 3 Russ. 415.
(3) [1799] 1 C.Rob. 134.

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condemned there by the French Consul and sold, but was not deemed by Sir William Scott, afterwards Lord Stowell, to have been legally condemned and the ship was restored to the former owner; The *Thomas*, (1) where a British ship was sold under the decree of a pretended Admiralty Prize Court without proper authority and the proceedings were held to be null and void and the ship was restored to the former owner; The *Perseverance*, (2) where a prize ship purchased by a neutral under illegal condemnation was restored to the original owner; The *Nostra de Conceicas*, (3) which was a case where a British vessel captured by a Dutch privateer and carried to the coast of Africa and there sold without being brought to legal condemnation, the ship was ordered to be restored to the former owner; a similar decision was rendered in *The Fanny & Elmira*, (4). These cases were all decided by Sir William Scott. In the *Eliza Cornish*, (5) and *The Bonita*, (6), Dr. Lushington, where there was an invalid sale of ships, ordered possession to be restored to the former owners.

The principles laid down by Lord Stowell and Dr. Lushington in the High Court of Admiralty have been followed in many later cases in England and in the Supreme Court of the United States. In the case of the Schooner *Sarah, Rose* vs *Himely*, (7) Chief Justice Marshall said at page 268:—"A sentence "professing on its face to be the sentence of a judicial "tribunal, if rendered by a self constituted body or by "a body not empowered by its government to take cog- "nizance of the subject it had decided, could have no

(1) [1799] 1 C. Rob. 322.
(2) [1799] 2 C. Rob. 239.
(3) [1804] 5 C. Rob. 294.
(4) [1809] 1 Edward's Rep. 117.
(5) [1853]1 Spink's Adm. & Ecc. 36.
(6) [1861] Lush. 252.
(7) [1808] 4 Cranch. (8 U.S.) 241.

"legal effect whatever". And at page 281:—"The "sentence of condemnation being considered as null "and invalid, the property is unchanged". In *Elliott & Peirsol,* (1), the Supreme Court of the United States in its judgment said:—"Where a court has "jurisdiction it has a right to decide every question "which occurs in the cause.....But, "if it acts without authority, its judgments and orders "are regarded as nullities. They are not voidable "but simply void; and form no bar to a recovery "sought, even prior to a reversal, in opposition to "them. They constitute no justification; and all "persons concerned in executing such judgments or "sentences are considered in law as trespassers". These two cases are cited and approved by the Supreme Court in Lessee of *Hickey* vs *Stewart,* (2) and at the latter page the Court said:—"We are of the opinion "that the Court had no jurisdiction of the subject matter "and the whole proceeding is a nullity". The cases were afterwards cited and approved in *Williamson* vs *Berry,* (3) and *Guaranty Trust Company* vs *Green Cove Railroad,* (4).

From this brief review of decided cases in Canadian, English and American Courts in Admiralty and other matters, it can be taken as settled definitely that, in order to constitute a valid judicial sale by virtue of which the purchaser can acquire title to the property sold, it is absolutely necessary that the Court ordering the sale should have power and jurisdiction to take cognizance of the matters brought before it in the proceeding in which the sale was ordered, and that where there is absence of jurisdiction in the Court

(1) [1828] 1 Peters (26 U.S.) 341.
(2) [1845] 3 How. (44 U.S.) 750, 762, 763.
(3) [1850] 8 Howard. (49 U.S.) 495, 541.
(4) [1891] 139 U.S. 137 & 147.

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ordering the sale, the whole proceedings are null and of no effect and purchasers of property so sold become trespassers on the property which they purport to acquire. Applying these principles to the present case, the defendant did not acquire any title to the *SS. Bella* under the sale from the marshall in the United States District Court, the plaintiff never lost his property or title thereto and is entitled to have the ship restored to his possession.

What claim has the defendant, under the circumstances disclosed in this case, for reimbursement of the purchase price and the sums alleged to have been expended for repairs and alternations on the ship? This question, so far as the repairs and alterations are concerned, must be considered from the point of view of the character of the possession which defendant acquired, his good faith at the time of the bid, his subsequent conduct, the nature and purpose of the expenditure and the enhanced or increased value, if any, given to the ship by the sums alleged to have been expended. As has been pointed out already, the sale was made on the order of a Court without jurisdiction. It was an absolute nullity, constituted no justification for possession, no property rights passed in consequence of it and defendant is in possession without right and as a trespasser. The ship at the time of the sale was insured for 19,500 pounds sterling. The plaintiff had refused a cash offer of $10,000.00 for her and defendant bought for $1,560.00, which the District Court Judge found to be an inadequate consideration and he cited the case of *The Sparkle*, (1) quoted with approval in *The Columbia*, (2). The District Court Judge found the ship was worth at least $12,000.00, when defendant paid $1,560.00 for

(1) [1874] 22 Fed. Cas. 874. (2) [1900] 100 Fed. Rep. 890 at p. 893.

her. Defendant apparently concealed from the marshall his identity and had himself described in the marshall's bill of sale as W. J. Thompson, of the City of New York, County of New York and State of New York. He has not explained when examined at the trial why this was done. He gave the marshall his address in care of McKinney, his paid broker and agent, and McKinney, when defendant was inquired for by plaintiff's representatives, refused to give any information about the defendant.

Sir William Scott, in 1799, in the case of *The Perseverance,* (1) already referred to, said:—"It is "a general rule, undoubtedly, that whoever purchases "under an illegal title, does it at his own peril; and "must take the consequence (both in his purchase "and in his own subsequent expenditure upon it) of "his inattention to his own security". In that case, which was of a prize ship illegally sold, the Court allowed half of the money which had been expended on repairs in consideration of the benefit which the original owners were likely to receive from the ameliorations. In a later case, in 1804, the case of Nostra de Conceicas (2), the same distinguished Judge said:— "If there shall appear to have been any actual ameliora- "tion, therefore, I shall direct the Portuguese pur- "chaser to be reimbursed. At the same time neutral "merchants must observe, that this is an allowance "which the Court will not think itself bound to con- "tinue, after the invalidity of these titles has been so "generally made known by the decrees of this Court, "and of the Superior Court. If persons will accept "ships in this manner, after such a notice, it must be "at their own peril that they proceed to lay out money "upon a title so notoriously invalid"

(1) [1799] 2 C. Rob. 239. (2) [1804] 5 C. Rob. 294.

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In a later shipping case, in 1806, *Young* vs *Brander*, (1) Lord Ellenborough, C.J., said:—

"It is true that the owners of a ship are liable "for repairs ordered for them or for their benefit by "their master; but it was never heard of that, if a "stranger ordered repairs for another's ship or carriage, "the owner was liable for such repairs. Suppose a "pirate ran away with a ship, would the owner be "liable for repairs ordered by him"?

The principle to be drawn from these cases is, that a purchaser at a judicial sale is chargeable with notice as to whether or not the Court ordering the sale has jurisdiction in the matter, and when it acts without jurisdiction, any subsequent expenditure by the purchaser is at his own peril, he must take the consequences and is not entitled to compensation therefor; 16 A. & E. Ency. of Law, 2nd Ed. 94.

When defendant, on 23rd September, 1920, received the order of the District Court which called upon him, among others, to show cause why the sale should not be set aside and cancelled and the ship returned to the marshall, (the ship was still in New York) he consulted his Attorney Nolan, and has testified that Nolan advised him that the title was good and that if he was ready to leave, to do so. It is quite apparent that, if his attorney Nolan had looked into the matter sufficiently, he could have seen that there was a serious question involved which might result, as it did, in a judgment declaring that the sale was a nullity and that defendant had no right to possession. Whether Nolan was merely mistaken in his law or not, he and defendant decided upon the immediate dispatch of the ship to Quebec. Defendant left New York at once

(1) [1806] 8 East 10 at p. 12.

for Quebec with the ship by way of the Hudson River, Oswego Canal, Lake Ontario and the River St. Lawrence without obtaining any clearance, although defendant knew that by the usual practice ships should clear before sailing. Defendant, who was the manager of the Quebec and Levis Ferry Company, was experienced in shipping matters, having been over thirty years in that business He knew that his title was called in question and that he was being asked to return the ship to the marshall, and it is evident that he intended to get the vessel away from New York for reasons easy to surmise. The inadequacy of the price paid by defendant, his false description of himself to the marshall, the conduct of his agent, his flight from New York with the ship without the usual clearance, when he knew his title had been attacked, are inconsistent with good faith on his part. About the middle of August he brought eleven workmen from Quebec to overhaul the ship. Radical changes were made in her; her two masts were removed and her funnel was shortened and she was converted from an Ocean going trawler into a passenger ferry boat intended for service between the City of Quebec and the Island of Orleans to be operated by the Quebec and Levis Ferry Company for the purpose of earning a Government subsidy in favour of the Company. A considerable sum of money was expended both in New York and at Quebec in making these alterations and in the sums are included railway fares from Quebec to New York, general supplies for the maintenance of the workmen, materials used in the alterations and general supplies for the ship. The defendant has testified that, outside the special service for which his Company intended to use this ship, she is not of any use, and, in answer to a question in cross-examination as to the

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value of the ship at the time this action was commenced, defendant answered: "I would not give you "$1,000.00 for her how after spending all that money "on her, she is no good for anything" The expenditures were made to run a service to the Island and, in defendant's opinion, the ship would not bring more than $1,000.00 in the open market at the time the present action was commenced. The purchase price and the money expended were all supplied by the Quebec and Levis Ferry Company. John Simpson Thom, President of Quebec and Levis Ferry Company, examined as a witness on behalf of defendant, testified that, apart from the special purpose which his Company had in earning the Government subsidy, the ship had not much value, and that he did not know what she was worth when the present action was commenced, and added:—"It all depends on what a man wants "her for, she might be dear at any price", and "I "know she could not be sold for much today".

When defendant took possession of the ship she was an Ocean going Trawler, now she is a River Ferry Boat and, according to evidence, not increased in value by reason of the expenditures made by defendant.

Having regard to the nullity of the sale, the evidence of defendant's bad faith in the whole transaction and the failure to show any enhanced value as the result of his expenditures, in my opinion, the defendant is not entitled to any compensation for the expenditure made by and for him on the ship.

So far as the purchase price is concerned, the plaintiff never had it and the amount paid by defendant to the marshall, less the latter's fees, is still in the hands of the District Court and defendant should apply there for a refund. The plaintiff has no responsibility in that connection.

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There will therefore be judgment for plaintiff, as the true and lawful owner of the SS. *Bella*, and defendant will be ordered to deliver possession of the ship to plaintiff free and clear of any claims for repairs and to pay the costs of this action.

Judgment Accordingly.

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March 6.

NOVA SCOTIA ADMIRALTY DISTRICT

PERCY W. SHAW.....PLAINTIFF;

VS.

THE SHIP *FIELDWOOD*.....DEFENDANT.

Shipping and seamen—Loss of wages by desertion—Loss to owner by desertion—Ship's articles—Canada shipping Act, R.S.C. ch. 113 Sections 287-297.

On September 22nd, 1920, plaintiff signed articles at Weymouth, N.S., agreeing to serve as cook and steward on defendant ship for a voyage from Weymouth to any ports or places in British or Foreign West Indies and any ports or places between certain limits of degrees of latitude, trading to and fro, as required, for two years. Final port of discharge to be in the Dominion of Canada. The ship sailed from Weymouth to Mobile, Spain, etc., and thence to Providence, Rhode Island, where plaintiff left the ship contrary to the master's orders, asking for his wages to date, which request was refused, and action was taken to recover the same.

Upon plaintiff leaving, the master hired another cook at Providence for less money than was given the plaintiff.

Held, That, notwithstanding that plaintiff was not justified in leaving the vessel by reason of the master's conduct, the owners having lost nothing by reason of his refusal to continue the voyage, but on the contrary having profited by his so doing, plaintiff was entitled to recover his wages.

ACTION in rem claiming the sum of $291 for wages as cook on board the ship *Fieldwood*, etc.

February 22nd, 1922.

Action tried before the Honourable Mr. Justice Mellish, L.J.A., at Halifax.

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Statement of Facts.

The plaintiff on September 22nd, 1920, signed articles at Weymouth, N.S., agreeing to serve as cook and steward on defendant ship at $120.00 per month for a voyage from Weymouth. N.S., thence to any ports or places in the British or Foreign West Indies (and) or any ports or places between the limits of 65 degrees North (and) or 65 degrees south latitude, trading to and fro as required, for a term not exceeding twenty-four months, final port of discharge to be in the Dominion of Canada; that he so served from September 22nd, 1920, to May, 26th, 1921, a period of eight months and four days at $120.00 a month, amounting to the sum of $976.00, and that he had received at various times credits or cash to the amount of $685.00, leaving a balance claimed as due him of $291.00.

The ship sailed from Weymouth, N.S., to Mobile, Alabama, U.S.A., thence to Bilbao, Spain, back to Terra Vigo in the Mediterranean and from there to Providence, Rhode Island, where the Plaintiff left her and returned on another ship as a passenger to Nova Scotia. The defendant ship, after the plaintiff left her. sailed for New York, and from New York returned to Lunenburg, Nova Scotia. The evidence also showed that whilst at Providence the Captain had told the plaintiff what he would do to him if he were not a cripple, and that the plaintiff visited the British Consul and in the presence of the Captain had asked that he be paid off and discharged which the Captain refused. They had also had words on the voyage across the Atlantic. The plaintiff left the ship at Providence and remained there until after the ship sailed for New York visiting the vessel several times before she sailed and was standing on the wharf when she put out. His clothes were left on board and were brought home by the ship. No action was taken

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against the plaintiff as a deserter or for being absent without leave. A new man was shipped at Providence at $35.00 a month to replace plaintiff, who acted as cook for the balance of the voyage. There was also evidence that the Captain, who was a part owner of the ship, had reduced the wages of some of the crew at Providence and intended to reduce those of the plaintiff.

Varley B. Fullerton for plaintiff.

The plaintiff is entitled to his wages up to the date he left, even if he then deserted. *Shelford & Mosey* (1) and in any event desertion was not proved. Abbott on Shipping 14th ed. page 241, *Button & Thompson* (2), and plaintiff was justified in leaving the ship being in fear through threats made by the Captain. The owners lost nothing by the plaintiff leaving the ship. In the case of forfeiture the idea seems to be to make good any loss the ship has suffered by the seaman leaving. The Canada Shipping Act, R.S.C. Cap. 113, Section 287 and 297, seems to control this case. In the case of *Shelford* vs. *Mosey* (3), Lord Reading decided that the master had not tendered to the proper officer under section 28 of the Marine Shipping Act, 1906, the wages of the seaman. He had omitted to tender the bonus which Lord Reading held to be wages.

The amendment to the Merchant Shipping Act passed in 1906 and found in Statutes of Canada, 1907, pages 1 to 40 or (XIII to LII) does not add in any way to the rights of seaman for wages, and therefore, Lord Reading when deciding this case did so irrespec-

(1) [1916] 86 L.J.K.B. 289. (2) [1869] L.R. 4 C.P. 330.
(3) [1917] 1 K.B. 154 at p. 158.

tive of the 1906 Act, and in the light of the Merchant Shipping Act or Common Law as it stood, and this is what he said: "In this case the seaman did not complete the voyage. He committed an act which put an end to the contract by virtue of the Merchant Shipping Acts, he is nevertheless entitled to the payment of his wages up to the time of his leaving the ship and that part of the law cannot be impugned. There is no question that a seaman's wages would become payable up to a certain time even though he had deserted or forfeited the right to continued employment. That disposes of any question as to wages."

W. C. McDonald for defendant.

Plaintiff was guilty of desertion and was not entitled to any wages. There was no justification for plaintiff in leaving the ship, he does not say that the Captain abused him in any way. Kay on Shipmasters & Seaman 505-506-509. *Ex. parte Lowery* (1)

Plaintiff signed on for the entire voyage which was to end in Canada. The completion of the voyage was a condition precedent to his right to payment. The Canada Shipping Act, R.S.C. c. 113, Section 186, provides that wages of seaman shall be paid three days after delivery of the cargo or five days after discharge. The articles provide that Shaw was engaged for a voyage, to end in Canada. This is clearly shown by the provision "no cash nor liberty granted abroad other than at the master's option." The case falls within the decision in the case of *Hulle* v. *Heightman* (2) There the agreement contained a provision that no seaman should demand money in foreign parts. *Button*

(1) [1893] 32 N.B.R. 76. (2) [1802] 2 East. 145.

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v. *Thompson*, (1), can be distinguished. In the latter case there was no stipulation that money need not be paid abroad. The Button case, too, was not one of desertion. In *Shelford* v. *Mosey* (2), Lord Reading states that the plaintiff (who had quit his ship abroad while serving under articles) would not be entitled to wages at common law. He found, however, that the plaintiff would succeed under the Merchant Shipping Act Amendments passed in 1906, and that he would be entitled to wages up till the time he left the ship.

The amendments to the Merchant Shipping Act passed in 1906 (or the M.S.A. 1906, as it is usually called) are not applicable to Canada, and its provisions have never been incorporated into the Canada Shipping Act or the amendments thereto.

It is submitted that to succeed in this case the plaintiff was obliged to show he was ready and willing to carry out his part of the agreement. The evidence expressly negatives such readiness or willingness.

The facts are stated above and in the reasons for judgment.

MELLISH, L. J. A., now, this 6th March, 1922, delivered judgment.

This is an action for wages. The plaintiff was engaged under articles to serve as Cook and Steward on the *Fieldwood* on September 22nd, 1920 monthly wages, $120.00. He left the ship on the 26th of May 1921 at Providence. Up to that date, if he had been regularly discharged his wages then would have been $291.00, the amount sued for herein. There is some evidence that on account of exchange, this would be somewhat larger, but it is too indefinite for me to give

(1) [1869] 4 C.P. 330. (2) [1917] 1 K.B. 154 at p. 158.

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effect to it. The evidence, including the plaintiff's letters, lead me to the conclusion that he was not justified in leaving the vessel, although the master's conduct was not such as would be likely to keep the crew together. The owners, however, lost nothing, but on the contrary profited by his so doing. The only defence is that the wages have been forfeited by desertion.

The Canada Shipping Act Cap. 113 Revised Statutes of Canada, 1906 Section 287 provides that a seaman on summary conviction may for desertion be punished by imprisonment and forfeiture of clothes and effects left on board and of all or any part of the wages he has earned.

Section 297 provides that any question concerning the forfeiture of wages may be determined in any proceedings with respect to such wages in such a ship as this, notwithstanding that in criminal proceedings imprisonment as well as forfeiture might be awarded.

I think the justice of the case will be met by reducing the Plaintiff's claim by the amount of wages for the days which he served during the month in which he left the ship—the month for the purpose of computation running from the 23rd of one month to the 22nd of the next, inclusive of such dates. This makes four days, and the plaintiff was paid at the rate of about $4.00 per day.

The reductions accordingly will be $16.00, and the plaintiff will have judgment for the balance of his claim, $275.00 and costs. See also Kay on Shipmasters & Seaman, 2nd edition, Pages 373-376.

Judgment accordingly.

1922
April 19.

IN THE MATTER OF A SPECIFIC TRADE-MARK CONSISTING OF THE WORD "WHISTLE."

BETWEEN:—

VESS JONES, OF THE CITY OF NEW YORK, IN THE STATE OF NEW YORK, U.S.A. ..... PETITIONER;

AND

ALLAN S. HORTON ..... OBJECTING PARTY.

Trade-Marks—Prior user—"Person aggrieved"—Sec. 42, Trade-Mark and Design Act.

Held, that it is the use of a trade-mark, and not its invention, which creates the right to its registration. In cases of conflict as to prior user the test is: Which claimant was the first to use the mark on his goods to distinguish them from others, thus giving information to the trade that such goods are his.

2. That "use" of a trade-mark within the meaning of the Trade-Mark Act must be of a public character, such use being demonstrated by the mark being related in some physical way to the goods themselves or to the wrapper or case containing the same.

3. Where a person had used a trade-mark in Canada since 1920, and elsewhere (under registration) for a much longer period, for the purpose of distinguishing his goods from those of rival traders, and another person had obtained registration of the said mark in 1921, the former is a "person aggrieved" under sec. 42 of the Trade-Mark Act by such registration in Canada and may apply to have the same expunged.

APPLICATION by petitioner to have the registration of the specific trade-mark consisting of the word "Whistle" expunged.

28th March, 1922.

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Audette J.

Case heard before the Honourable Mr. Justice Audette, at Toronto.

R. S. Smart and *H. G. Fox* for petitioner.

H. J. Scott K.C. for objecting party.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 19th April, 1922) delivered judgment.

This is an application, by the petitioner, to expunge from the Canadian Register of Trade-Mark the above specific trade-mark consisting of the word "Whistle," as "applied to the sale of soft drinks" and registered in Canada on the 6th October, 1921, by the said objecting party, who resides at Windsor, Ontario.

The Court is given jurisdiction over such matters both under sec. 23 of the Exchequer Court Act and under sec. 42 of the Trade-Mark and Design Act.

It appears from the evidence that the petitioner and his predecessors in title, the Orange Whistle Company, have been manufacturing and selling a soft drink called and labelled "Whistle" since 1916 in the United States of America, and registered the same at that date, in the United States, as appears by exhibit No. 3.

The petitioner's business was started in January, 1916, inventing the drink at the same time as they invented the name or trade-mark. The petitioner organized a number of serving companies in several states, viz.: New York, Ohio, Tennessee, Alabama, Texas, Missouri, etc., and built up a large business

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after having extensively advertised at great expense. In 1920, the petitioner's sales in the United States and Canada amounted to $9,000,000. In the same year he spent for advertising in Detroit, across from Windsor, the objecting party's residence, between $6,000 to $7,000, besides what his agent Wagener spent himself.

He started developing his Canadian business by sending circulars in Canada, in 1917, receiving enquiries for samples. On the 5th February, 1920, N. Moore, the person in charge of the company in San Francisco—controlled by the petitioner—booked Messrs. Cross & Co. for shipping and did actually ship to them in March of the same year, and thereafter, as more particularly appears by exhibits Nos. 9, 10, 11, 12 and 13.

Edwin Irvine, the proprietor of the firm Cross & Co., put up a plant, manufactured and bottled "Whistle" in Vancouver, Canada, since March, 1920—buying the sirup from the petitioner who always kept control, the product being sold in Canada under the name of "Whistle," with the orange and blue label with the word "Whistle" across it.

The petitioner's business in Canada last year amounted to $12,000, of which $10,000 represents the Vancouver business. He has two serving factories in Canada.

Albert Brown, of Montreal, manager of the Caledonia Spring business, heard of this "Whistle" on the 12th March, 1919, and saw it advertised in the Bottler's Gazette, and wrote for sample in 1919, as per exhibit No. 7, and as a result received sample exhibit No. 8.

Witness Wagener began manufacturing Whistle at Detroit, U.S.A., in 1918, under arrangement with the petitioner. He met Horton, the objecting party, five or six years ago and then again at his plant, in Detroit, in August 1921, when he informed him (Wagener) he was perfecting something to take place of "Whistle."

Horton paid Wagener another visit later on requesting a sample of "tin sign of Whistle" which Wagener gave him.

Part of Horton's examination on discovery was read at trial. I will refer to it hereafter.

At the conclusion of the petitioner's case in chief, counsel at bar for the objecting party moved for judgment by way of non-suit, upon the ground among others, that the petitioner was not a person aggrieved under sec. 42 of the Trade-Mark and Design Act; and that therefore the court had no jurisdiction and that the Vancouver firm were receiving their goods from the San Francisco Company and not from the suppliant. This motion was continued to the merits and evidence was then adduced on behalf of the objecting party.

It is conclusively established from Horton's examination on discovery that prior to June, 1921, he did not have any printed label or matter upon which the word "Whistle" appeared. He never used a label with the word "Whistle" prior to 1921.

At page 5 of the discovery evidence, Horton states he had his label printed last year under the following circumstances. The Jones Company, who printed the label, did not obtain the *design* for the label. Richardson, a travelling salesman for the Wright Lithographing Company, "obtained the design for me." (p. 6.) "He said he could get me one so he went over the river—I guess from Wagener over there who was bottling Whistle on the other side.

"Q. He got a copy of the label that Mr. Wagener was using? A. Yes, sir.

"Q. And he gave it to your lithographers? A. No, he gave it to me.

"Q. Gave it to you? A. Yes.

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"Q. And you gave it to the Jones Lithographing Company? A. They both figured on it, yes.

"Q. And the Jones Lithographing Company made your labels from it? A. I told him I didn't know where—I knew at that time there was one over there, but not before—no; let's see—I told him I didn't know at that time that this place had a patent on Whistle over there—that they had no right to have that Whistle, and I took the label and made the insertion of the girl's head, or the boy's head, with the hand to his ear.

"Q. You took the label, and—. A. We will admit that this is a copy of the label that they use on the other side.

"Q. I just want to get this: You took the label that you got from the Whistle Company of Detroit and you asked your lithographer to copy it and to add a little boy's head to it? A. I told him to make me a label up with the orange and the Whistle—I wasn't sure whether it was going to be the same colour as that. I told him the shape of the label, that is, the same shape as my dry ginger ale label.

"Q. I show you a label here which I am advised is the one used by the petitioner, and ask you if you recognize that as being like the label which you obtained in Detroit

(Exhibit No. 2).

"A. The label I had didn't have this bottom 'Minimum contents 6 fluid ounces,' on it; and it wasn't exactly quite the same colour.

"Q. But apart from that, if you rubbed these few words out—? A. It wasn't exactly the same colour. It seemed to be more of a darker orange.

"Q. But the design was the same? A. The design was practically the same as that.

"Q. Looking at Exhibits 1 and 2, you would say that your lithographers had made a good copy? A. No. I don't see that there's any copy to it.

"Q. No copy? A. No; if it was an orange it would be that colour.

"Q. But I mean apart from the colour, that the design is a good copy? A. We will admit that the label is—the lithographer took it to get an idea of what I wanted.

"Q. And he copied it exactly, didn t he? A. No, I can't say that he copied it exactly. There is a girl whistling to the boy, where the other is just a girl whistling.

"Q. But apart from the little boy's head, he copied it exactly? A. No, it is a different coloured label.

"Q. I am speaking of the design now. A. The design is the boy listening to the girl whistling, I should judge.

"Q. But the whole diamond-shaped label, with the arrangement—. A. They are not diamond-shaped labels * * *.

"Q. These labels speak for themselves, if you will refresh your memory from them it will make the record clearer. Will you admit what is the same on each? A. One is a light orange colour, the other is dark.

"Q. But as far as the design, the letter-press, goes, it is the same? A. So far as the letter-press, yes.

"Q. Have you noticed that the labels run in slightly different shapes according to the ink used? A. Mine don't—not if they are done by good lithographers they don't".

Then in December Horton procured from Wagener a tin sign with the words "Thirsty? Whistle," and changed it for his use into "Thirsty? Drink Whistle." He contends he had this formula completed four years ago.

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Now coming to the evidence at trial adduced after the petitioner's evidence disclosed when they started business, Horton testifies he invented that drink as far back as the fall of 1911, that he made and sold that drink from 1911, under the name of "Whistle"—but he adds he did not use any label until June 1921.

Arthur Bangle, a pool-room and soft drinks dealer at Windsor, who has been in the pool-room business for three years and sixteen years in the grocery business, testified he was Horton's customer for about 10 years, and that about 9 years ago he bought from him a soft drink under the name of "Whistle," but that it was not a known drink at the time.

Archibald Lewis, employee in a cafeteria at Windsor, testified that from 1918 to 1920 he bought soft drinks from Horton, under the name of "Whistle," because he told him so.

John E. Hanlan, of Windsor, when at the base ball park, bought from Horton, between 1912 to 1915, soft drinks which the latter told him it was "Whistle."

Then in rebuttal, Albert E. Segner, of Windsor, who worked for Horton in 1912 or 1913, up to 1915, when he went in the army from 1915 to 1919 and worked again for a short time for Horton both in 1919 and 1920, testified he had knowledge of every drink bottled by Horton and that during the time he worked for Horton, he never heard of any drink called "Whistle." He was discharged by Horton in 1915. The liquor was in the mixing room and he says he knew what he was bottling.

Again, Charles Wickens, of Windsor, testified he worked for Horton during 1917, 1918, 1920 and a short time in 1921. He says he knew what he was

bottling and that in the year 1917, 1918 and 1920 he never heard of a drink called "Whistle", but that he did hear of such a drink in July and August, 1921.

The evidence respecting the time at which the sale of this soft drink, under the name of "Whistle," was made by Horton is unsatisfactory and conflicting and, in the view I take of the case, it has nothing to do with the question of law involved in the controversy and further I do not deem it necessary to pass upon the declaration accompanying the application for the trade-mark. However, as the trial judge, having had the advantage of seeing the witnesses, observing their demeanor, and the manner in which the testimony was given, and taking into consideration all the surrounding circumstances of the trial, the probabilities and improbabilities, I feel in duty bound to declare that I do not rely on that part of the evidence tending to show that such soft drinks were sold by Horton, under the name "Whistle" as far back as 1911. No reliability should be placed upon such evidence.

Indeed, it is the use of a trade-mark, and not its invention, that creates the right, Paul on Trade-Marks, 153 sec. 92. Paul on Trade-Marks, adds further, at p. 148: "The test in all cases of conflict as to priority of adoption is, which claimant was first to so use the mark as to fix in the market a conviction that goods so marked had their origin with him." See also *Candee, Swan & Co.* v. *Derre & Co.* (1). The applicant for the registration of a trade-mark in Canada must be the proprietor of the mark, and the evidence in the present case discloses pretty well how the design was conceived and made up—that is long after the petitioner was using it in Canada. The

(1) [1870] 54 Ill. 439.

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colourable distinction in copying the mark obtained in Detroit clearly disclosed the intention of the applicant. *The Vulcan* (1); *Partlo* v. *Todd* (2); *The Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.* (3).

"No right can be absolute in a name as a name merely. It is only when that name is printed or stamped upon a particular label or jar and thus becomes identified with a particular style and quality of goods, that it becomes a trade-mark." *Rowley* v. *Houghton* (*3a*). See also *McAndrew* v. *Bassett* (4).

And again, Sebastian, 5th ed., p. 62, says: "The expression 'used as a trade-mark' was much considered in the case of *Richards* v. *Butcher* (5), where Kay J. said that 'user as a trade-mark' means, not what the person who uses has in his own mind about it, not what he has registered in a foreign country, but what the public would understand, when the trade-mark or so called trade-mark is impressed upon the goods, or upon some wrapper or case containing the goods, to be the trade-mark. That is the trade-mark proper; and 'user as a trade-mark' means and must necessarily mean, the impressing of those words either upon the goods, or upon some wrapper or case containing the goods, in such a way that the public would necessarily understand those words to be, and alone to be, the trade-mark of the person who uses them." See also Kerly, 4th ed., pp. 32, 34, 35, 227, 228.

It is not necessary that the applicant for registration should be the inventor of the word applied for. *Linotype Co.'s application* (6).

(1) [1914] 15 Ex.C.R. 265; 51 S. C.R. 411.
(2) [1888] 17 S.C.R. 196.
(3) [1910] 27 T.L.R. 63.
(*3a*) 2 Brewster, (Penn. Rep.) 304.
(4) [1864] 4 DeG. J. & S. 380.
(5) [1891] 2 Ch. D. 522.
(6) [1900] 2 Ch. D. 238.

The petitioner has shewn a prior bona fide appropriation of the word "Whistle" as a trade-mark, supplemented by a continuous use in the United States since 1916 and in Canada since March 1920, long before Horton either built up his design from the petitioner's design procured at Detroit and also long before June 1921, when Horton first used it.

I may casually add, in answer to the contention raised at bar that the petitioner is not "a person aggrieved," as contemplated by sec. 42 of the Trade-Mark Act that I cannot agree with that view taking that he is absolutely within the purview of the Act. The petitioner has been using his trade-mark in Canada since 1920 and in the United States since 1916, to distinguish his goods from those of other rival traders and if the Canadian registration remains against his prior user he will be deprived of the just use of his bona fide trade-mark in Canada. Under such circumstances I take it the petitioner is a person aggrieved and the Court should exercise in his favour the statutory discretion provided by sec. 42 of the Act. In support of that conclusion I would cite *In re Vulcan* (1); *Baker* v. *Rawson* (2); *The Autosales Gum & Chocolate Company* (3); *Batt & Co's Trade-Mark* (4); *Powell* v. *the Birmingham Vinegar Brewery Co. Ltd.* (5); *In re Apollinaris Company's Trade-Mark* (6).

Therefore, for the reasons above mentioned, I have come to the conclusion that the petitioner is the proprietor of the trade-mark "Whistle," and that he has acquired the right to the same in Canada by first

(1) [1914] 51 S.C.R. 411 and cases therein cited.
(2) [1891[8 R.P.C. 89 at p. 98.
(3) [1913] 14 Ex. C.R. 302.
(4) [1898] 2 Ch. D. 432, 441.
(5) [1894] A.C. 8.
(6) [1891] 2 Ch. D. 186.

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user thereof in Vancouver ever since March 1920, while the objecting party used such a mark or design in Canada only sometime in June 1921. It is not necessary, as suggested, that the use of the word "Whistle" in Canada, prior to 1921, should have been made at Windsor itself. Paul, on Trade-Marks, at p. 149, says: "The mere fact, however, that an established trade-mark is not at the time in use in a particular locality, gives no one the right to appropriate it. If a manufacturer or vendor could secure a claim to a trade-mark on the ground alone that it was not in use, prior to the time when he adopted it, in the special locality in which he proposed to use it, the law for the protection of trade-marks would be shorn of most of its strength, for, on the same principle, other persons would be at liberty to adopt it in any locality in which it happened at the time not to be in use."

"The world is wide," said Lord Justice Bowen, in a trade-mark case (*Harper & Co.* v. *Wright & Co.* (1) "and there are many names * * * . There is really no excuse for imitation, etc." The argument of undesigned coincidence in the present case is one not commending itself or deserving of respect in view of all the circumstances disclosed in the evidence. The petitioner has extensively advertised, has built up a large business under the name "Whistle" and he is entitled to protection.

It is unnecessary to give any opinion upon what as yet is a moot question as to whether—taking into consideration that Canada and the United States are adjoining and neighbouring countries—a Canadian citizen would have the right, with impunity, to approp-

(1) [1895] 2 Ch. 593.

riate an American registered trade-mark extensively used in the United States for many years and register it as his own in Canada; and furthermore whether the American owner having for a long period neglected to register in Canada, did not lose, by such laches, his right to so register.

There will be judgment ordering the expunging from the entry in the Canadian Trade-Mark Register of the Specific Trade-Mark "Whistle," under No. 128, Folio 29460, in accordance with the Trade-Mark and Design Act. The whole with costs against the objecting party.

Judgment accordingly.

Solicitors for petitioner: *Fetherstonhaugh & Co.*

Solicitors for objecting party: *Fleming, Drake & Foster.*

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April 22.

RODRIGUE GOULET.....PETITIONER;

VS.

IDA SERRE, DIT ST. JEAN, *et al*.....RESPONDENTS.

Trade-Marks—Expunging—Registration made upon a false declaration and one not disclosing all proprietors—Purity of Register.

In the interests of trade, public order and purity of the register of Trade-Marks, the Court will exercise its statutory discretion in ordering the removal from the register of any entry made therein without a sufficient cause, i.e., when the registration of a Trade-Mark was obtained upon a declaration not disclosing the names of all the proprietors of the mark, and falsely stating that the Trade-Mark was not in use by any other persons than those named in the application and declaration at the time of its adoption.

2 That whilst it might not be of strict necessity to order the expunging of a Specific Trade-Mark which has expired, by reason of its non-renewal within the statutory 25 years, yet with the object of obviating any difficulty that might hereafter arise under the circumstances of the case, such entry and registration should be expunged.

PETITION to have trade-marks "La Fortuna" and "Artiste" expunged from the register of Trade-Mark and Design and have the same registered in the name of petitioner and others named.

April 10th and 11th, 1922

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

A. Duranleau, K.C., for petitioner.

C. Laurandeau, K.C., for Ida Serre dit St. Jean.

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F. A. Béique, for Hermine Goulet and other heirs of Ludger Goulet.

Oscar Dorais, K.C. & J. P. Lanctôt, for Henri Goulet and heirs of Joseph Goulet.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 22nd April, 1922) delivered judgment.

The Petitioner, by the present proceedings, seeks to expunge from the Canadian Register of Trade-Marks, three "specific" trade-marks as applied to and in connection with the sale of cigars, and further that the same be registered in his favour and Ludger Goulet's estate jointly.

These three specific trade-marks consist of:

1. The words "La Fortuna" registered, on the 16th November, 1920, under Folio No. 27582.

2. The word "Artiste," with a coloured label which is described in the certificate of registration by the following words, viz.:—"avec étiquette de couleur, représentant un artiste assis sur un banc, peignant un rideau, à son côte un chien regardant le dit rideau, un paquet de tabac (en feuilles) une boîte de cigares et un pot de fleurs, tel qu'il appert par la demande et le patron ci-contre," and registered on the 4th November, 1920, under folio No. 27510.

3. The same word "Artiste" with the above described label, registered on the 17th December, 1883, under folio No. 2194.

The Exchequer Court of Canada is given jurisdiction over such matters both under sec. 23 of the Exchequer Court Act and under sec. 42 of the Trade-Mark and Design Act.

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Audette J.

Freeing myself from all unnecessary considerations and having regard only to the broad facts of the case, I find the important and controlling fact, (a fact disclosed by the evidence, and I think, conceded by all parties) that the petitioner had, in November, 1920, when Henri Goulet registered the trade-marks Nos. 27582 and 27510, an undoubted clear, individual and undivided right to, and interest in, the said trade-marks and has ever since had it; and moreover that when the said Henri Goulet registered the same no formal embodiment in writing was ever made by him of such known right and interest in him (the petitioner), either in his application or in the declaration for trade-marks.

As I have already had occasion to say in the *Billings & Spencer Case* (1), the Canadian Trade-Mark Act does not contain a definition of trade-marks capable of registration; but it provides by sec. 11 that the registration of trade-mark may be refused if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking. *The Standard Ideal Co.* v. *The Standard Sanitary Mfg. Co.;* (2); *Partlo* v. *Todd* (3): This section 11 further provides that the *applicant should be undoubtedly* entitled to the exclusive use of the trade-mark. *Roger's Trade-Mark* (4); *The J. P. Bush Mfg. Co.* v. *Hanson et al* (5).

If by virtue of such registration Henri Goulet, or those he registers for are allowed to retain the exclusive use of the trade-mark the petitioner will be forever barred and excluded from using the same or in other words will have all rights, title and interest in the same wiped out by such registration. The applicant

(1) [1921] 20 Ex. C.R. 405 at p. 410.
(2) [1911] A.C. 78.
(3) [1888] 17 S.C.R. 196.
(4) [1895] 12 R.P.C. 149.
(5) [1888] 2 Ex. C.R 557.

for registration must use or intend to use the trade-mark, therefore, Henri Goulet,—or the estate in whose favour he registered, could not so use the trade-mark without leave of the petitioner or without using something in which the petitioner has a right and interest. Kerly, Law of Trade-Mark, pp. 114, 120, 140.

Then it is, by section 13, provided that the applicant may have his trade-mark registered upon forwarding a declaration that it "*was not in use to his knowledge by any* other person than himself at the time of the adoption thereof."

Section 42 (R.S.C. 1906, ch. 71) provides, among other things, for expunging, at the suit of an aggrieved person, the entry of any trade-mark, made on the register, *without sufficient cause*. The petitioner, whose rights have been frustrated by such registration is a person aggrieved within the purview of the Act. *Baker* v. *Rawson* (1); *The Autosales Gum & Chocolate Company* (2) and *Ball & Co's Trade-Mark* (3). The present registration of 1920 "without sufficient cause" which claims the mark, constitutes a cloud on the petitioner's title, and if he is the owner of or has an interest in the marks, he has a right to have that cloud removed.

The only conclusion one is forcibly led to upon the language of the declaration made by Henri Goulet when, *inter alia*, he says in registering "La Fortuna:" "La dite marque de commerce spéciale n'a été employée à ma connaissance par aucune autre personne que par les dits Joseph Goulet et Ludger Goulet, faisant affaires à Montréal, sous les noms de Goulet & Frères, avant d'avoir été choisie et adoptée par ces derniers."

(1) [1890] 8 R.P.C. 89 at p. 98. (2) (1913) 14 Ex. C. R. 302.
(3) [1898] 2 Ch. D. 432.

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is that, only part of the truth is therein disclosed, and amounts to more than an untruth, since he knew at the time he made his application to register, that the petitioner had rights and interests in the same, that he used the said trade-mark as a member of the partnership. Both the application and statutory declaration are silent upon this subject. Good faith, honesty and loyalty are expected in all transactions and a Court of justice is invested with due authority and is in duty bound to see that such principles are duly respected.

Now could a trade-mark be so registered in the name of two estates without disclosing the names of the persons forming part of such estates, is a very doubtful question which I find unnecessary to decide for the purposes hereof. However, following the decision in the *United States Steel Products* v. *The Pittsburg Perfect Fence Company* (1) it must be held that the *proprietor* of the trade-mark alone can register. If there are several owners, that must be disclosed. The latter case is authority for refusal to register, if it appears that the applicant is not the proprietor of the trade-mark; the Trade-Mark and Design Act providing for the registration in the name of the proprietor only.

It is inconceivable that any one could know better than Henri Goulet, when he made his declarations for the registration, that the petitioner had some rights and interest in the ownership of the trade-marks as a result of the petitioner's partnership owning the same and through which Henri Goulet claimed for the estates. By stating only part of the truth and repressing part of it—in not disclosing that the petitioner was part owner of the marks—he made statements amount-

(1) [1917] 19 Ex. C. R 474.

ing to misrepresentation and thereby obtained registration. Had he disclosed the whole truth and nothing but the truth, he would not have procured the registration. Part of the truth only is more treacherous and more difficult to meet than a glaring untruth.

Henri Goulet's conduct in obtaining registration under such circumstances and under such curtailed and guarded statement of facts was most reprehensible and all his claims cannot avail, because the help of the Court will not be extended to one who comes in court with unclean hands.

All that has been said with respect to "La Fortuna" will equally apply to the other trade-mark "Artiste" with however this qualification.

The Trade-Mark "Artiste" was duly registered as a specific trade-mark on the 17th December, 1883. Under sec. 17 of the Act, such specific registration endures for a term of 25 years, and can only be renewed before its expiry, and the registration of such renewal must be registered before the expiration of the current term of twenty-five years.

This specific trade-mark "Artiste" registered in 1883 expired in 1908, and cannot, under the provisions of sec. 17 above referred to, be again registered in 1920, as was done by Henri Goulet. It would seem that this trade-mark has expired.

However, whatever might have been the merits or the demerits of the applicant Henri Goulet, the court in a matter of this kind, where the interests of trade, public order, and the purity of the register of trade-marks are concerned, shall and must always exercise its statutory discretion in ordering the removal from

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the register of such entry made *without sufficient cause*. *The Canada Foundry Co.* v. *The Bucyrus Co.* (1); *The Leather Cloth Co.* (2); *Baker* v. *Rawson* (3); *The Appollinaris Co.* (4); Kerly's Law of Trade-Mark, 318, 320; Sebastian, 236, 403, 520, 600.

Coming now to the second branch of the case, whereby the petitioner seeks for an order directing the registration of these trade-marks in both his favour and the said Ludger Goulet's estate jointly, it must be stated that it appears from both the evidence and the defendant's pleadings that the petitioner is apparently the sole owner of these trade-marks for having purchased them in June 1921, at a sale made of the same, under direction of the Superior Court of the District of Montreal, in an action of licitation for the partition of the assets of the above mentioned estates. The statement of claim has not been amended.

In consideration of this important fact and in the view the Court takes of the case, it becomes unnecessary to decide whether or not these trade-marks formed part of the partnership assets and ever passed to the estate without being first disposed of with the good-will of the partnership. Can a trade-mark be sold in gross, that is without the good-will? The cases of *The Trade-Mark "Vulcan"* (5) and *Gegg* v. *Bassett* (6), are authorities for the negative. See Hopkins on Trade-Mark, 3rd ed., pp. 28, 68, 161, 575. Could these trade-marks ever pass to the defendant's estates, without first being sold with the good-will of the

(1) [1912] 14 Ex. C. R. 35; 47 S.C.R. 484.
(2) [1865] 11 H. L. C. 523.
(3) [1890] 8 R.P.C. 89.
(4) [1890] 8 R.P.C. 137, at 160, 161 & 163.
(5) [1914] 15 Ex. C. R. 265; 24 D.L.R. 621.
(6) [1902] 3 O. L. R. 263

partnership? Would it not seem that these estates could acquire interest in the assets of the partnership, only upon the proceeds of the same having been realized from the sale of the good-will with the trade-marks? *Eiseman et al* v. *Scheffer et al* (1); *Independent Baking Powder Co.* v. *Boorman* (2); *Bowden Wire Co.* v. *Bowden Brake Co., Ltd.* (3). These are interesting questions which it becomes unnecessary to decide in the view I have taken of the case, and the consideration of the same would indeed carry us far afield.

There will be judgment ordering the expunging from the entry on the Canadian Trade-Mark Register of the Specific Trade-Mark "La Fortuna" registered on the 16th November, 1920, under No. 27582, and the further expunging of the Specific Trade-Mark "Artiste" registered on the 4th November, 1920, under No. 27510—in accordance with the Trade-Mark and Design Act.

While the necessity of expunging the Specific Trade-Mark "Artiste" registered on the 17th December, 1883, under Folio No. 2194, and expiring in 1908, as provided by sec. 17 of the Trade-Mark and Design Act, might not be of strict necessity, yet with the object of obviating any difficulty that might arise in reference to the title to the trade-marks registered in 1920, it is thought advisable, following the decision in *re Batt* (4) to order the expunging of the same. The continuance of such registration can answer no legitimate purpose and its existence is purely baneful to trade, as said by the Master of the Rolls, in *re Batt* (*ubi supra*).

(1) [1907] 157 Fed. Rep. 473.
(2) [1910] 175 Fed. Rep. 449.
(3) [1912] 30 R.P.C. 45 & 581; & 31 R.P.C. 385.
(4) [1898] 2 Ch. D. 432 at p. 439 [1898] 15 Rep. P.C. 534.

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The petitioner is aggrieved by maintaining the entry of the trade-mark, it is certainly embarrassing to say the least, and in his interest, it should be expunged, as the registered owner is not the proprietor thereof. Smart on Trade-Marks, 62-64.

There will be no order directing the registration of these trade-marks in favour of both the petitioner and the Ludger Goulet estate jointly, for the reason above mentioned that the petitioner would appear to be the sole owner of the same for having purchased them at a sale made under direction of the Superior Court of the District of Montreal; but without passing upon the rights of the said petitioner to register in his own personal name, he will now be at liberty to apply for the registration of the same, if he sees fit, The whole with costs against the contesting party Henri Goulet.

Judgment accordingly.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT. 1922 April 22.

GEORGE McCULLOUGH *et al*,

PLAINTIFFS AND JUDGMENT CREDITORS;

VS.

THE S.S. *MARSHALL*.....DEFENDANT;

AND

REAL ROBILLARD (Acting Marshall). APPELLANT.

Appeal—Admiralty Act, 1891—Section 14—*Costs—Interlocutory Judgment—Absence of permission to appeal—Jurisdiction.*

1. That the judgment of a Local Judge of Admiralty confirming a taxation by the District Registrar of the marshall's bill for services etc., relating to the care of the ship whilst in his custody is an interlocutory judgment. That an interlocutory judgment or pronouncement is one which determines some subordinate point or settles some special question arising in the cause and does not deal finally with the merits of the cause. It can be ancillary to or executory of the final judgment and complete the adjudication of the case.

2.—That where by statute an appeal is given to this court from an interlocutory judgment or order, upon permission to so appeal having been previously obtained, and when no such permission has been obtained, this court has no jurisdiction to hear the appeal.

Semble:—Appeals involving merely a question of costs should not be entertained, more particularly when the appeal is from the decision of the trial judge confirming the findings of the taxing master, or when the matter is only one of quantum involving the exercise of his discretion.

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APPEAL from the decree or order of the trial judge, as Local Judge in Admiralty of the Quebec Admiralty District, confirming the taxation, by the district Registrar, of the marshall's bill for services and disbursements relating to the care of the ship whilst in his custody.

April 11th, 1922.

Appeal heard before the Honourable Mr. Justice Audette at Montreal.

H. E. Walker, for appellant.

T. M. Tansay for the ship defendant.

Walter R. L. Shanks, K.C. for The Steel Company of Canada, purchaser of vessel, etc.

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

AUDETTE, J.—now (this 22nd April, 1922) delivered judgment.

This is an appeal from the judgment or order of the Local Judge of the Quebec Admiralty District, pronounced on the 8th July, 1921, confirming the taxation, by the Deputy Registrar or taxing master, of the acting Marshall's bills.

As a prelude it may be stated that appeals involving merely a question of costs should not be entertained. *Chicoutimi Pulp Co.* v. *Price* (1). And it would seem that such a principle should obtain with special force, when the appeal was originally from the finding of the taxing master to the trial judge who had already,

(1) [1907] 39 S.C.R. 81.

in the final judgment allowed costs, and who confirmed the master—the appeal being practically upon a question of *quantum*, again involving discretion from which there is generally no appeal.

However, there is in the present case a more serious objection standing in the way of the present consideration of the questions involved. The present appeal lies under the provisions of sec. 14 of The Admiralty Act 1891, whereby it is enacted that appeals from interlocutory decree or order can be entertained by the Exchequer Court when permission to so appeal has been previously obtained.

No such permission has been obtained.

This right to appeal is entirely statutory and this Court is given jurisdiction under the provision of such statute. It has no jurisdiction to hear the appeal in the absence of such permission, as required by the statute.

The rule of construction in such cases is that all the prescribed elements of jurisdiction must be present before the appeal can be entertained. The statute in this case imposes the duty upon the appellant to obtain the leave to appeal either from the local judge or a judge of the Exchequer Court of Canada. No such leave has been obtained, and one of the requirements of the statute preliminary to the jurisdiction of this Court arising has not been satisfied. Therefore the appeal is not properly before the Court, and cannot be entertained. Brown on Jurisdiction, 2nd ed. (1901) sec. 21, p. 111.

Some stress has been laid at bar upon the consideration that such judgment which determines the amount of the bill might be considered as a final judgment; but with that view I cannot agree.

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The term judgment may be considered as a generic term in law and practice covering all decisions given by a Court of law; but there is a wide difference between a final and an interlocutory judgment.

A final judgment is one which determines the rights of the parties in an action or proceedings, while an interlocutory judgment or order is one which does not decide the cause, but merely that which only settles some intervening matters relating to the cause. Words and Phrases Judicially Defined, vol. 4. p. 3712; Idem (Second Series) 1149; Audette, Exchequer Court Practice 478.

An interlocutory judgment or pronouncement determines some subordinate point or settles some special question arising in the cause and does not deal finally with the merit of the action. It can be ancillary to or executory of the final judgment and complete the adjudication of the case.

An order which does not deal with the final rights of the parties, but merely directs how the declarations of right already given in the final judgment are to be worked out, is interlocutory.

Having come to this conclusion, finding that this Court for want of the statutory leave has no jurisdiction, and following the decisions already given in this Court upon a similar point, in *re 251 Bars of Silver & The Sea Insurance Co. et al* v. *The Canadian Salvage Association* (1); and *Johnson* v. *Adam B. Mackay* (2), I hereby dismiss the present appeal with costs, without expressing any opinion one way or the other upon the questions involved in the present controversy.

Judgment accordingly.

(1) [1915] 15 Ex. C. R. 367. (2) [1917] 17 Ex. C. R. 155.

BETWEEN

1922

HIS MAJESTY THE KING.....PLAINTIFF; May 1.

VS.

J. DAVID PERREAULT.....DEFENDANT.

Exchequer Court—Jurisdiction—Wreck Commissioner's Court—Canada Shipping Act (R.S.C. 1906, c. 113)—Appeal—Crown, Right to choose its court.

1. The Crown by information sought to recover from a pilot the amount of a fine and costs, which he was condemned to pay by the judgment or decision of the Commissioner's Court created under the provisions of the Canada Shipping Act (R.S.C. 1906, c. 113, secs. 781 to 809 and amendments) relating to shipping casualties, etc.

Held: That the Exchequer Court had no jurisdiction by way of appeal from such decision.

2. Section 806A of said Act (as enacted by 7-8 Ed. VII, c. 65) provides that there shall be no appeal from the decision of the said Commissioner's Court, except to the Minister of Marine and Fisheries; and that the judgment of the Court cannot be set aside for want of form, etc., nor removed to any Court by certiorari or otherwise.

Held: That the re-opening of the case for the purpose of annulling or vacating the judgment aforesaid by means of collateral attack would be in direct violation of the statute.

3. That the Crown, having obtained the judgment of a statutory Court, was free to choose its Court to effectuate its rights thereunder, and the Exchequer Court of Canada is seized of jurisdiction for such purpose, both under section 31 of The Exchequer Court Act, and The Canada Shipping Act.

INFORMATION exhibited by attorney-general of Canada seeking to recover from defendant, a pilot, a sum for which he had been condemned by the Court of Investigation of Shipping Casualties, under the Canada Shipping Act.

April 11th, 1922.

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Reasons for Judgment.

Audette J.

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

J. C. H. Dusseault K.C. for plaintiff.

Charles E. Gaudet K.C. for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now this 1st May, 1922 delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover, from the defendant, the sum of $337 being the amount of the finding or decision of the Court of Investigation created under sec. 781 et seq. of The Canada Shipping Act, ch. 113, R.S.C. 1906, as amended by 7-8 Ed. VII, ch. 65.

This amount claimed is made up as follows, and is to cover the Expenses of investigation, comprising the travelling expenses of the Commissioner and his secretary from Ottawa to Montreal, and the fees of the assessors..... $ 160.00

"Fine for breach of regulations..... 40.00

200.00

"Cost of French evidence..... 137 00

$ 337.00

The only appeal from the judgment of the Court of Investigation is to the Minister as provided by secs. 802 and following, as amended by the Act of 1908.

The Exchequer Court has no jurisdiction to sit on appeal from the decision at first instance or from the decision of the Minister, and cannot hear an attempt to impeach such decision even upon grounds going to

its legality or regularity. The re-opening of the case would be in direct violation of the statute and the doctrine of *res judicata* would be despoiled of its effect. What the defendant seeks to do here is to have the judgment annulled by means of a collateral attack.

"A 'collateral attack' on a judgment is, in its general sense, any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree. The fact that the parties are the same, and that the defendants seek to attack the decree by allegations in their answer, cannot change the rule, or make the attack any the less a collateral one. It is well settled that judgments of a court of competent jurisdiction are not subject to collateral attack, unless they are void, and by "void" is meant that they are an absolute nullity." Words and Phrases, 2nd Series, pp. 753, 754, citing *People* v. *McKelvey* (1); *Cochrane* v. *Parker* (2).

By section 806A it is provided as follows:—

"806A. There shall be no appeal from any decision of a court holding any formal investigation under this Act, except to the Minister for a rehearing under the provisions of section 806.

"2. No proceeding or judgment of a court in or upon any formal investigation shall be quashed or set aside for any want of form, nor shall any such proceeding or judgment be removed by certiorari or otherwise into any court; and no writ of prohibition shall issue to any court constituted under this Act in respect of any proceeding or judgment in or upon any formal investigation, nor shall such proceeding or judgment be subject to any review except by the Minister as aforesaid."

(1) 74 Pac. Rep. 533, 534, 19 Colo. App. 131.

(2) 54 Pac. Rep. 1027, 12 Colo. App. 169.

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These provisions reinforce the well-known maxim *omnia presumuntur rite et solemniter esse acta.*

This Court has no power to go behind the judgment of the Court of Investigation.

The King, having obtained the judgment of the statutory Court, can choose his own court to effectuate his rights thereunder and the Exchequer Court is a court seized of such jurisdiction both under sec. 31 of The Exchequer Court Act and The Canada Shipping Act.

There will be judgment against the defendant for the sum of $337 and interest, as prayed.

Coming to the question of costs I think that substantial justice will be done between the parties under the circumstances if I lump the plaintiff's costs at $75.00, and I hereby order and adjudge accordingly.

Judgment accordingly.

Godin, Dussault, Dupuis & Cadotte, for the plaintiff.

Charles D. Gaudet, for the defendant.

IN THE MATTER OF THE PETITION OF RIGHT OF GEORGE B. ALDERSON..... SUPPLIANT;

1922
May 18.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Evidence—Onus of proof—Animal Contagious Diseases Act and Regulations thereunder.

A. applied for and obtained, under the provisions of sec. 88¾ of the Regulations passed under the authority of the Animal Contagious Diseases Act, a license to feed to his hogs garbage obtained from outside, which license contained the following: "In consideration of the granting of a license to me I hereby agree . . . . (4) to forfeit all claim to compensation, in case it is necessary to destroy any of my hogs, as a result of hog cholera unless it can be shown that the infection came from some other source than garbage feeding."

Held: That the onus of proving that the cholera in question came from some other source than the garbage feeding was upon the suppliant.

PETITION OF RIGHT seeking to recover $7,482.00, value of a number of hogs slaughtered by officers of the Department of Agriculture, under the Animal Contagious Diseases Act.

May 3rd and 4th, 1922.

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

I. F. Hellmuth, K.C., and *J. G. Gibson, K.C.*, for suppliant.

MacGregor Young, K.C., for respondent.

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ALDERSON
v.
THE KING.

Reasons for Judgment.

Audette J.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 18th May, 1922) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $7,482.00 representing, as alleged, the value of 212 hogs slaughtered, without justification, as suffering from hog cholera, by officers of the Department of Agriculture of the Dominion of Canada, under the provisions of the Animal Contagious Diseases Act.

The respondent, by the statement in defence, avers, among other things, that the hogs were rightfully slaughtered in accordance with the Act and that by the terms of his license to feed garbage the suppliant forfeited all claim to compensation.

The evidence adduced on behalf of the suppliant and the respondent as to whether or not the hogs in question were affected by cholera is absolutely conflicting and directly opposed the one to the other. All of the suppliant's evidence shows that the hogs were in perfect health and all of the respondent's evidence shows that some of them were actually affected or had been in contact with or in close proximity to hogs affected by hog cholera.

In weighing contradictory evidence, one must add to or take from such evidence according to the surrounding circumstances, probabilities and improbabilities of the case.

According to the suppliant's evidence the hogs were in perfect health, were taking their food and showed no sign of illness or disease at the time of their destruction.

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Reasons for Judgment.

Audette J.

According to the respondent's evidence, four duly qualified and graduated veterinary doctors of very large experience and well versed in the diagnosis of hog cholera found the suppliant's piggery infected with the disease.

Is it possible to reconcile this conflicting evidence?

While I do not charge dishonesty in the suppliant's evidence, I cannot overlook the fact that it is the evidence of interested parties—that is the evidence of the owners of the pigs, his son, the manager of the piggery, and the two employees and that the evidence adduced on behalf of the Crown is by parties personally disinterested.

The failure to detect the symptoms of cholera on the part of the suppliant, may have been the result of want of observation and more especially the want of knowledge possessed by men skilled in the art of diagnosing a disease, or of the ability to find even the apparent and exterior indicia of the same, by ante-mortem examination, which in this case was afterwards confirmed by post-mortem observation.

On the morning of the 19th April, 1920, while in course of an inspection with Dr. Tennent, lay-inspector Baker noticed and called Alderson's (jr.) attention to a sickly pig in pen No. 12, which Alderson in his testimony described as a sickly pig, not smart, a cull. The temperature of the pig was then taken and it showed 105 3-5.

On the afternoon of the same day Dr. Hall—while Doctor Richards, Monaghan and Tennent were present—made a post-mortem examination of that pig which revealed the clear evidence of hog cholera.

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On arriving at the piggery, Dr. Hall was shewn a hog—a shoat—which he found down and unable to rise, It showed discoloration of a portion of the hip up to the abdomen, snuffling of the nose, general prostration,—all of these ante mortem clinical symptoms indicating hog cholera.

Dr. Hall added that there was infection distributed all through the pens and that the hogs were showing clinical manifestation of the disease.

Dr. Hall in both his ante-mortem and post-mortem examinations is confirmed by the three other doctors. In face of such evidence I feel I must accept the finding of the men of the art in preference to the evidence of the suppliant.

Under the circumstances 212 of the hogs were ordered to be slaughtered.

Under the provisions of Regulation No. 6, made under the authority of secs. 28, 29, 30 et seq. of the Act, it is provided that: "6. Hogs affected with hog cholera or swine plague, or which have been in contact with or in close proximity to hogs affected with hog cholera or swine plague, shall . . . be forthwith slaughtered."

I therefore find that the hogs in question were rightly slaughtered according to law and the killing of the same was duly justifiable.

This suppliant wishing to feed garbage to his hogs, under the provisions of sec. $88\frac{3}{4}$ of the Regulations, made application for a license to do so as is shewn by exhibit No. 2 and obtained the license which is filed as exhibit No. 1. This application contains the following condition:

"In consideration of the granting of a license to me, I hereby agree (1) to maintain my hogs in a clean, sanitary condition; (2) to sell no hogs except for

immediate slaughter; (3) to notify the veterinary inspector if sickness appears among my hogs, and (4) to forfeit all claim to compensation in case it is necessary to destroy any of my hogs, as a result of hog cholera unless it can be shown that the infection came from some other source than garbage feeding."

There is not a tittle of evidence on the record — one way or the other—to show whether or not the infection in question in this case came from some other source than garbage feeding. The onus was upon the suppliant and he has not discharged it.

Therefore, it is with regret I have come to the conclusion that the suppliant is not entitled to any compensation for the hogs so slaughtered. The Court has no other course to follow than the one dictated by law—if any benevolence is to be shewn the suppliant, it is for the officers of the Crown to consider and apply it.

In the view I take of the case it becomes unnecessary or useless to advert to the question of salvage and other minor questions raised at trial.

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

Judgment accordingly.

Gibson & Gibson, solicitors for suppliant.

McGregor Young, solicitor for respondent.

1922
May 18.

BETWEEN

JOSEPH ALPHONSE LEMAY.....CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Requisition—Rental value of tug—War Measures Act, 1914—*Costs—Evidence viewed with suspicion*

L's. steam tug (gross tonnage 47·58 and registered tonnage 17·82) was, on the 2nd November, 1918, requisitioned by the Crown for war purposes and remained under requisition for 15 days, when the period of requisition was terminated by the close of the war.

Held: That, in view of the short period for which the tug was held, the sum of $30.00 *per diem*, was a fair and reasonable compensation or rental for such a tug.

2. Where the evidence at the trial had been increased in volume by testimony of the claimant and his son, which the court viewed with suspicion and declined to accept as contrary to the written record, the court, while allowing the claimant costs, directed that one-fourth of the bill when taxed should be deducted and borne by the claimant himself.

REFERENCE by the Crown under the provisions of the War Measures Act, 1914, of a claim of suppliant for compensation for the use of his tug requisitioned by the Crown.

May 10th, 1922.

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

The Hon. A. Galipeault, K.C. for claimant.

Wm. LaRue, for respondent.

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Audette J.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 18th May, 1922) delivered judgment.

This is a reference made by the Crown, under the provisions of sec. 7 of "The War Measures Act, 1914, (or otherwise existing in that behalf)", of the claim of Joseph Alphonse Lemay for compensation for the use of his tug *Sir Lomer* (gross tonnage 47·58 and registered tonnage 17·82) during the war, rexuisition by the Canadian Government.

The claimant, as set forth in the pleadings, seeks to recover the sum of $1,653.00.

The Crown, by the statement in defence, admits liability, for the tug so requisited, up to the sum of $754.25.

Therefore, the question in controversy between the parties, is that of a *quantum meruit.*

Negotiations had been started by correspondence on behalf of the Crown, at the time the tug was requisitioned, for fixing its rental value; but the parties never came together, they were never *ad idem* upon this point and the compensation must now be ascertained upon the basis of a *quantum meruit* and I will deal seriatim with each item of the claim.

1°. (Par. 8 of claim)—This is an item of $250, which the respondent by par. 5 denies, but in respect of which it offers $10.00 by par. 11. This amount is claimed in respect of changes made in the tug, such as the removal of the deck, etc., while she was in the Crown's possession, with the object of removing the engines, boilers, etc., therefrom to ship the tug on board a transport to

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England. The war having come to an end in November, 1918, the officers of the Crown placed back in the tug her deck and beams supporting the same, leaving the deck in a state of leakage and in such a weak state that some works became necessary to place the tug in her former state and condition.

For this claim I will allow, notwithstanding the exaggerated and unsatisfactory evidence to the contrary, the sum of $ 150.00

2°. (Par. 9)—The second item for 365 00
is admitted in its entirety, by the Crown.

3°. (Par. 10)—This is an item for the daily rental of the tug, alleging further that claimant has been deprived of her services for the balance of the season, notwithstanding that the tug was idle when requisitioned.

I may say, as a prelude, the season was practically closed when the tug was returned to her owner and no claim could, in any case, be entertained in that respect.

Under the evidence and the allegation in the statement of defence, I find the tug remained under requisition for 15 days and I hereby fix as a fair and reasonable *per diem* compensation for such a short period the sum of $30 daily 450.00

The Crown is offering $300 for this item, or $20 a day.

4°. Coming to the claim set forth in pars. 11 & 12 of the statement of claim, I find that the respondent tendered the tug

at Portneuf, on the last day of requisition and that the claimant refused her there and asked the Crown to deliver her at Quebec and the Crown did so in compliance with such request, the vessel having been originally requisitioned from Quebec. The claimant is thereby estopped from setting up any claim for expenses incurred in afterwards taking the vessel from Quebec to Portneuf. This item also includes the expenses the claimant yearly and usually incurred in hauling his vessel at Portneuf every season in her wintering quarters.

Nothing will be allowed in respect of this claim. Nil.

4°. (Par. 13)—This is an item of $100 for repainting the tug, when returned she being painted in a dark grey, as customary under Admiralty Rule. The respondent is offering $50 for this item and one of its own witnesses named a figure above $80.00. I will allow 85.00

5°. (Par. 14)—This item covers certain minor equipment of the tug which were missing when returned, namely: a hawser, valued at $80; two small axes, $1.50; one large axe $4.00; one large wrench $2.50 and one small one $1.50; kitchen utensils $10.00. One wrench was returned.

The claimant Lemay testified there was at the time of delivery a hawser on board the tug of 350 to 400 feet, by 2 inches diameter, and his son testified that this hawser would be of 200 to 300 feet.

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Both witnesses are testifying under great misapprehension—to say the least—since under exhibit No. 4 filed on behalf of the claimant himself, which is a survey or inventory made at the time the Crown took possession and which is signed by the claimant himself and Captain Koenig, on his behalf and Major Oliver on behalf of the Crown—the only hawser on board the tug at the time was one of 10 fathoms. I will allow 30 00

The Crown offers $29.25 in respect of this item.

I did not, by any means, find the demeanour of either the claimant or his son satisfactory when in the witness-box at trial; and their testimony respecting the hawser has considerably shaken my faith in the balance of their evidence, especially in connection with the repairs to the tug. True, another witness, one Gignac, spoke as to the valuation of such repairs, but he had not seen the tug at the time the government returned her, although he casually saw her this spring. However such repairs usually run into heavy expense. It is very difficult to arrive at a satisfactory conclusion upon such evidence.

6°. (Par. 15)—This item covers an expenditure which became due under the terms of the requisition and which the claimant, but for the requisition, would not have incurred. The full amount is allowed 20 00

$ 1,100.00

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Therefore, there will be judgment declaring that the claimant is entitled to recover from the respondent the sum of $1,100.00 with interest thereon from the date of the Reference, namely, 31st October, 1919.

Coming to the question of costs it is quite obvious that the Crown should not in justice be mulcted for the payment of the cost of that part of the evidence in which the claimant and his son swore recklessly and inconsistently with the facts in respect of the hawser. Therefore, whilst I will allow costs in favour of the claimant I will qualify such allowance by ordering that when the total of the bill of costs is ascertained one-fourth thereof should be deducted and borne in any event by the claimant himself.

Judgment accordingly.

Galipeault, St. Laurent, Gagné & Devlin, solicitors for suppliant.

Win. Larue, solicitor for respondent.

1922
May 31.

IN THE MATTER OF GASTON, WILLIAMS AND WIGMORE OF CANADA, LIMITED; AND GASTON, WILLIAMS AND WIGMORE STEAMSHIP CORPORATION.... } CLAIMANTS;

AND

HIS MAJESTY THE KING, REPRESENTED IN THAT BEHALF BY THE GOVERNMENT OF CANADA..... } RESPONDENT.

Re. Requisition of Ship *Lord Dufferin.*

Requisition of ships—War Measures Act, 1914—Order in Council, 24th November, 1916—Powers of Minister of Marine and Fisheries thereunder—Compensation—"Off hire."

1. That in virtue of the Order in Council dated 24th November, 1916. and passed under the War Measures Act, 1914, the Dominion Government was empowered to requisition ships in its own name and as principal and not as agent for the British Government; and that the Minister of Marine and Fisheries, acting thereunder, had no power to vary the same by adding thereto or derogating therefrom.
2. That inasmuch as conditions prevailing in Canada are more alike those in the United States than in Britain, the rate of compensation allowed in the United States affords a safer comparative guide than the English rate, in establishing a just and reasonable rate for Canada.
3. That for the same reasons the rule obtaining in the United States with respect to "*off hire*" should also apply to vessels requisitioned by Canada.
4. Where a ship is "*off hire*" due to a collision occurring in the war zone, when acting under instructions of the Admiralty and according to signals given by the destroyers escorting her, she is entitled to the full rate of compensation; credit however being given to the Crown for any expenses saved the owners during this period.
5. Where on the other hand the accident takes place out of the war zone, etc., the owners should only receive half the "*off hire*" rate.

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REFERENCE by the Minister of Justice of Canada under the provisions of the War Measures Act, 1914, of a claim for compensation in respect of the ship *Lord Dufferin* requisitioned during the war.

March 6th, 7th, 8th and 9th, 1922.

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

A. C. McMaster, K.C. and *N. A. Belcourt, K.C.* for claimants.

F. E. Meredith, K.C. and *A. R. Holden, K.C.* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 31st day of May, 1922) delivered judgment.

This is a Reference, made to this Court by the Minister of Justice for Canada, under the provisions of section 7 of the War Measures Act, 1914 (5 Geo. V., c. 2) of a claim for compensation in respect of the ship *Lord Dufferin* requisitioned, during the war, in the manner hereinafter mentioned.

The *Lord Dufferin* is a British cargo steamship, registered on the Canadian Register of Shipping, in the port of Montreal, P.Q., of 4,664 tons gross register and gross deadweight capacity of 7,250.

On the 24th November, 1916, the Government of Canada passed an order in council, under the special powers given the Governor in Council, under the War Measures Act, 1914, whereby it was, among other things, provided that "any British ship registered in the Dominion of Canada" may be requisitioned by and on behalf of His Majesty, for the carriage of

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foodstuffs and of any article of commerce—and authorizing the Minister of Marine and Fisheries to give effect to these regulations by causing notices of requisition to be served on the owner of any such ship, and furthermore vesting in him the power to give instructions and directions accordingly.

The power and authority to so requisition any British ship registered in Canada was by this order in council vested in the Minister of Marine and Fisheries, to be exercised entirely in conformity with and within the scope of the order in council, and such power and authority are to be thereby measured and ascertained. Any such specific power vested in the Minister of Marine and Fisheries by the order in council does not carry with it the authority to vary its terms. The order in council does not provide that the Canadian Government shall requisition vessels as agents for the British Government and there was no such authority given therefor to the Minister by the order in council, *Cf. The King* v. *the Vancouver Lumber Company* (1); and *The British American Fish Corporation, Limited* v. *the King* (2). Therefore to ascertain what power and authority is so vested in the Minister for the requisitioning of ships, reference must be had to the order in council which is the only source and foundation of such power and authority.

Freed from all unnecessary details it may be said that the *Lord Dufferin* was, under the authority of this order in council, requisitioned, that the owner delivered possession of the same, at Durban, Africa, on the 14th March, 1917, and that the vessel was released on the 25th November, 1918. The ship remained under requisition 621 days and a fraction, or 622 days.

(1) [1914] 17 Ex.C.R. 329; 41 D.L.R. 617; 50 D.L.R. 6.

(2) [1918] 18 Ex.C.R. 230; 59 S.C.R. 651.

By the notice of requisition it is, *inter alia*, provided that the British Admiralty is thereby "authorized to take over immediately the possession and control of the said ship for the purposes aforesaid"—that is, as provided by the order in council and the notice for the carriage of foodstuffs and other articles of commerce necessary to be transported for the purposes of the present war.

Now, it has been contended, on behalf of the Crown, resting such contention on both the order in council and the notice of requisition, that when the Minister was acting thereunder, he was acting on behalf of the Imperial Government as agent, and therefore the Canadian Government does not admit any liability, although it will be recouped of any condemnation by the British Government.

I am unable, on reading the order in council of the 24th November, 1916, to accede to such contention. The Minister has no power to vary the order in council, either by adding thereto or derogating therefrom, and there is nothing in the order in council suggesting that the Canadian Government, in thus acting under the provisions of the Canada War Measures Act, 1914, was acting as agent for the Imperial Government. The vessel was on both occasions requisitioned and released by and on behalf of the Canadian Government, through Canadian officials, and furthermore, kept under control by them, as shewn by the several cables and letters filed of record.

Moreover, that fact is fully and amply supported by other evidence and documents filed of record. The Deputy Minister of Marine and Fisheries for Canada—through whom practically all requisitions were effected—testified upon this point as follows: at page 2 of his examination on discovery, which was partly read at trial, viz.:

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"Q. Then, I believe, was objection taken by the Government of the Dominion of Canada to the requisitioning of steamers on the Canadian registry by the British Government? A. The right in general was asserted by the Dominion Government that the power to requisition vessels of Canadian registry rested solely in the Canadian Government."

Then at p. 5 thereof:

"Q. And the ship was taken for the purposes of the British Government? A. No.

"Q. The space was taken. A. No.

"Q. How do you put it? A. She was taken for the purposes of His Majesty by the Canadian Government.

"Q. That is the way you put it? A. Yes.

"Q. Well, then, she was for that purpose delivered by the Canadian Government to the British Government? A. To the British Government.

Then at page 8:

"Q. Did the Canadian Government requisition any steamers for its own purposes? A. They were all requisitioned for our own purposes. We regarded the purposes ours just as much.

"Q. Did you requisition any steamers that you did not turn over to the British Admiralty? A. No, I do not think so."

Affirming and recognizing this Canadian view, we have, as exhibit No. 34, the despatch of Sir Walter Long, the British Colonial Secretary, to the Governor General, bearing date the 19th May, 1917, stating that "*requisitioning authority should be regarded as vested in and only to be exercised on behalf of the Government of that part of the Empire in which vessel's* port of registry situated . . . *In last resort wishes of Government* in whose country vessel registered will prevail . . . "

Moreover, the Imperial Proclamation of the 3rd May 1914 (Statutory Rules and Orders, Vol. 1, p. 806) in respect of requisitioning of British ships only extends to British ships within the British Isles or the waters adjacent thereto and does not apply to British ships of Canadian registry.

Moreover, the rights of the Canadian Government with respect to requisitioning British vessels of Canadian registry is fully asserted and set forth in the Order in Council of the 3rd January, 1917, filed herein as exhibit No. 33.

Having said so much, it becomes unnecessary to consider whether or not under these circumstances of national emergency and in the interest of the defense of the realm, the view set up by the Crown could be supported and, furthermore, whether the Canadian Government really contracted as principal although intending to contract only as agent of the Imperial Government. Bowstead, Law of Agency, 388; *Graham* v. *Public Works* (1).

I find the action was properly instituted coming, as it does, within the ambit of sec. 7 of the War Measures Act, 1914; that this Court has jurisdiction to hear, determine and adjudicate upon the same and that the Crown, in the rights of the Canadian Government, is the party that requisitioned in its own name and behalf the vessel in question herein.

Coming to the question of the rates for compensation to be awarded for the use of a requisitioned vessel in Canada it may well be said as a prelude that the British Blue Books referred to in the Imperial "Indemnity Act, 1920," do not apply to the present case.

(1) [1901] 2 K.B. 781, at p. 790.

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A copy of these "Blue Books" has been filed as exhibit No. 26, and at p. 7 thereof, dealing with the requisition of "Cargo Liners," such as the *Lord Dufferin* the following clause is therein enacted, viz.:—

"6. The rates of hire set forth in the following schedule are not to apply to vessels taken up in the Dominion overseas where the circumstances will probably call for *higher rates.*"

It is in evidence that in normal days owing to British competition, there has been great difficulty for American owners to make profit on their ships. The operating of a British ship being in almost all respects much cheaper (p. 205).

With regard to the relative conditions governing the operating cost of freighters such as the *Lord Dufferin,* there is evidence before the Court to show that the expense of running such a ship is greater in the United States than in Canada (p. 177) owing to the larger crews carried, the greater amount of food necessary, and the higher wages paid in the former country.

Witness Grey reckoned it to be one-third more in the United States than in Canada, while witness Robinson contends the difference runs from $\frac{1}{3}$ to $\frac{1}{2}$ more in Canada, and other witnesses state that the cost in Canada is almost $\frac{3}{4}$ to $\frac{2}{3}$ of the American. However, witness Austin, on behalf of the claimants, contends that the costs of operating American or Canadian vessels are exactly equal; but more than operating a British vessel. This witness further states that during the time of the requisition of the *Lord Dufferin,* their American company chartered vessels for which they paid from 35 to 55 shillings per dead weight ton. On 25th July, 1917, they chartered the *Harold,* 2,500 tons, dead weight, at 55 shillings (p. 53).

Witness Cowan, the Director of Operations of the Canada Steamship Co., testified that on the 11th January, 1917, his Company chartered the steamer *Nepawaw*, 2,100 tons dead weight, to the French Government at 43 shillings; on the 31st December, 1916, the steamer *A. E. McKinstry*, 2,905 tons, dead weight, at 43 shillings, as well as the *Winona*, 2,440 tons, deadweight, and the steamer *Acadian*, 3,100 tons dead weight, at same price.

Then witness Robinson, heard on behalf of the Crown, stated that, in the middle of 1919, the rate obtainable for a charter of about a year, depending upon the class of steamers, was somewhat between $9.00 and $10.00 a ton dead weight—or between 45 to 50 shillings, assuming the pound at $4.00 and the shilling at 20 cents.

The English rate fixed by the British blue books on gross weight under special British conditions is entirely inadequate for Canada as determined by the blue books themselves. But conditions prevailing in Canada are more like those in the United States and it is, therefore, obvious that the United States rate affords a safer comparative guide than the English rate in establishing a just and reasonable rate for Canada. The British rate, as stated under the signature of the Deputy Minister of Marine, in exhibit No. 35, is altogether inadequate to enable vessel owners to even meet operating expenses and he further adds:

"The conditions in Canada, so far as the operation is concerned, are somewhat similar to those which obtain in the United States. The rate of wages, etc., are practically similar. The United States

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Government quite recently decided upon a policy to requisition steamers, and they have fixed rates to govern as from the 15th instant. These rates are as follows:—

"Over 10,000 tons deadweight, $5.75 per ton per month.

"8,001 to 10,000 tons deadweight, $6.00 per ton per month.

"6,001 to 8,000 tons deadweight, $6.25 per ton per month.

"4,001 to 6,000 tons deadweight, $6.50 per ton per month.

"3,001 to 4,000 tons deadweight, $6.75 per ton per month.

"2,500 to 3,000 tons deadweight, $7.00 per ton per month."

"It will be seen at a glance that the rate fixed by the United States Government are substantially in excess of the rates paid by His Majesty's Government. While vessels under requisition in the service of His Majesty's Government are being paid at blue book rates, neutral vessels doing similar service for His Majesty's Government are receiving compensation ranging from 40s. to 47s."

Under the American rates fixed on 27th September, 1917, with retroactive effect, the *Lord Dufferin* would call for a price of $6.25 per ton deadweight with more advantageous terms and conditions with respect to the insurance and off hire.

Prior to the war period the usual way of hiring and chartering vessels, generally throughout the world, including Canada, United States and England, was on tonnage deadweight and not gross. The British blue books introduced gross tonnage and this change only applied to them and the United States retained the usual basis of deadweight.

As a general proposition it may be said that where there is no agreement to the contrary, a requisitioned vessel is assumed to be always available for service and the moment she ceases to be so, she becomes off hire and not entitled to remuneration.

However, since the rules obtaining in England are not to prevail in Canada, under the provisions of the blue books, and that the conditions in Canada are somewhat similar to those in the United States, the rules obtaining in the United States with respect to off hire should also apply to Canadian vessels under the present circumstances, and clause 22 of the United States Requisition Charter will be followed.

The *Lord Dufferin* was off hire 13 days between 14th September and 27th September, 1917; 42 days between 3rd February and 17th March, 1918; 21 days between 22nd March and 12th April, 1918; 117 days between 29th July, 1918, and 25th November, 1918. In all one hundred and ninety-three days.

The off hire of the 13, 42 and 21 days above mentioned making a total of 76 days, was the result of the accident which happened when the *Lord Dufferin* loaded with aeroplanes and shells of every kind, collided with the *Largo Law* on sailing from Malta and laying her course under Admiralty instructions, according to signals given by the destroyers, escorting her. See *British and Foreign Steamship Co.* v. *the King* (1); *Atlantic Transport Co., Ltd.*, v. *Director of Transports* (2); *Cf. Adelaide Steamship Co.* v. *the King* (3).

(1) [1917] 2 K.B. 769; [1918] 2 K.B. 879. (2) [1921] 38 T.L.R. 160.
(3) [1922] 38 T.L.R. 362.

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I find that with respect to these 76 days there should be no deduction, the collision having occurred in the war zone, acting under the instructions of a war vessel and in direct guidance of military or naval authority. However, a certain credit should be given to the Crown for any expenses saved to the owners during these 76 days. There is no tangible evidence of such savings and this matter will be taken into consideration in arriving at the rate of compensation.

Then with respect to the off hire during 117 days resulting from the collision with the *Ciudad de Buenos Aires* I find, again following the American requisition charter, that the accident took place out of the war zone etc., and the claimants are entitled to recover only one half of the hire. *Britain Steamship Co., Ltd.*, v. *The King* (1).

The genius of the English common law is that no property should be taken from the subject by the Sovereign power without proper compensation. *DeKeyser's Royal Hotel, Limited*, v. *the King* (2); *Newcastle Breweries, Limited*, v. *the King* (3); and see per Lord Atkinson in *Central Control Board* v. *Cannon Brewery Co., Ltd.* (4). And further, as said in *The Aquitania* (5), the aim of the Court is to work out principles which make for justice and seek to avoid the turning away of a bona fide suitor without remedy.

Taking all the circumstances of the case into consideration, charging the claimants with all premium of insurance they saw fit to place upon the vessel, and

(1) [1919] 1 K.B. 575.
(2) [1919] 2 Ch. D. 197, 226.
(3) [1920] 1 K.B. 854.
(4) [1919] A.C. 744 at 752.
(5) [1920] 270 Fed. R. 240.

allowing a certain amount by way of set off resulting from the obvious and necessary saving of some expenses during the repair period—approaching this last consideration as a jury would—I have come to the conclusion to allow as a fair, just and reasonable compensation to be paid the claimant the sum of $5.75 per deadweight ton, per calendar month of thirty days. Scrutton on Charterparties, 10th ed. 384, I reckon the number of days of requisition at 622, and allow 505 days at the rate of $5.75 per ton dead weight per month and one hundred and seventeen days (117) at half rate, namely, at $2.87½ per ton dead weight.

The compensation is to be ascertained at prevailing rates at the date of the taking and is to be reckoned and paid in Canadian currency. *Atlantic Shipping, etc.*, v. *Dreyfus* (1).

The statement of the amounts already paid on account, by the Crown, under British rate, and accepted under protest, as well as the evidence in respect of such payments are both unsatisfactory. This statement is somewhat clouded from the fact that the claimants have kept their books of account in United States currency, which must be transposed into Canadian currency. Moreover, counsel at bar on behalf of the Crown, was not in a position to satisfactorily establish these payments without communicating with the British Government.

Under the circumstances, failing the parties, through their counsel, to agree as to such payment made on account, and to adjust the same, leave is hereby given them to apply to the Court, upon notice for further direction in respect of the same.

(1) [1922] 38 T. L. R. 556.

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The compensation monies are made payable to the owners of the vessel excluding the charterers; the owners, through their counsel at bar, having undertaken to adjust the matter out of court as between themselves, regarding it, so to speak, as a domestic and internal business and as set forth in the charter between themselves.

Therefore, there will be judgment adjudging and declaring that the claimants, Gaston, Williams and Wigmore of Canada, Limited, the owners of the *Lord Dufferin*, are entitled to be paid by the Crown, as total compensation for the hire of their requisitioned vessel at the rate of $5.75 per ton dead weight for 505 days, and at the rate of $2,87½ per ton dead weight for 117 days, after deducting the several and large amounts already paid on account by the Crown. The whole with costs against the respondent.

Judgment accordingly.

Solicitor for claimants: *Edmund Bristol. K.C.*

Solicitor for respondent: *F. E. Meredith. K.C.*

IN THE MATTER OF THE PETITION OF LEHN & FINK INC., OF THE CITY OF NEW YORK, IN THE STATE OF NEW YORK, ONE OF THE UNITED STATES OF AMERICA, MANUFACTURERS,

PETITIONER,

1922
July 12.

AND

IN THE MATTER OF A CERTAIN SPECIFIC TRADE MARK TO BE USED IN CONNECTION WITH THE MANUFACTURE AND SALE OF TOOTH PASTE.

AND

P. BEIERSDORF & CO., G.m.b.H.

OBJECTING PARTY.

Trade-Mark—Assignment—License—Sale by American Alien Property Custodian—Effect of sale on Canadian trade-mark.

Petitioners claimed the ownership of the trade-mark "Pebeco" under certain agreements with the German firm P. Beiersdorf & Co. (the predecessor in title of the Objecting Party) made, respectively, in July and September 1909 and February, 1919 and having relation to the business of selling tooth-paste bearing the name or mark of "Pebeco" in the United States and Canada. Subsequently to the execution of the said first-mentioned agreements, namely, in 1909 the general trade-mark "Pebeco" was registered in Canada by the said P. Beiersdorf & Co. In 1911 P. Beiersdorf & Co. obtained a specific trade-mark in Canada for the word "Pebeco" as applied to tooth-paste. In their applications for both the general and specific marks P. Beiersdorf & Co. swore that the trade-mark "Pebeco" belonged to them. After the United States had entered into the war with Germany in 1917, the Alien Property Custodian in the United States, under the provisions of the Act of Congress known as the "Trading with the Enemy Act", seized the American trade-mark and sold it to the Petitioners in the United States, together with the rights of P. Beiersdorf & Co. under the said agreements.

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LEHN & FINK v. BEIERSDORF.

Petitioners sought by their action to expunge from the Register of Trade-Marks in Canada the word "Pebeco" as registered in Canada in the name of P. B. & Co. and to have the same registered in their own name as a Specific Trade-Mark to be used in connection with the manufacture and sale of tooth-paste.

Held, that inasmuch as the said agreements amounted to nothing more than licenses to sell the goods bearing the trade-mark of P. B. & Co. in the United States and Canada that the petition should be dismissed.

2. That the American Alien Property Custodian could not sell or dispose of the property of German and Canadian citizens in Canada or any rights subsisting between them there. All he could sell or dispose of was the American trade-mark and property of German and American citizens in the United States or any rights subsisting between such citizens in that country.

Rey v Lecouturier, 27 R.P.C. 276 followed.

PETITION to have the trade-mark PEBECO expunged from the register of trade-marks of the Dominion of Canada, as registered in the name of the objecting party, and to have the same registered in their own name.

May 29th, 1922.

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

The Hon. Wallace Nesbitt, K.C. and A. W. Langmuir, for petitioner.

Russell S. Smart for the objecting party.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 12th July, 1922), delivered judgment.

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Reasons for Judgment.

AUDETTE J.

The Petitioners seek, by the present action, to expunge, from the Register of Trade-Mark of the Dominion of Canada, the word "Pebeco", as registered in the name of P. Beiersdorf & Company, and to have the same registered in their own name as a Specific Trade-Mark, to be used in connection with the manufacture and sale of tooth paste.

For the proper understanding of the controversy between the parties, it becomes necessary to set out here in full the admissions made by both parties at the opening of the case. These admissions read as follows, namely:

"The following admissions are made by the parties solely for the purposes of the trial of this action and without prejudice to the right of either party to contradict the same in any other action or proceeding whatsoever:

"1. The allegations contained in paragraphs 1 and 2 of the Petition.

"2. The allegations contained in paragraphs 1, 2 and 3 of the Statement of Objection and Counterclaim filed by P. Beiersdorf & Co., G.m.b.H.

"3. That the Trade-Mark 'Pebeco' in question in this action was one registered in Canada in the year 1907, as a Trade-Mark in the name of P. Beiersdorf & Co., the predecessor in title of the Objecting Party, and was used in Canada by P. Beiersdorf & Co. in connection with the sale of Tooth Paste prior to the dates of the execution of the contracts of 1909 hereinafter referred to.

"4. That in the year 1903 an agreement was entered into between the Petitioner's predecessors, Messrs. Lehn & Fink, Inc., and P. Beiersdorf & Co., and such contract may be proved by the production of a copy thereof as agreed upon by the parties.

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"5. That Messrs. Lehn & Fink, Inc. and P. Beiersdorf & Co., forthwith entered upon performance of and carried out the terms of the said agreement of 1903, and continued in performance of the terms thereof until such time as said agreement of 1903 was rendered inoperative and supplanted by the agreements of 1909 hereinafter referred to.

"6. That in the year 1909 further contracts were entered into between the Petitioner's predecessors, Messrs Lehn & Fink, Inc. and P. Beiersdorf & Co. in regard to the manufacture and sale of 'Pebeco' Tooth Paste and the use of the Trade-Mark 'Pebeco' as follows, and such contracts may be proved by production of copies thereof as agreed upon between the parties:

(*a*) Contract executed by Beiersdorf at Hamburg, June 28th, 1909, and by Lehn & Fink, Inc. in New York, July 12th, 1909.

(*b*) Contract executed by Beiersdorf in Hamburg, September 9th, 1909, and by Lehn & Fink, in New York, October 1st, 1909.

"7. That following execution of the said contract of 1909, performance of the same was thereafter carried out by the parties thereto without breach. In the year 1917, the United States of America entered the Great War and, consequently, enacted the Trading with the Enemy Act, and Lehn & Fink, Inc., under the provisions of that Act, applied for and received a license from the Federal Trade Commission of the United States of America and used the said trade-mark 'Pebeco'. Subsequently to such license, the Alien Property Custodian purported to seize certain property and transfer the same as set out in paragraph 8 hereof."

"8. The Alien Property Custodian of the United States purported to seize and transfer certain property of P. Beiersdorf & Co. as set out in an assignment from the said Alien Property Custodian to Lehn & Fink, Inc., the Petitioners, dated the 13th day of May, 1919, and such assignment may be proved by the production of the instruments purported to be signed by the said Alien Property Custodian, without proof of seizure, it being open to the Objecting Party to contend that such seizure and assignment did not in fact or law cover the Canadian Trade-Mark and business.

"9. The Petitioner paid the sum of $1,000,000 for the assignment from the Alien Property Custodian referred to in paragraph 8 hereto, which said sum is held by such Alien Property Custodian or the Government of the United States of America.

"10. That a Treaty of Peace has been entered into between the United States of America and Germany, and for the text thereof both sides may refer to printed copies thereof as commonly available without any necessity for proving the same.

"11. That the Treaty of Peace between Germany and the United States referred to now forms part of the law of Hamburg.

"12. That certain labels to be agreed upon between the parties, including labels and literature already filed in Court, are labels used by the Petitioner in connection with the marketing the 'Pebeco' Tooth Paste in Canada and the United States under the terms of the said contracts of 1903 and 1909.

"13. That part of the 'Pebeco' Tooth Paste supplied to the Canadian market after the year 1909 was made by P. Beiersdorf & Co. of Hamburg, and shipped by them to Canada upon the order and request of Lehn & Fink, Inc., the Petitioner. The orders for

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such Tooth Paste being taken by Lehn & Fink, Inc., and the Tooth Paste shipped by P. Beiersdorf & Co. to the Canadian Purchasers or the sub-agents of the Petitioner, Lehn & Fink, Inc.

"14. That an armistice came into effect between Germany, Great Britain, Canada and the United States and other Powers at war with Germany on the 11th day of November, 1918.

"15. That subject to the general application of any general law or enactment or treaty, the Government of the Dominion of Canada has not at any time or in any way interfered with the respective rights as the case may be of the parties hereto in and to the Canadian Trade-Mark 'Pebeco' and the goodwill in connection therewith; nor has the Canadian Government at any time made any seizures of such Trade-Mark and goodwill.

"All of the foregoing admissions are made subject to the right of either party to object to the facts admitted being offered in evidence in this case on the ground of irrelevance.

"The parties agree that either party may with the permission of the Court make such amendments in the pleadings herein as delivered as may be necessary and agreed upon to set forth the contentions of the parties."

The petitioners' claim rests upon the contract of the 12th July, 1909, the contract with respect to the Canadian Territory of the 19th September, 1909, and the amending or "altering" contract of the 9th February, 1919, which changes the 12th July contract. All these contracts are filed as exhibit No. 3. Furthermore the petitioners also rest their claim upon the seizure made in the United States by the Alien Property Custodian and the assignment made by him to the Petitioners and which is filed as exhibit No. 4.

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I have read over the agreements contained in Exhibit No. 3 and find in them nothing but an agreement in the nature of a license. In fact it is a license whereby the German owners of the Trade-Mark "Pebeco" impose the obligation upon the American licensees to pay royalties and to comply with a number of terms and conditions for the preservation and maintenance of their estimated high grade of the goods protected by their trade-mark and in consideration thereof they correspondingly assume the obligation to extend or give the American people the right to sell in the United States and in Canada, the goods bearing the objecting party's trade-mark. Both parties have the right to terminate this agreement on the 1st January of any year by giving three months' notice. A service of such notice, however, shall not be admissible earlier than from January 1st, 1935. The Agreement further provides that should one of the parties violate one of its essential conditions, the other party may withdraw from the agreement.

The agreements in no way can be termed a sale of the Trade-Mark. There is not a single clause or enactment in the agreements whereby the ownership of either the trade-mark in the United States or in Canada is dealt with or mentioned. The ownership of these trade-marks did not change or pass under these agreements.

The only mention of Canada and the only part of these agreements dealing with Canada is limited to the few words of the agreement of the 19th September, 1909, which states that the previous agreement "between Chemische Fabrik P. Beiersdorf & Co., in Hamburg, and the firm Lehn & Fink in New York, dated the 12-22, 1909, is supplemented by the undersigned as follows :

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"The territory covered by this agreement is being extended to include Canada. All provisions in force with regard to the United States of America shall also apply to Canada."

This *habendum* and last clause contained in this short agreement means nothing more than that Lehn & Fink can sell as well in the United States as in Canada, but in no wise can it be contended that it carries with it the transfer of the ownership of the trade-mark "Pebeco" in Canada.

Paragraph 3 of the *Admissions* wrongly states "that the Trade-Mark 'Pebeco' was registered in Canada in the year 1907", as it appears by exhibits 7 and 7a that the *General* trade-mark "Pebeco" was registered in Canada on the 11th November, 1909, and the *Specific* trade-mark "Pebeco" to be applied to the sale of Tooth Paste, and which "consists of a panel upon which appears the word 'Pebeco' accompanied by the words 'Tooth Paste' and No. 650, with an ornamental border line at the right and an ornamental border line and the words 'The registered Trade-Mark Pebeco protects against imitations', at the left"—was registered in Canada on the 8th August, 1911".

It therefore appears that the agreements relied upon by the Petitioners for claiming the ownership of the Trade-Mark bear respectively the date of July, 1909, and September, 1909, whereas the word "Pebeco" was registered in Canada only subsequently to these dates, before the war, by the German firm P. Beiersdorf & Company, of Hamburg, Germany, who were the owners thereof, an indispensable condition to the right for such registration. The Specific Trade-Mark was registered even as late as 1911. On both occasions,—being after the date of these two agreements,—P. Beiersdorf & Co. swore that the trade-marks

belonged to them and it was as owners alone that they had the right to register. This idea of ownership on behalf of the Petitioners seems to have originated only recently, perhaps only since the war, following the rights they acquired in the United States under the American law which avoided the German trade-marks during the war,—a state of law which did not, however, obtain in Canada.

I therefore find that the ownership of the two Canadian Trade-Marks,—or any one of them—in no way passed under these agreements, which amount to nothing more than a license with its usual terms and conditions, the most cogent proof for this finding.

Coming now to the consideration of the sale made, in the United States, by the Alien Property Custodian acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act" approved of on 6th October, 1917, it will be seen, by reference to exhibit No. 4, that he seized the American Trade-Mark and sold the same to the Petitioners.

By the habendum clause of such sale the Alien Property Custodian sold to the Petitioners "the following property, to wit:

"That certain trade-mark registered in the United States Patent Office and identified as follows:

"Trade Mark No.	Date of Registration	Title.
61678	April 2nd, 1907.	Pebeco Tooth Paste.

"and also

"The business of the firm of P. Beiersdorf & Co. in the United States appurtenant to the said trade-mark, and all the rights, interests, and benefits created in favour of or conferred upon said enemy, the firm of P. Beiersdorf & Co., by a certain agree-

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ment dated June 28, 1909, and July 12, 1909, between said enemy and Lehn & Fink, of New York, and by any and all agreements between said enemy and Lehn & Fink, modifying said agreement: and also, all the rights created and existing in favor of or conferred upon said enemy in and to any royalty or sum or sums of money accrued or accruing under the terms of any of said agreements; and also, all claims and demands conferred upon said enemy against said Lehn & Fink, and every right, title and interest with respect thereto, etc., etc."

From the seizure and sale, it will obviously appear that no one at that time conceived the idea that the above mentioned agreements had conveyed the ownership even of the American Trade-Mark, since after seizure it was sold to the very people who now claim that such trade-marks had passed to them under such agreements. The matter is too clear. And if the American Trade-Mark did not pass under these agreements, it cannot be reasonably contended that the Canadian Trade-Marks passed thereunder.

That sale was furthermore made "subject to the rights of Lehn & Fink under the agreements or licenses." How can the Petitioners now contend that these agreements or licenses conveyed the ownership of the Trade-Mark, when they willingly paid for this American Trade-Mark a very large sum of money? Mentioning it is answering it.

I must therefore further find that in the sale made by the American Alien Property Custodian the Canadian Trade-Mark did not pass.

Indeed, in as much as within each State nothing is recognized as Law except that which the supreme authority in that State has enacted and is able to

enforce, it follows that the American Court could not *proprio vigore* cancel or dispose of the Canadian Trade-Marks.

Lord Macnaghten, in *Rey* v. *Lecouturier*—the famous *Chartreuse Case*—(1) said: "To me it seems perfectly plain that by the very nature of things a law of a foreign country, and a sale by a foreign court under that law, cannot affect property not within the reach of the foreign law, or the jurisdiction of the foreign court charged with its administration."

And in the same case (p. 280), per Lord Loreburn: "but this property—for property it is—which has come in question in this appeal is property situated in England, and must therefore be regulated and disposed of in accordance with the law of England."

The Alien Property Custodian in the United States could not sell rights existing between German and Canadian citizens. All he could sell was the American Trade-Mark and the rights conveyed to American citizens and existing in the United States under the above mentioned working agreements or licenses—which obviously admit the ownership of the trade-mark to be in Beiersdorf & Co.—as licensee under these agreements. The petitioners, as licensees, are estopped from attacking the ownership of the Trade-Marks. Trade-Marks in Canada belonging to alien enemies during the war remained in statu quo and no law was enacted depriving them of such property.

I therefore find that the Canadian Trade-Marks did not pass under the sale by the Alien Property Custodian and that the ownership thereof remains in those who first registered them in Canada.

(1) (1910) 27 R.P.C. 268 at p. 276.

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Reasons for Judgment.

Audette J.

Having said so much, I may add there were a number of incidental questions raised at bar upon which in the view I take of the case, it becomes unnecessary to pass. If they were not wholly based upon a hypothetical view of the facts of the case, they were certainly extraneous to the real issue between the parties, namely, whether the petitioners are the true owners of the Canadian marks. That is the salient fact to which the court has directed its consideration and made its finding adverse to the claim of the petitioners.

Therefore there will be judgment ordering the rectification of the Canadian Register by expunging the trade-mark Pebeco, registered on the 18th May, 1920, by Lehn & Fink, Inc., in Register No. 113, Folio 26506, and to restore and register on said Canadian Register the General Trade-Mark "Pebeco" registered on the 11th November, 1909, by P. Beiersdorf & Company, in Reg. 58, Folio 14181, and also the Specific Trade-Mark "Pebeco" to be applied to Tooth Paste, registered on the 8th August, 1911, by P. Beiersdorf & Company in Register No. 66, Folio 16135. The action is dismissed with costs to the objecting party.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT 1921

December 14.

In re:

MARTIN.....PLAINTIFF;

VS.

THE *SEA FOAM*.....DEFENDANT.

Shipping—Jurisdiction—Repairs—"Under arrest"—Sec. 13 Admiralty Court Act, 1861, c. 10.

The ship defendant was seized by the mortgagee when it was being repaired in plaintiff's yard. No proceedings of any kind had been instituted in the court when plaintiff took his present action.

Held: That the ship defendant was not "under arrest" within the meaning of sec. 13 of the Admiralty Court Act, 1861, c. 10, at the time plaintiff issued his writ herein and that the Court had no jurisdiction to entertain his action.

2. That the pursuance of a private remedy is not at all analogous to the taking of public proceedings in Court.

Action by plaintiff to recover for repairs done to the defendant ship and claiming a lien therefor.

The ship was under repairs by plaintiff when Balfour, Guthrie & Co. seized it under mortgage. It was sold by Balfour, Guthrie & Co. to one Cole. The defence claimed that the Court was without jurisdiction and that no lien attached.

December 14th, 1921.

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

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MARTIN
v.
THE
SEA FOAM.

Reasons for Judgment.

Martin, L.J.A.

Hume B. Robinson and J. A. W. O'Neil for plaintiff;

D. N. Hossie for defendant.

The facts are stated in the reasons for judgment.

MARTIN L. J. A. now (this 14th December, 1921) delivered judgment.

It is clear to me after examining the authorities cited this morning and in the light of those cited yesterday that this Court has no jurisdiction to entertain this action, because the vessel was not "under arrrest" within the meaning of sec. 13 of The Admiralty Court Act, 1861, ch. 10, at the time the writ was issued herein.

The cases of The *Northumbria* (1) and The *Normandy* (2) which Mr. Robinson has drawn to my attention are instructive, and if I must say so, the latter goes further than I am inclined to think it should have gone. It is an expansion of the principle laid down in The *Northumbria* to this extent, that sections 13 and 34 must be construed together, and so construed they show the purpose of the Legislature to have been to give jurisdiction to this Court whenever it was substantially seized of a suit against the vessel; and the learned Judge of the Admiralty Court goes on to explain his decision in The *Northumbria* by saying that:

There a caveat warrant having been issued, and the arrest of the vessel prevented, and bail having been given by the owners in pursuance of their undertaking, I held that, for the purposes of the present section, there was a constructive arrest,

(1) [1869] L.R. 3 A. & E. 24; 39, L.J. Adm. 24 & 18 W. Rep. 356.

(2) [1870] L.R. 3 A. & E. 152; 39, L. J. Adm. 48; 18 W. Rep. 903.

and he proceeds to say that he is prepared though not till "after I confess, much hesitation, to take the step further," that he did take, subject to a condition which he imposed. In The *Northumbria* case he had observed that:

> "Looking to the whole scope and tenor of the Act, this Court was intended to have jurisdiction in suits of this description, when it is in possession of the bail which represents the "Res", whether the "Res" has been released on the giving of bail after the arrest, or whether the arrest has been prevented, as in this instance, by such a caveat as has been issued in this case."

But all that has been done in the case at bar is that the vessel was seized by the mortgagee when it was being repaired in the plaintiff's yard and no proceedings of any kind have been instituted in this Court, and so I do not feel prepared to take still another step further and hold that the pursuance of a private remedy is at all analogous to the taking of public proceedings in this Court, and hence there is no jurisdiction to entertain this action in this Court and it must be dismissed.

Judgment accordingly.

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June 22.

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

B. W. B. NAVIGATION COMPANY LIMITED,
PLAINTIFFS;

AND

THE SHIP *KILTUISH* AND OWNERS.....DEFENDANTS;

AND

BARNET LIGHTERAGE COMPANY LIMITED,
PLAINTIFFS;

AND

THE SHIP *KILTUISH* AND OWNERS....DEFENDANTS.

Shipping and seamen—Lights on barges in tow—Article 5 Regulations for preventing collisions at sea.

Held: That barges being towed in the coast waters of British Columbia should comply with the provisions of Article 5 of the Regulations for preventing collisions at sea; and failing to do so will be held guilty of negligence and liable for damages due to collision with another vessel.

Action to recover damages due to a collision in the coast waters of British Columbia.

February 24th and 25th 1922.

Cases heard before the Honourable Mr. Justice Martin at Vancouver.

1922

B. W. B. NAVIGATION COMPANY LIMITED AND BARNET LIGHTERAGE COMPANY LIMITED v. THE SHIP KILTUISH.

Statement Facts.

Reginald Symes and *Sidney Smith* for plaintiffs;

E. C. Mayers and *W. S. Lane* for defendants.

On or about 3.15 a.m. on the 1st of November, 1921, the "*Projective*" a tug boat belonging to the Plaintiffs, the B. W. B. Navigation Company, Limited, having in tow the Barge *Pyrites* belonging to the Plaintiffs, the Barnet Lighterage Company, Limited, whilst on a voyage from Vancouver to James Island came into collision in Active Pass with the Steamship *Kiltuish*, belonging to the Coastwise Steamship and Barge Company, Limited, the Defendants. The *Projective* was carrying the regulation lights but the Barge *Pyrites* carried one bright white light at mast head but no side lights as provided for by Article 5 of the Regulations for Preventing Collisions at Sea, which is as follows:—

"A sailing vessel under way and any vessel being towed shall carry the same lights as are prescribed by Article 2 for a steam vessel under way, with the exception of the white lights mentioned therein which she shall never carry."

The Plaintiffs sued for $1,829.90, damages to the tug boat *Projective* and the Barge *Pyrites*, and the Defendants counterclaimed for $763.60 damages to the Steamship *Kiltuish*. At the trial the Plaintiffs endeavored to adduce evidence to show that it was not customary for barges in tow to carry side lights in coastwise waters, but the Learned Trial Judge refused to admit this evidence on the ground that it was not permissable to prove custom where custom conflicted with statutes or regulations.

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B. W. B. NAVIGATION COMPANY LIMITED AND BARNET LIGHTERAGE COMPANY LIMITED v. THE SHIP KILTUISH.

Reasons for Judgment.

Martin L.J.A.

MARTIN, L. J. A. now (this 22nd June, 1922), delivered judgment.

Largely owing to the conflict of evidence the questions raised in this consolidated action have occasioned me much reflection, and after a reconsideration of the whole matter I have reached the conclusion that both parties are to blame for the collision, the fault on the part of the *Kiltuish* being the neglect to stop and navigate with caution when the danger became apparent, and that on the part of the tug and tow being the misleading of the *Kiltuish* by failure to exhibit the regulation lights on the tow and also allowing the tow to drift too far across the channel. In all the circumstances I am of the opinion that this is a case where the liability should be apportioned equally under the Maritime Conventions Act, 1914, Can. Chap. 13, and each delinquent should bear its own costs— *Pallen* v *The Iroquois* (1).

I should perhaps say, to avoid misunderstanding, that in coming to this conclusion I have considered the liability of the tug and tow as being on the facts, inseparable, and that according to my very full notes of the argument, the Plaintiff's counsel did not contest the submission of the Defendant's counsel to that effect, but, if by chance I am under a misapprehension on this point the matter may be spoken to. If required, there will be the usual reference to the Registrar, with merchants to assess damages.

Judgment accordingly.

(1) (1913) 18 B.C.R. 76; 17 Ex. C.R. 185; 11 D.L.R. 41.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1922
June 26.

ERIKSEN BROTHERS.....PLAINTIFFS;

VS.

THE *MAPLE LEAF*.....DEFENDANT.

Shipping—Arrest of ship—Jurisdiction in cases of equipping and repairing—Practice—Sham proceeding.

Held (following *Momsen* v *The Aurora*, (1913) 18 B.C.R. 353; 13 D.L.R. 429) that where a creditor finds a ship or the proceeds thereof are under arrest of the Court in pursuance of its valid process issued to the marshall in that behalf, he may without more bring his action for, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the litigant to show this Court that, when suing, the original action under which the ship was arrested must eventually succeed.

Semble. There may be circumstances so strong as would justify the Court in saying that the action under which the arrest was made was only a sham proceeding and could therefore be disregarded.

Motion to dismiss action for want of jurisdiction.

June 12th, 1922.

Motion heard before the Honourable Mr. Justice Martin, at Victoria.

Hume B. Robinson for the motion;

E. A. Lucas, contra.

1922

ERIKSEN BROTHERS v. THE MAPLE LEAF.

Statement of Facts.

Henry Eriksen on the 19th of May, 1922, issued a Writ in rem against the Defendant ship endorsed as follows:—

The Plaintiff as Ship's Carpenter on board the ship *Maple Leaf* claims the sum of $97.20 for wages due him and for his costs;

and a Warrant for the arrest of the ship was immediately issued. On the next day a Writ was issued by the present Plaintiffs for $487 for work done at North Vancouver for repairing and equipping the said vessel. The vessel at the time the work was done was lying at North Vancouver and all work done was done at that place. Appearance under protest was entered in both actions and shortly afterwards the action of Henry Eriksen was discontinued.

According to material in Affidavits fyled in support of the Motion, Eriksen Brothers originally presented a bill to the Purchasers of the Ship, before action, for $560.77 on the 27th day of April, 1922, and Henry Eriksen did not present and never at any time presented to the purchasers of the Ship a bill for work alleged to have been performed as ship's carpenter. When the above mentioned bill was not paid, however, separate actions were launched as above recited.

Argument of Counsel.

HUME B. ROBINSON:—In support of the motion argued that the first action by Henry Eriksen was really launched for the purpose of getting the Ship under arrest so that when the present Plaintiffs commenced their action she would be under arrest and therefore the provisions of Section 4 of the Admiralty Act of 1861, 24 Victoria, Chap. 10, would be complied with and that since Henry Eriksen's claim was under $200 the Admiralty Court had no

jurisdiction on the face of it, by virtue of Section 191 of the Canada Shipping Act, Revised Statutes of Canada, Chap. 113, and the whole proceedings were an abuse of the process of the Court.

He cited the following:—

The Evangelistria (1) Ex-parte Andrews (2) and *Momsen* v *The Aurora* (3).

E. A. LUCAS—contra; cited *Letson* v *Tuladi* (4) and *Momsen* v *Aurora* (3).

MARTIN L. J. A. now (this 26th June, 1922) delivered judgment.

This is a motion by defendant to dismiss this action for want of jurisdiction.

It appears that on the 19th of May last one Henry Eriksen issued a writ against the defendant ship endorsed as follows:—

> The Plaintiff as Ships Carpenter on board the ship *Maple Leaf* claims the sum of $97.20 for wages due to him and for his costs.

And the ship was arrested the same day, and next day a writ was issued by the present Plaintiffs for $487, for work done in Vancouver for "repairing and equipping" the said vessel.

An appearance was entered on 30th May to Henry Eriksen's action and it was later discontinued for reasons which do not appear.

It is conceded that unless the ship can legally be said to have been "under arrest", within the meaning of sec. 191 (b) of the Canada Shipping Act, R.S. Cap. 113, in the action of Henry Eriksen there is no juris-

(1) [1876] 3 Asp. (N.S.) 264.
(2) [1897] 34, N.B.R. 315.
(3) [1913] 18 B.C.R. 353; 13 D.L.R. 429.
(4) [1912] 17 B.C.R. 170; 15 Ex. C.R. 134; 4 D.L.R. 157.

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diction to entertain this action. It does not appear that Henry Eriksen is one of the plaintiffs in the present case who are indefinitely styled "Eriksen Brothers".

The defendant's counsel submits that an examination of the proceedings will disclose that this Court really had no jurisdiction to entertain the suit of Henry Eriksen because it was under the sum of $200 required by said sec. 191, and that the affidavit upon which the warrant for the arrest issued should have shewn such circumstances as would have brought it within one or more of the exceptions reserved by that section, but it is to be observed that there is nothing in that section which requires the plaintiff to show at the time the suit is instituted that he is within an exception, and hence it must be assumed that it was intended that he should have the right to prove his status at the trial or any prior time, if necessary. Moreover, the warrant for arrest was issued by the Registrar, and I have already held in *Letson* v *The Tuladi* (1) that, under our rules, even where particulars are prescribed the Registrar may dispense with them, and *a fortiori* where particulars are not prescribed it is difficult to see upon what principle they should be insisted upon *ab initio*. In *Momsen* v *The Aurora* (2), I held (under the corresponding sec. 165 of the Imperial Merchants Shipping Act, 1894,) that:—

> "as soon as a creditor finds a 'ship or the proceeds thereof are under arrest of the Court' in pursuance of its valid process issued to the marshall in that behalf, then he may without further ado bring his action for, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the litigant to shew to this Court now that the original action under which the ship was arrested must eventually succeed."

(1) [1912] 17 B.C.R. 170; 15 Ex. C.R. 134; 4 D.L.R. 157.

(2) [1913] 18 B.C.R. 353; 13 D.L.R. 429.

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Here there is nothing before me to warrant me in holding that the arrest under Henry Eriksen's suit was not by valid process. Of course there might be circumstances so strong as would justify the Court in saying that the action under which the arrest was made was only a sham proceeding, and therefore could be disregarded, but the facts here would not justify me in coming to such a conclusion.

There is nothing in the Evangelistria (1) which is contrary to this view, because it merely held that the arrest should be *de jure*, and it is in that light that the arrest in question here must be regarded.

With respect to *Ex-parte Andrews* (2), it is to be observed, first, that that is a decision on a section of a very different character relating to summary actions in certain specified courts and it would be very unsafe to deduce from it any general principle relating to ordinary actions for wages in this Court: second, that the statute there required as a condition precedent to the exercise of summary jurisdiction that a complaint on oath should be laid and it is only legally to be expected that such a complaint should *ab initio*, disclose all facts necessary to confer jurisdiction, but there is no condition of that kind imposed by the statute in question here; and third, that the rule for certiorari was granted as arising out of the summary proceeding itself and not as an indirect attack in another action as here. That case should obviously be restricted to the statute and facts upon which it was decided.

I am, therefore, of opinion that the motion should be dismissed with costs to the plaintiff in any event.

Judgment accordingly.

(1) [1876] 3 Asp. (N.S.) 264. (2) [1897] 34 N.B.R. 315.

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October 19.

QUEBEC ADMIRALTY DISTRICT

PETER BROWN, JR.....PLAINTIFF;

AND

S.S. *INDOCHINE*.....DEFENDANT.

International Law—Person and property of the Sovereign—Exception from the Jurisdiction of Courts—King's vessel.

The SS. *Indochine* was the property of the Government of Indo-China, a French possession, administered by a Governor-General for and in the name of the French Republic. Her officers and crew were in the service and pay of that Government, and at the time of the accident she was on a voyage in the interest of the Government of Indo-China. She was arrested under proceedings taken in the Quebec Admiralty District on a claim made by the owners of the Danish Ship *Sarmatia* as a result of a collision between the two ships on the 11th August, 1922.

Held: That, recognizing it is an established principle of law that the person and property of foreign sovereigns and the property of independent sovereign states are exempt from the jurisdiction of the Courts of this country, the *Indochine* could not be lawfully arrested, and the warrant of arrest and all subsequent proceedings should be set aside and the action dismissed.

Semble: That a Sovereign State cannot be impleaded indirectly by proceedings *in rem* against its property. That immunity from arrest of a foreign state owned ship is not affected by the vessel being used for trading purposes and as a cargo carrier, nor does it matter how the vessel is being employed.

APPLICATION for the release of the S.S. *Indochine* from arrest.

September 9th, 10th and 12th and October 10th and 19th A.D. 1922.

Case heard at the City of Montreal before the Honourable Mr. Justice Maclennan.

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A. R. Holden, K.C., A. C. M. Thomson, for plaintiff.

F. J. Bissaillon, K.C. for defendant.

MACLENNAN L. J. A. now (this 19th day of October, 1922) delivered judgment.

An application has been made to the Court for the release of the steamship *Indochine* from arrest, on a claim made by the owner of the Danish Steamship *Sarmatia* as the result of a collision between the two ships on 11th August, 1922. The application is based upon the representation that the SS. *Indochine* at the time of the collision was a French ship and belonged to the Government of Indo-China, a French possession which was administered by a Governor General governing and administering for and in the name of the French Republic, that the ship, her officers and crew were in the service and pay of that Government, and at the time of the accident the ship was on a voyage in the interest of the Government of Indo-China.

Counsel for plaintiff submit that the SS. *Indochine* is not the property of an independent Sovereign State within the meaning of International Law; that she was not being used in public service and that her owners had waived exemption from arrest by reason of having engaged in a commercial trading adventure.

By a document entitled "Acte de Francisation", dated 10th June, 1918, signed by the Governor General of Indo-China, it is certified in the name of the President of the French Republic that the *Indochine* is a French vessel belonging to the Government of Indo-China registered at Hanoi, the capital of the possession. Immediately following the collision, the Governor

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General of Indo-China cabled to the Consul General of France, at Montreal, to take charge of the ship, and Marcel de Verneuil, Deputy Consul of the Consulat Général of France in Canada, has made an affidavit filed before me in the following terms:—

"Je, Marcel de Verneuil, consul adjoint du Consulat Général de France au Canada, domicilié au No 1745 de la rue Hutchison, en la cité de Montréal, étant dûment assermenté sur les Saints Evangiles, déclare:

"1. Que le navire *Indochine*, saisi en cette cause, était, lors de l'abordage du dit navire avec le vapeur *Sarmatia*, est et a toujours été la propriété du gouvernement de l'Indochine, possession française, administrée par un gouverneur-général, gouvernant et administrant pour et au nom de la République Française:

"2. Que la navire *Indochine*, ses officiers et hommes d'équipage sont au service du dit gouvernement de l'Indochine et à la solde de ce dernier;

"3. Que la navire *Indochine* voyageait le 11 août dernier et voyage constamment dans l'intérêt du gouvernement de l'Indochine, est une propriété publique, destinée et employée à l'usage du public de l'Indochine.

"et j'ai signé,
"M. de VERNEUIL".

"Assermenté devant moi,
"à Montréal, ce 7ème
"jour de Septembre 1922.

"W. S. WALKER,
"Dept. Reg."

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Albert Ducamin, of Marseilles, France, a French Naval Reservist and Master of the *Indochine*, has made an affidavit in which it is stated that the ship, at the time of the collision with the *Sarmatia*, was and always has been the property of the Government of Indo-China, a French possession administered by a Governor General for and in the name of the French Republic; that the ship, her officers and crew are in the service and pay of said Government and that the said ship, on 11th August last, was on a voyage in the interest of said Government, and that she is public property destined and employed for the public use of Indo-China. The cross-examination of Captain Ducamin and the "Acte de Francisation" referred to show that the ship was originally a Japanese ship, had been purchased by the French Government and registered in the French colony of Indo-China, that her master and officers were engaged and paid by the Governor General of Indo-China and the ship was being used in the service of that colony. During the late war she was an armed vessel and she came from Indo-China to this side of the Atlantic with convicts to French Guiana and rice for Havana. On that voyage she had on board eighty armed soldiers to guard the convicts. After delivery of the convicts she proceeded to Havana where the rice was discharged and a cargo of sugar was shipped and carried to New York. The military guard was on board until the ship's arrival in New York. For the return voyage the ship entered into a charter party to proceed to Montreal where a cargo of grain was to be taken on board for carriage to France. While ascending the River St. Lawrence the collision, out of which this action has arisen, took place.

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No evidence was offered in contradiction of the foregoing as to the ownership of the *Indochine*.

Since the hearing of the application, the Deputy District Registrar of the Court has received, through the Registrar from the Deputy Minister of Justice, a copy of a communication to the Under-Secretary of State for External Affairs of Canada from the Consul General of France at Montreal, stating:—"Que le vapeur *Indochine* propriété de l'Etat français (Gouvernement Général de l'Indochine) a été l'objet d'une saisie ordonnée par la Cour d'Amirauté de Québec le 14 août 1922 sur la demande de M. Peter Brown, Jr., propriétaire du vapeur *Sarmatia*. J'ai l'honneur de faire remarquer que ce vapeur étant la propriété d'un Etat avec lequel le Canada entretient de bonnes relations d'amitié ne saurait être l'objet d'une saisie même conservatoire. Je vous serais donc reconnaissant de bien vouloir porter ce fait à la connaissance de M. le Ministre de la Justice", with the suggestion by the Minister of Justice for the consideration of the court that, if the Government of France in fact be as alleged the proprietor of the steamship *Indochine*, these proceedings are without jurisdiction upon the authority of the case of the *Scotia*, 1903, Appeal Cases 501, and the cases there cited by Counsel in argument. This suggestion and communication were brought to the notice of the representatives of the parties as well as representations in support of the plaintiff's claim, made by the Consul General of Denmark to the Minister of Justice which have also been placed before the Court. At the request of plaintiff, Counsel for both parties have reappeared and the case been argued a second time.

It is an established principle of jurisprudence that the person and property of the Sovereign are exempt from the jurisdiction of the Courts. It is claimed by the applicant that by International Law a like immunity extends to the person and property of a foreign sovereign and to the property of an independent Sovereign State. In considering the reasons for the immunity extended to the person and property of one Sovereign by the courts of another Sovereign, the first case to be considered is *The Exchange* (1), where the Supreme Court of the United States, in 1812, held, that a public vessel of war of a foreign Sovereign at peace with the United States coming into an American port and demeaning herself in a friendly manner was exempt from the jurisdiction of the United States Courts. Chief Justice Marshall, in the course of a very learned opinion on behalf of the Court, said at page 136:—

"The world being composed of distinct sovereignties possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.....
.....One Sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under

(1) [1812] 7 Cranch 116.

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an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him..... Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise".

Immunity is not limited to foreign ships of war, but extends to the public property of a foreign Sovereign State which is destined to public use and to the property of any ambassador. The leading English case of this subject is *The Parlement Belge* (1), decided in the Court of Appeal in 1880. This ship was a mail packet running between Ostend and Dover and also carrying merchandise and passengers. She was the property of the Belgian King and was navigated and employed and in the possession of the Belgian Government. An action *in rem* was entered against her to recover damages in respect of a collision in English waters. Upon an application for discharge from the proceedings *in rem*, the question arose whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign. After having reviewed the decision in the case of *The Exchange* and other American and English decisions on the question, Lord Justice Brett, on behalf of the Court of Appeal (5 P. D. 214) said:—

(1) [1880] L. R. 5 P. D. 197.

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction".

The Court of Appeal further decided that, in a proceeding *in rem* for a claim made in respect of a collision, the owner of the vessel seized is at least indirectly impleaded and called upon to show why his property should not be condemned and sold in satisfaction of the claim. And Lord Justice Brett, at page 219, said:—

"To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court".

In the case of *The Parlement Belge* it was claimed that the immunity was lost by reason of the ship having been used for trading purposes, to wit, carrying cargo and passengers in addition to mails. It appears

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from the reports of the case that the ship had been mainly used for the purpose of carrying the mails and only subserviently to that main object for the purposes of trade, and Lord Justice Brett, at page 220, said:—

"It has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner. The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity".

The decision of the Court of Appeal in *The Parlement Belge* is authority for:—

1st. The right of the foreign sovereign to have the public property of his state respected;

2nd. It is contrary to International Law and the comity of nations that an independent foreign sovereign should be directly or indirectly impleaded in the English Courts;

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3rd. The dictum of Sir Robert Phillimore in *The Charkieh* (1), that a ship belonging to a foreign sovereign may lose its right to claim immunity from arrest, if it engages in commercial trading as a carrier of merchandise and passengers, is disapproved.

Taking *The Parlement Belge* as a starting point, the English Admiralty Courts, by successive decisions have come to recognize that all government-owned or government-requisitioned ships, whether used for military, political or commercial purposes, are in time of peace as well as of war immune from seizure. In *Young* vs SS. *Scotia* (2), the Judicial Committee of the Privy Council, on an appeal from the Supreme Court of Newfoundland, dismissed an appeal from a judgment which set aside the seizure upon a claim for salvage against a vessel which was used by the Canadian Government as a ferry boat in connection with a line of railways owned by the Government of Canada. In *The Jassy* (3), where a vessel belonging to the King of Roumania, employed for the public purposes of the state in connection with the national railways in Roumania, had been arrested in an action for damage by collision, the President of the Admiralty Court, Sir Gorell Barnes, dismissed the action.— In *The Broadmayne* (4) where an action for salvage was taken against a ship requisitioned by the Crown, the Court of Appeal ordered that all further proceedings in the action with a view to the arrest or detention of the ship be stayed so long as the ship shall remain under requisition in the service of the Crown, and Lord Justice Swinfen Eady, in the course of his judg-

(1) [1873] L. R. 4 Adm. & Ecc. 59.
(2) [1903] A.C., 501, 72 L. J. P. C. 115.
(3) [1906] P. 270, 75 L. J. Adm. 93.
(4) [1916] P. 64, 85 L. J. Adm. 153.

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ment, at 85 L. J. Adm. 155, said:—"It is clear that a ship which is requisitioned by the Crown is as free from arrest as a King's ship of war would be, and the exemption extends as well to claims of salvage as to claims for collision or other claim. The grounds upon which the exemption exists were fully stated in the judgment of the Court of Appeal in the case of *The Parlement Belge*, where the whole question is discussed."

In *The Crimdon* (1), where a writ *in rem* was issued on a claim arising out of a collision against the Swedish SS. *Crimdon*, at the time under charter in the service of the Government of the United States for public purposes, Hill J (in 1918) said at page 82:—"I am definitely of opinion that, following the decision and what underlies the decision in the case of *The Broadmayne*, the proper view is that the arrest could not be maintained. This, of course, is not a case where the the vessel was the property of the state. In such a case neither the writ *in rem* nor the arrest could be maintained. The writ *in rem* could not be maintained because you cannot sue the Sovereign personally by serving a writ on him, neither can you make him indirectly subject to the jurisdiction of the court by serving the writ *in rem* on the property". In *The Gagara* (2), the Court of Appeal confirmed the judgment of Hill J. setting aside the writ *in rem*, the warrant of arrest and all subsequent proceedings in an action against a ship which was in the possession, in England, of the Esthonian Government.—In *The Porto Alexandre* (3), the Court of Appeal confirmed the judgment of Hill J. to the effect that a Sovereign State cannot be impleaded in the English Courts,

(1) [1918] 35 T. L. R. 81. (2) [1919] 88 L.J. Adm. 101.
(3) [1920] P. 30; 89 L.J. Adm. 97.

either directly by a suit *in personam*, or indirectly by the arrest of its property, and that immunity is not affected by the fact that the property is employed not in a public national service, but in commerce.—Mr. Justice Hill, at page 99, said:—"My view is that the law as it now stands and as laid down in *The Parlement Belge* is that a Sovereign state cannot be impleaded either directly by being served in person, or indirectly by proceedings against its property, and that in applying that principle it matters not how the property is being employed". The ship in that case was the property of the Portugese Government.—In the Court of Appeal Lord Justice Bankes, at page 101, said:—"There is very little difference between the material facts in *The Parlement Belge* and in the present case and, in my opinion, *The Parlement Belge* covers this case". Lord Justice Warrington, at page 102, said:—"Whatever may be the actual use to which this ship is put, I think the evidence is quite sufficient to show that she is the property of the State, and is destined to its public use; and, therefore, the case seems to me to come exactly within the principle of the judgment in *The Parlement Belge*". In the same case Lord Justice Scrutton, at page 103, said:—"We are concluded in this court by *The Parlement Belge*. Sir Robert Phillimore took the view that trading with the property of a State might render that property liable to siezure; but the Court of Appeal overruled the views of Sir Robert Phillimore as I understand them". The Lord Justice then cites what was stated by Brett, L. J., at 5 P. D. 217, and quotes from Hall's International Law, 7th Ed., at page 211:—"If in a question with respect to property coming before the Courts

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a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign state"; and then proceeds as follows:—"I quite appreciate the difficulty and doubt which Hill J. felt in this case, because no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many States are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult. But while it seems to me that *The Parlement Belge* excludes remedies in these Courts, there are practical commercial remedies. If ships of the State find themselves left on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case. there may be found a difficulty in finding cargoes for national ships. These are matters to be dealt with by negotiations between Governments, and not by Governments exercising their power to interfere with the property of other states, contrary to the principles of international courtesy which govern the relations between Independent and Sovereign States. I think it is clear that we must in this Court stand by the decision of Hill J. and dismiss the appeal".

The English Court of Appeal (Lord Justice Bankes, Lord Justice Scrutton and Lord Justice Atkin) on July 12th, 1922, in the case of *Lynntown* vs *Tervaete* (1), reversed the decision (2) of the President of the

(1) 12 Lloyd's List Law Reports 252; (2) [1922] 91 L.J. Adm. 151.

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Admiralty Division. The English Steamer *Lynntown* had sustained damage from a collision with *The Tervaete*, then the property of the Belgian Government and employed in Government service. After the collision the Belgian Government sold the ship to private owners and she came to an English port where she was arrested by a procedure *in rem* by the owners of *The Lynntown*, who alleged that the collision gave rise to a maritime lien inchoate and dormant till *The Tervaete* ceased to be the property of the Belgian Government, but which could be enforced when the ship as the property of private owners came within British jurisdiction. The pretentions of the owners of *The Lynntown* were sustained by the President who refused to release *The Tervaete* and held, that the collision gave rise to a maritime lien against a ship owned by a foreign Sovereign State and used by that State for cargo-carrying purposes which could be enforced against the private owners who had bought the ship from the Belgian Government, but his decision was unanimously reversed by the Court of Appeal where it was held that a maritime lien could not attach to the property of a Sovereign State, and that at the time of the collision the Belgian Government could not have been sued *in personam* nor could their ship have been arrested *in rem*. Lord Justice Atkin, in the course of his opinion, said at page 256:—"The result appears to me to be that the maritime lien against a foreign Sovereign cannot exist at all". The principles laid down in *The Parlement Belge* were followed, the writ was set aside and all proceedings thereunder stayed.

The Courts in the United States, since the decision of *The Exchange*, have followed the same principles.

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In a leading case decided in Massachusetts, *Briggs* vs *Light Boats* (1), Mr. Justice Gray, referring to the immunity of foreign public vessels, said at page 165:—"The immunity from such interference arises not because they are instruments of war, but because they are instruments of Sovereignty and does not depend on the extent or manner of their actual use at any particular monent, but on the purpose to which they are devoted". And, at page 163, he says:—"It is difficult to see how the Government of a Republic can hold any property for personal or private purposes", In another Massachusetts case, *Mason* vs *Intercolonial Railway of Canada* (2), it was held that, the Courts of a State have no jurisdiction to procede with a suit against the Sovereign of another State or Country, and that a suit in tort against the property of a Railway of Canada, that is not a corporation in which any private individual has an interest, but is the property of the British Crown and is owned and operated by the King of England in the right of his Dominion of Canada, is properly dismissed. In *The Pampa* (3), it was held by one of the District Courts of New York, that a naval transport of the Argentine Republic was not subject to a libel for damages from collision, although at the time of the collision carrying a cargo of general merchandise belonging to private persons, and, as an incident to the vessel's voyage to the United States, to obtain coal and munitions for the use of the Argentine Government. In *The Maipo* (4), it was held by a District Court, that a Chilean naval transport, although chartered to a private individual to carry a commercial cargo, was not subject to

(1) [1865] 93 Mass. (11 Allen) 157.
(2) [1908] 197 Mass. 349.
(3) [1917] 245 Fed. Rep. 137.
(4) [1918] 252 Fed. Rep. 627; 259 Fed. Rep. 367,

seizure under process of an Admiralty Court of the United States in a suit by a shipper for damage to cargo. The case came before the District Court a second time (3), when it was held that a vessel owned and operated by a foreign Sovereign State, although engaged in the business of a common carrier, is exempt from seizure on process *in rem* from an Admiralty Court of the United States in a suit by a private individual whether based on contract or tort, and Circuit Judge Hough said:—"Why was a war vessel exempt from seizure? Not because it was a war vessel, but because it was a part of the exercise or manifestation of sovereign power. Why is any other vessel exempt? Why may any other piece of property be exempt? For the same reason, just as the Sovereign himself is exempt. Now, it may be the opinion of counsel, as it assuredly is my opinion, that when a sovereign republic, empire, or whatnot, goes into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers just as much as any private person; but I think it must be plain that if I, in my official capacity, were to assert that view and enforce it, I would be assuming (in this case), as one of the humbler officers of the Government of the United States, to define for the Republic of Chile what that republic should consider to be a governmental function. If the Republic of Chile considers it a governmental function to go into the carrying trade, as would appear to be the case here, that is the business of the Republic of Chile; and if we do not approve of it, if we do not like it, if we do not wish any longer to accord that respect to the property so engaged, which has hitherto been accorded to government property, then we must say so through diplomatic channels, and not through the judiciary".

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The recent judgment of the Supreme Court of the United States in the three cases of *The Western Maid*, *Liberty* and *Carolinian* (U. S. Sup. Ct., January 3, 1922)(1) emphasizes the non-liability of national ships in cases of collision. *The Western Maid*, owned by the United States and manned by the navy, was in collision in New York harbour. *The Liberty* was a pilot boat under charter to the govenment and had a collision in the harbour of Boston. *The Carolinian*, also a chartered ship, had done similar damage in Brest, France. The two latter had been re-delivered to the owners, and the former to the U. S. Shipping Board, when the libels were filed, so that the process in no way interfered with the possession of the Sovereign. In each case the Supreme Court issued its extraordinary writ of prohibition to prevent district courts from exercising jurisdiction.

An exhaustive review of the authorities, on the questions raised in this case, in England, United States and France, is to be found in Revue Internattionale du Droit Maritime, tome 34, 1922, 2éme semestre, page 1. In discussing the principles recognized in France, the writer of the review states at page 8:—"Les tribunaux français sont absolument incompétents pour connaître de l'action qu'un créancier du navire voudrait diriger contre l'Etat étranger. Le respect de la souveraineté des Etats ne permet pas aux tribunaux de statuer et, puisqu'il s'agit d'un service public de l'Etat étranger, le respect mutuel que se doivent les Etats leur commande de ne pas troubler, même par voie de droit, l'exécution de ces services. Le créancier éventuel n'aurait que la

(1) United States Supreme Court Advance Opinions, 1921-22, 185, and Michigan Law Review, vol. xx, March, 1922, p. 533.

ressource d'une action devant les tribunaux étrangers compétents, si, dans le pays étranger, on admet l'action judiciaire contre l'Etat, ou, à défaut, d'une réclamation diplomatique. La jurisprudence française admet cette règle sans hésitation".....
....."Quant à la saisie d'un navire étranger affecté â un service public, elle est naturellement impossible; une saisie qui n'aurait même qu'un caractère conservatoire porterait atteinte à la souveraineté de cet Etat."

On the question of the ownership of *The Indochine*, there is very little difference between the evidence in this case and the evidence in the case of *The Scotia*. In the latter case *The Scotia* was built in England for the Government of the Dominion of Canada, for use by the latter as a railway ferry for the carriage of railway trains between Ports Hawksbury and Mulgrave in the Province of Nova Scotia in connection with the operation of the Intercolonial Railway of Canada which was the property of and was operated by the Dominion Government. The Supreme Court of Newfoundland (Newfoundland Reports 1897-1903, p. 560), on the evidence of ownership, held that *The Scotia* was the public property of the Dominion of Canada and therefore the public property of His Majesty. This finding of fact was approved on appeal to the Privy Council. The evidence in the case now before the Court, including the "Acte de Francisation" or certificate of registry, establishes that *The Indochine* is a French ship registered in the French possession of Indo-China and is the public property of Indo-China and therefore the public property of the Republic of France, an independent foreign Sovereign State. During the war *The Indochine* was an armed vessel and since the war she

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has been employed for the public use of Indo-China and was so engaged on the voyage which brought her across the Atlantic. In addition, there is the representation of the Consul General of France, that the ship belongs to his Government and, on the authority of *The Parlement Belge*, *The Exchange* and other cases which might be cited, that suggestion is conclusive. As the public property of a foreign Sovereign State, destined to public use, the ship is immune from arrest.

The English Court of Appeal, in *The Parlement Belge*, *The Porto Alexandre* and *The Tervaete*, and the Privy Council in the case of *The Scotia* and the other cases cited, English and American, lay down the general principle that immunity from arrest of a foreign state owned ship is not affected by the vessel being used for trading purposes and as a cargo carrier, that it matters not how the vessel is being employed and that a Sovereign State cannot be impleaded indirectly by proceedings *in rem* against its property. French jurisprudence is to the same effect. It would be a violation of the well established principles of International law and the doctrine of immunity so often enunciated in the Courts to permit this ship to be detained on an *in rem* proceeding on a claim for damages which should be the subject of diplomatic negotiations between the Government of the Country of which the plaintiff is a citizen, and the French Government. It is not a matter for the Courts.

I am therefore definitely of opinion that the arrest cannot be maintained, that this Court is without jurisdiction and cannot proceed further in the cause; (*The Mary Anne* (1), and *Stack* vs *Lepold* (2),) and as a

(1) [1865] 34, L. J. Adm. 73 at p. 74.

(2) [1918] 18, Ex. C.R. 325; 45 D.L.R. 595.

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consequence the writ *in rem*, the warrant of arrest and all subsequent proceedings must be set aside and the action dismissed with costs, and there will be judgment accordingly.

Judgment accordingly.

Solicitors for plaintiff: *Messrs. Pentland, Gravel & Thomson.*

Solicitors for defendant: *Messrs Bissaillon & Beique.*

1922
October 14.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

GEORGE McCULLOUGH *et al*.....PLAINTIFFS
(Respondents)

AND

SS. *SAMUEL MARSHALL* AND OWNERS.....} DEFENDANTS;

AND

HYMAN I. ELIASOPH.....CLAIMANT
(Appellant)

Appeal—Motion to dismiss for want of prosecution—Jurisdiction of Court in absence of specific rule—Common Law.

Held: That there is no distinction in principle to be drawn between the inherent authority of the Court to order the dismissal of a case on appeal for want of prosecution and the dismissal on similar grounds of a case at first instance.

2. That it is a fundamental principle in the administration of justice that right and justice ought not to be deferred at the will of any party to an action.

MOTION to dismiss for want of prosecution.

5th October, 1922.

Motion heard before the Honourable Mr. Justice Audette at Montreal.

H. E. Walker, K.C. for respondents.

T. M. Tansey, for appellant.

W. R. L. *Shanks*, K.C. appeared for the purchaser, The Steel Co. of Canada.

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

AUDETTE J. now (this 14th October, 1922) delivered judgment.

This is an appeal, lodged by the claimant, Hyman I. Eliasoph, from the judgment of the local judge of the Quebec Admiralty District, pronounced on the 8th day of July, 1921, in respect of, and in so far only as that judgment deals with the fees and costs taxed in favour of:

1. The plaintiffs' solicitors;
2. The local judge;
3. The district registrar, and
4. The priority denied Hyman I. Eliasoph's claim.

The three first subjects of this appeal are exclusively questions of costs upon which the district taxing master has passed and whose finding has been confirmed on appeal to the local judge. The judgment in that respect would appear to deal exclusively with the quantum of the costs and not with their rank in the distribution of the proceeds of the sale of the vessel nor as to whether or not costs were rightly or wrongly allowed, and therefore such judgment becomes an interlocutory judgment or order, and leave was accordingly asked for and obtained to prosecute such appeal and security to the amount of $100 was duly given, as provided by the rules, in such interlocutory matters.

The fourth subject would appear to deal with the merit of the claim, since Eliasoph claims a priority which is denied him by the judgment appealed from. As suggested by counsel for the respondent, in such a case the rules of court provide for security to the amount of $200—instead of the $100 given herein.

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The matter now comes before this court, on appeal, on three motions—one, on behalf of the plaintiffs-respondents to dismiss the appeal for want of prosecution; the second, on behalf of the appellant, made subsequently to the first motion and as a sequence thereto, for an order fixing a date for the hearing of the appeal; and a third one also (made during the hearing of the two first motions) by the appellant for leave "to amend the Notice of Appeal, in order to include therein notice of said appeal to the Local Judge in Admiralty and to the Registrar . . . and that he be now permitted to serve such notice or amended notice thereof on the solicitors for the said Local Judge and Registrar, or on themselves and the other parties herein, etc."

The questions raised respecting the three first subjects deal exclusively with a question of costs and as such involve a question of discretion since under rule 132 "the judge may in any case make such order as to costs as to him shall seem fit."

"No appeal lies from an order as to costs only, when such costs are in the discretion of the judge, except with leave." (Hals., 23, p. 132) which was given herein. "But (Hals., 23, p. 133) in all matters coming within the discretion of the judge in chambers, the Court of Appeal does not interfere unless the discretion has been exercised on a wrong principle or there has been some miscarriage."

A matter involving merely a question of costs should not be entertained. *Chicoutimi Pulp Co.* v. *Price* (1).

(1) [1907] 39 S.C.R. 81.

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In *re Smith* v. *the St. John City Railway Co.* (1), it was further held that it is only when some fundamental principle of justice has been ignored or some other gross error appears that the Appellate Court will interfere with appeals upon questions of costs only. The latter case is made very much more apposite from the fact that the question of costs therein mentioned was one resulting from the consolidation of cases. The judgment appealed from seems to cast the blame for this alleged welter of costs to the number of motions lodged by the present appellant himself and it would follow that if he had asked for consolidation, at the proper stage, much of what he now finds fault with would have been avoided.

In *re Beaudette* v. *SS. Ethel Q.* (2) confirmed on appeal to the Supreme Court of Canada (unreported) Anglin J. said: "It is the invariable practice of this Court to refuse to entertain appeals of which the sole object is a reversal or modification of a disposition made of costs, however manifest it may be that such disposition was based upon an erroneous conception of the merits of the proceeding before the Court."

The fourth question involved is one with respect to the priority claimed by the said Eliasoph and which is clearly dealt with by the Local Judge.

Then there is the application to allow to give notice of the appeal to the Local Judge and the Registrar; a motion originating during the argument of the other application above mentioned.

Having for the purpose of clear understanding set forth the matters involved upon the merits of this appeal from a perusal of the record and from what was said on the argument of those three motions, I now come to the determination of these applications.

(1) [1898] 28 S.C.R. 603. (2) [1916] 16 Ex. C.R. 280.

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The judgment appealed from bears date the 8th July, 1921. The first document or notice of motion by way of appeal served upon the plaintiffs alone (see Rule 159) was filed on appeal to the Exchequer Court, in this registry, on the 10th September, 1921, and thereunder attached was a copy of the motion paper of an application to the local judge for leave to appeal and extension of time if necessary.

On the 2nd September, 1921, an order was made by the Local Judge, granting leave to appeal and extending the delay in so far as the same may be necessary, to the 10th September, 1921.

The notice of motion by way of appeal, filed on the 10th September, 1921, and served exclusively upon the plaintiffs, gave notice for the hearing of the appeal on the 19th September, 1921. (See Rule 166).

No one appeared before this Court, on appeal, on the 19th September, 1921, either on behalf of the appellant or the respondent. See Annual Practice, 1922, at pp. 1109-1110. Would it not seem that the appeal should have been then either enlarged or set down for another day instead of leaving it lapse?

Therefore, from the 10th September, 1921, no proceedings of any kind were had or taken until the 8th June, 1922 (save and except the filing of the record on the 18th January, 1922) when a notice of motion was filed by the plaintiffs-respondents, of which service had been made on the appellant on the sixth—stating that the motion would be presented before this Court on the 27th June, 1922.

Then, on the 15th June, 1922, the claimant-appellant issued a summons returnable on the 27th June, 1922, asking for an order fixing the date for the hearing of this appeal.

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These matters stood adjourned from the 27th June to the 4th July, 1922 (through no fault of any of the parties herein) when the two first mentioned motions were made before me. Realizing then that the appeal involved both the Judge's as well as the Registrar's fees and that no notice of any kind of this appeal from the taxation of these bills had been given them, I therefore refused to proceed with the hearing without enquiring whether or not these two parties intended to be represented on the appeal, feeling in duty bound to do so, not only as a matter of courtesy but of justice to these two interested parties who had had no notice of such appeal—notwithstanding that Rule 160 provides that "the notice of appeal shall be served upon all parties directly affected by the appeal."

These two parties had a right to expect their fees would not be dealt with in their absence and without giving them an opportunity to show cause, if they saw fit. Would not the want of service of the notice of appeal upon these two parties render thereby the appeal null and void in respect at least of these two parties?

The appellant's counsel denied, at Bar, the jurisdiction of the Court to hear a motion for dismissal of the appeal for want of prosecution; because there was no specific rule of court to that effect. However, Rule 228 enacts that in all cases not provided for by the Rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed. See Roscoe's Admiralty Practice, 4th Ed., p. 508; Coote Admiralty Practice, 2nd Ed., 151-155; Williams & Bruce, 3rd Ed., 538.

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At common law, courts of first instance have undoubted authority and jurisdiction to dismiss for want of prosecution actions instituted therein; and there is no distinction in principle to be drawn between the dismissal of a case on appeal for want of prosecution and the dismissal of one at first instance. Right and justice ought not to be deferred at the will of any litigant in any court. That is a fundamental principle in the administration of justice. See C.P.Q. Art. 1239.

All rules in all our Courts which deal specifically with the question of dismissal would seem to so deal with the matter with the specific object of fixing a delay within which peremption is acquired. And in the absence of the fixing of such delay the Court is nevertheless seized with the jurisdiction to deal with the subject matter and its judicial discretion is limited to the question of diligence or want of diligence in prosecuting an appeal within reasonable time.

A party unsuccessful in an action cannot unreasonably interfere with the judgment the adverse party has obtained against him and unduly deprive him of the benefit of such judgment in his favour by the mere lodging of an appeal which he does not prosecute, and in the present case this want of diligence of prosecuting the appeal affects not only the parties to the appeal, but also all parties entitled to receive monies and be collocated upon from the proceeds of the sale of the vessel.

Had the appellant been in earnest in his appeal, he had the opportunity to manifest it within almost a year from the date of judgment. The record from the Court below was only transmitted to this Court in January, 1922, which again would go to show intentional and unreasonable delay.

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I have therefore come to the conclusion that the present appeal does not appear to me, from all that was said on the argument of these applications and the perusal of the record, to be meritorious. The appellant has failed in many material instances, namely, *inter alia;* 1. The want of giving notice of appeal to all interested parties; 2. The want of attending on the day fixed by his notice of appeal; and 3, the want of diligence in prosecuting the appeal which, coupled with all the other reasons, compel me to arrive at the conclusion to grant with costs the motion to dismiss the appeal for want of prosecution in respect of the issues between the appellant and the plaintiffs-respondents, the Judge and the Registrar—the three first issues above mentioned. The appellant has shown unreasonable delay in prosecuting his appeal and has been derelict in respect of the matters above mentioned. He has already delayed for over one year the distribution of the proceeds of the sale of the vessels; he cannot with impunity thus impede the expeditious administration of justice.

The application, made at the end of the argument of these matters, for leave to amend the notice of appeal in order to include therein notice of appeal to the Local Judge and the Registrar is therefore dismissed with costs.

The application, on behalf of the claimant-appellant to fix a date for the hearing of these appeals is also dismissed with costs, but in so far only as in respect of the three above mentioned issues, with leave to the claimant-appellant to apply with due speed, upon notice to all interested parties, to fix a date for the hearing of the appeal upon his claim.

Judgment accordingly.

1922
September 28.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE NASHWAAK PULP AND PAPER CO.....DEFENDANT.

Damages—Circumstantial Evidence—Burden of Proof—Appreciation of evidence.

Where plaintiff is forced to prove his case from presumptive or circumstantial evidence, such evidence in order to prevail should not only give rise to a presumption in favour of plaintiff's contention, but should also exclude the possibility of the accident having been occasioned by any other causes than those relied upon by the plaintiff.

INFORMATION filed by the Attorney General of Canada on behalf of His Majesty the King to recover from the defendant damages to a train and crew of the Canadian National Railway resulting from the said train toppling over a embankment at the bridge over the Nashwaak River in the Province of New Brunswick.

July 26th, 1922.

Case now heard before the Honourable Mr. Justice Audette at Fredricton, N.B.

Mr. P. J. Hughes and *Mr. Raleigh Trites* for plaintiff.

Mr. W. Henry Harrison and *J. J. F. Winslow* for defendant.

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Audette J.

AUDETTE J. now (this 28th day of September, 1922), delivered judgment.

This is an information exhibited by the Attorney General of Canada, whereby the Crown claims the sum of $24,319.22 as damages resulting from an accident on the Canadian National Railway. It is alleged that the right of way caved in as a result of the use, in the manner hereinafter mentioned, by the defendants, of their piers and dams in driving logs on the Nashwaak River, near Marysville, in the County of York, in the Province of New Brunswick.

The defendants, who as well as their predecessors in title have been driving logs on the river in question for a number of years, deny having, in any manner whatsoever, done anything on the river which caused the accident in question; and aver by their pleadings that the accident resulted from the improper and negligent construction of the embankment which caved in and slid down the river on the 10th May, 1920.

The parties herein have filed for the purposes of this action, as exhibit No. 11, the following admission, viz.:—

"1. That the defendant is riparian owner on both sides of the river from the highway bridge at Marysville to a point above the abutments and the piers holding the booms of the defendant company, which were carried out at the time of the accident.

"2. That a dam above the highway bridge at Marysville was in existence for over sixty-five years prior to the time it was carried out.

"3. That the C.N.R. authorities knew of the building of the dam and had the plan thereof."

And by exhibit No. 10, it is further, *inter alia*, admitted:

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"(7) That the right of way upon which the Nashwaak Bridge and its approaches are situate, to a width of 200 feet on the west bank and 425 feet on the east bank, is vested in His Majesty the King in fee simple."

The accident took place on the early morning of Monday, the 10th of May, 1920.

On that morning of the 10th May, 1920, Moore, a locomotive engineer on the C.N.R. left South Devon at 4.40 a.m. and passed over the fill adjoining the railway bridge, where the accident occurred later—at between 4.50 and 4.55 a.m., with engine and tender running backwards and saw nothing, felt nothing unusual. He got over the place in question without accident and without noticing anything wrong.

On the same morning of the 10th May, 1920, Conductor Long testified that he left South Devon, at 4.50 a.m. with the local freight train, loaded with pulp wood, composed of engine and about fifteen cars and van, and proceeded to Marysville, which he left at 5.30 a.m., and at about 1¼ miles therefrom when he came to the west embankment of the Railway bridge built across the Nashwaak river, the engine, tender and two cars went over the embankment—as more particularly shewn by the two photographs, exhibits Nos. 1 and 2.

Two of the crew lost their lives, one was injured, the track and rolling stock were damaged; and for the recovery of all such elements of damage the Crown is now suing the defendants.

Long says he came over from his van to the place of the accident and found half of the filling gone—from the centre of the road it had slid out. The rails and sleepers had toppled over, leaning towards the river. He judged about 65 feet in length had so slid. The centre of the track between those 65 feet was worn out more than the ends.

The embankment at that place is 18 feet high.

The engine and two cars took also a deal of material with them when falling down the embankment.

There had been a steady and heavy rain all of Saturday and Sunday (8th and 9th May) preceding the Monday (10th) upon which the accident happened. One witness said he thought the rain had started during the night of Friday.

The river was running high and rising on Saturday and Sunday, the volume of water being increased by the melting of snow in the forests and the heavy rain during several days. Freshets were manifested at different places on the river, around the date in question. And witness Underhill said that he noticed quite a freshet, but that it was nothing unusual for that time on the river.

The Nashwaak river, as put by one witness, is a "savage river," liable to rises and falls.

About three-quarters of a mile or so below the railway bridge, adjoining which the western embankment is built on the edge of the shore and which slid out—the defendant company had erected a concrete dam, and in 1919-1920, at 1,000 feet above the dam, they had five piers diagonally set across the river and at the same height as the dam, being composed of two shore abutments and three piers, in front of which was a floating boom tied to the piers, for the purpose of gathering their logs. In the result two new piers had been added at that date. The whole installation was approved by the Provincial Government. 28 Vict. c. 53. N.B.; 9 Geo. V., c. 109. N.B. *C.P.R.* v. *Park* (1).

(1) [1899] A.C. 535.

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The theory of the Crown is that during the night between Sunday and Monday the top of these piers gave out under the pressure of the logs which had formed a floating jam; but there was no eye witness of the actual occurrence heard before me. Yet it would appear from the evidence that the piers had given away and the water receded before the first train passed over the embankment in question on the morning of the accident.

The river is about 200 feet wide and 14 feet deep, which would give quite a large cross-section.

Now it is contended by the plaintiff that the gathering of a large quantity of logs at the piers had the effect of raising the water about three feet higher than the highest level of the past, and that, assuming the logs went over suddenly during the night of Sunday to Monday, the flow of the water being impeded and retarded by the logs, in suddenly receding, created a suction under the embankment at the railway bridge about three-quarters of a mile up the river. While this theory is supported by some evidence and contradicted by other, it may be stated, that under conflicting evidence, it is so asserted. And as admitted at trial, the evidence does not disclose the cause of the accident. Even if, as surmised, the jam at the piers might have occasioned the damage to the bank there is no evidence that it did and there is no reason to take that inference as a fact and be on the alert to accept it. Was this alleged flood on the river the result of the piers or of the heavy rain? No one saw the waters receding suddenly, as alleged. Washouts on railways are continually occurring in the course of the year, and more especially in the spring, as a result of heavy rain and freshets, as well near and away from rivers. The accident itself affords no just inference

against the defendants— it is a matter of proof. One must look around and see if the accident might just as well be the result of other causes. It is contended by witnesses heard on behalf of plaintiff that a floating jam would not affet the height of water to the extent mentioned by some other witnesses.

Now confronting this wide field of conjecture, there is sufficient evidence of a positive character to justify the inference that it was not good and prudent workmanship to construct of sand and gravel an embankment 18 feet high on this edge of a shore without the protection of rip-rap. How indifferent the railway people were to the possibilities of trouble here is further manifested by the fact that the workmen engaged in constructing the embankment were taken away before the same was completed to the satisfaction of the person in charge of such construction. Moreover, if the waters had only reached a level of 3 feet less, the slide and the accident might just as well have happened from the same cause on account of defective construction. There is no evidence establishing that the scouring or caving in started high or low on the bank.

There is ample evidence on the record to find that the building of such a railway embankment with a bank of light gravel and sand exposed to the action of the water in the river would not be proper workmanship and would amount to negligence. All reasonable care in the construction and maintenance of the bank does not seem to have been established.

It is important, however, to note and consider that while it is contended that the water went to this height of 2 to 3 feet above the normal height—that no one ever saw it. The contention is exclusively based upon the evidence of witnesses who gather and reason it from indicia upon the ground—upon the soil.

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And more especially, upon the evidence of witness Wade, a section man upon this very section which was under his care, who, after the accident—at about 9 o'clock on Monday morning, the 10th May, 1920, crossed over the east side, the side opposite where the accident happened and made a mark on a telegraph post at the height he thought the water had gone up to. Again it will be noted this witness speaks not from having seen the water at that height but at the height he theorized and surmised it went from *indica* on the post. In appreciating this testimony one must not forget that it had been raining heavily for several days and that this telegraph post must have been wet and soaked with rain from top to bottom. How could Wade with certainty distinguish the wet from the rain and the wet from the water from the river?

It is in evidence that by Sunday and even Monday morning there was a serious and large accumulation of logs occasioned by the piers of the railway bridge for 50 yards back, as testified to by witness Easterbrook—above the place where the accident happened—and yet this large accumulation of logs—as shown on several photographs filed as exhibits—did not seem to have interfered with the flow of the water in the river below. There is no evidence to that effect and it is with this jam above the railway bridge that this high water and the floating jam below would have manifested itself at the piers near the dam, three-quarters of a mile below, according to the theoretical and surmising evidence, placing the cause of the accident to such jam.

There was a strong current in the river during the days in question—but it is well in this respect to consider that the embankment that gave way and where the accident happened, is at almost right angle at the

bend of the river where the full strength of the current strikes the very opposite side of the river where the accident happened. Moreover, one must not overlook that the lower end of the western wing wall of the railway bridge, adjoining the place of the accident, extends about 15 feet from the shore, as testified by witness Maxwell, a civil engineer, who recently made a survey of the locality, and the main abutment is almost at right angle with the river.

From the evidence adduced by witness Price it appears that the bank would have—either partly or entirely—gone only between the passages of the first train and that of the freight train that morning. He saw the accident from the opposite side of the river, at a distance of about 200 yards. He says that at about 5 o'clock, or before, that morning, when there was a dense fog he "thought he noticed something like fresh dirt on the south side of the embankment."

And at about six o'clock, when "the fog had lifted some," he heard the train coming and then could see that the bank had gone and the sleepers curved in.

At that time, according to the plaintiff's contention, the waters had subsided. At no time did the logs gather within between 50 and 150 feet below the railway bridge, where it remained clear water. The logs would have gathered between the piers—a thousand feet above the dam—and this distance of 50 to 150 feet from the railway bridge.

The question left to the Court to determine is whether this theory or surmise is a sufficient discharge of the burden of proof cast upon the plaintiff in proving his case—when it is obvious the accident might under the circumstances have happened through and resulted from severall other causes which will have to be examined and analysed.

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(a) The defendants contend the embankment in question "was improperly and negligently constructed" Upon this point there is clear and distinct evidence, by competent witness, that had the embankment been properly rip-rapped there would have been no caving in, no slide and therefore no accident.

From the examination of all the photographs taken on the 10th May, the date of the accident, there is nothing showing any stone or any rip-rap, but quite the contrary.

There does not seem to have been any slide between the dam and the bridge, except at this embankment made of the material mentioned at trial. Would not that go to show that if there has been any slide there, that it is due to the material used, which was left unprotected?

There is conflict in the evidence of the engineer who was supposed to have the charge of filling behind the western wing wall at the time of the construction of the railway bridge—and Astle, the section foreman who was in charge of the men making the fill of this western approach—with respect to the nature of the material used. However, witness Howie, a civil engineer and one of the contracting firm for that bridge, testified that he saw the material used in the embankment and that while he qualified it as good material, he says that it was not material that would protect itself against water—it would be all right if protected. But would not such a construction become a dangerous menace under flood condition? Even witness Condon, district engineer, C.N. Railway, says he would not leave a bank of light material exposed to water. Coming back to what has already been said which is that if properly rip-rapped, no accident would have

happened, and as testified to by several witnesses the embankment should have been properly rip-rapped above extreme high water and that it would be negligence not to so protect it.

In *The Great Western Railway Co.* v. *Braid, et al* (1), Lord Chelmsford, at p. 116, said: "There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency and this evidence may become conclusive from the absence of proof on the part of the Company to rebut it. See *Wing* v. *London General Omnibus Co.* (2).

(b) The accident happened on the 10th of May when the frost was coming out of the ground and when the railway authorities knew so well that their road bed was not in good and proper order, that witness Long—the engineer in charge of the wrecked freight train—testified that it was an ordinary freshet and that at the time of the accident he was going at a speed of 5 to 6 miles—because they had had "orders limiting their speed to 10 miles an hour due to the softness of the track—that frost was then coming out of the ground, that pulp wood was heavy." Would not the limiting of speed to such a low rate as 10 miles an hour for these reasons amount to the knowledge that their tracks or right of way was in precarious condition and that it would be as plausible to surmise or accept the theory that the accident might have been the result of this bad state of the right of way rather than that assumed sudden receding of water, in the river—which no one ever saw?

(1) [1863] 1 Moore P.C.N.S. 101. (2) [1909] 2 K.B. 652, 663.

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(c) Witness Campbell said that "the jar of a train would start a slide." Would not this be also more likely when the road bed of the railway was in such bad condition that freight trains were not allowed to travel at a greater speed than 10 miles an hour.

(d) A train—or rather an engine and tender—had passed over the place of the accident shortly before the mishap without its crew noticing anything out of the ordinary. Before approaching the railway bridge and the place of the accident there is in the track a curve running into a tangent. Is it not also reasonable to surmise or suggest that a rail might very well have spread after the passage of the first train that morning, and started the slide described by witness Price. Is not that theory as reasonable as the sudden receding of the water on the river having the effect claimed as above mentioned? Witness Condon says the spread of a rail would have the same effect on the embankment as that claimed by the sudden receding of the waters on the river.

(e) Respecting the filling of the approach or embankment at the back of this wing wall, extending 15 feet from the shore, the evidence discloses that it was entrusted to section-foreman Astle, who declared there was no engineer in charge while he did the work—notwithstanding the statement of the railway engineer, who stated he occasionally went over to inspect. The same engineer was also contradicted respecting his statement as to the nature of the material used or rather where the material was also taken from. Witness Astle, the person in charge, stated rock had been thrown at the foot of the fill, but he adds that "we had not time to put rock as we wanted, we were called away." *Withers v. The North Kent Railway Co.* (1).

(1) [1858] 27 L.J. Ex. 417.

Be that as it may, there is no satisfactory evidence to establish that the embankment was properly riprapped and that the necessary stone was put into the embankment.

I must also find, under the evidence, that the riprap mentioned in exhibit No. 9 was not placed on that embankment. The context of the evidence establishes that clearly as the construction contract had nothing to do with the filling at the back of the embankment.

(f) It is further established by the evidence and Exhibit "I" that the building of the wing-wall at almost right angle with the river—at that bend—and extending 15 feet from the shore has had the effect of deflecting the course of the water or current onto the opposite shore and of creating an eddy (or a whirlpool as put by one of the witnesses), at the very foot or toe of this embankment which so caved in. The eddy was observed and noticed by some of the witnesses. Could not that eddy work into a sandy bank—if it was not riprapped—and undermine and scour at the toe, thus provoking the slide in question? Witness Bishop contends that the embankment should not only have been riprapped on the surface, but that the bottom of the fill should have been made entirely of stone. The plaintiff rests his case upon the theory and surmise of one single manner in which the accident might have happened and I find that out of the many other causes above mentioned the one suggested by the plaintiff is the most unlikely of all.

However, the onus was upon the plaintiff to prove his case, and this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility

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of the accident having been occasioned by other causes which are just as plausible, if not more, than that surmised and relied upon by the plaintiff. The plaintiff failed to show with any reasonable degree of certainty—there is no direct evidence, flowing from weighty, precise and consistent presumptions or conjecture arising from the facts proved—that the accident was actually caused by the positive fault, imprudence or neglect of the defendant. In the result I must find that the plaintiff has failed to prove his case. *The Quebec and Lake St. John Railway Co.* v. *Julian* (1); *The Montreal Rolling Mills Co.* v. *Corcoran* (2); *Beck* v. *C.N.R.* (3).

Therefore, there will be judgment, declaring and adjudging that the plaintiff has failed to prove his case and dismissing the action with costs.

Judgment accordingly.

(1) [1906] 37 S.C.R. 632. (2) [1896] 26 S.C.R. 595.
(3) [1910] 13 W.L.R. 140.

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grace and bounty of the Crown, and that no action will lie against the Crown to recover the same.—2. That the word "entitled" used in orders in council relating to such a gratuity should not be construed as setting up a contractual relation between the officer and the Crown, which would give rise to a right of action.—3. Where there is a discretion vested in an executive officer by order in council having the force of law, no appeal lies to the courts from the exercise of such discretion. BACON *v.* THE KING **25**

2 —— *Construction — Public buildings — Plans — Competition of Architects—Order in Council authorizing same—Board of Assessors—Power of same to alter conditions.*] The Dominion Government, having need of additional departmental buildings at Ottawa, by order in council proposed a competition for architects involving the submission of preliminary designs for certain of such buildings, "the prizes being the selection of say five of the most successful competitors who would be invited to complete working plans of such of the buildings as the Minister of Public Works may prescribe, for which they would be paid each $3,000. Of these latter, the architect submitting the best working plans would be employed to carry out this work at a commission to be arranged." The order in council also provided for the appointment of three assessors to judge the preliminary designs and select the five prize-winners to prepare the working plans as above mentioned, and to ask the most successful of such competitors to prepare the working plans. The award of the assessors in both cases was to be subject to the approval of the Minister under the order in council. Advertisements were then published inviting architects to enter such competition and, assessors having been appointed, conditions were published by them for the guidance of architects in preparing their competitive designs. By these conditions the number of competitors was increased to 6 instead of 5, as provided by the order in council, and each of the five unsuccessful competitors who submitted plans was to receive an honorarium of $3,000. Plans were submitted by the suppliants, which were among the 6 sets selected. There was no approval

of these plans by the Minister, and there was no competition as to final plans. The buildings were not proceeded with by the Government, owing to the breaking out of war and other reasons. Suppliants claim 1 per cent on an estimated cost of $10,000,000 for buildings constructed on their plans.—*Held*, that the Crown was justified under the circumstances in not proceeding with the erection of the buildings; and that even if a contractual relationship existed the delay in proceeding did not constitute a breach thereof.—2. That the approval of the Minister of the plans was a condition precedent to the right of the suppliants to recover even the honorarium of $3,000; and that all the circumstances negatived the existence of a contract between the suppliants and the Crown to pay the percentage claimed.—3. That no action would lie against the Crown on account of the failure of the Minister to approve of the suppliants' plans, the matter being one of executive discretion.—4. As between a reasonable construction of the intention of the parties to a contract and an absurd one, the Court should be zealous to find reasons to adopt the former.—5. That the portion of the conditions prepared by the assessors which purported to change the conditions embodied in the order in council were ultra vires and void. SAXE ET AL *v.* THE KING..... **60**

3 —— *Obligation of Crown as bailee — Reasonable care — Tort — Contractual relationship.*] By a contract under seal, entered into between the suppliant and the Crown, suppliant agreed to deliver a certain number of gauntlets for the use of the R.C.M. Police, equal in every respect to the sample submitted by them. These were delivered, and upon examination, a large proportion thereof were rejected as not up to sample.—The rejected gauntlets were marked with an ordinary lead pencil mark, easily removed, and shipped back to suppliant, who returned them to Ottawa because so marked. This mark was removed by the employees of the Crown and in some instances the surface of the leather was injured in the process.—*Held:* That the Crown in the right of the Dominion of Canada may be liable as a bailee, and that after the rejection of the gauntlets herein it became an involuntary bailee,

SALVAGE SERVICES

See SHIPPING AND SEAMEN (Nos. 1, 12, 16, 17).

SALE

AUCTION—*See* SHIPPING AND SEAMEN
JUDICIAL—*See* SHIPPING AND SEAMEN

SECURITY

See SHIPPING AND SEAMEN (Nos. 8, 10).

SHIPPING AND SEAMEN

PROCEDURE IN ADMIRALTY. *See* PRACTICE.

JURISDICTION OVER VESSEL OF FOREIGN SOVEREIGN, ETC. *See* INTERNATIONAL LAW.

1——*Shipping—Fishing industry — Custom—Proof of—Salvage.*] On the 29th July last, the *R.S.*, a fishing boat chartered by and engaged in fishing for the G.C. Cannery Company went adrift in Knight Inlet, B.C.—The *Freiya* was owned by one C. and was at the time engaged in buying fish from the same Company and others and taking it to market, and claims for alleged salvage services rendered the *R.S.* when adrift as aforesaid.—The *R.S.* alleged that there existed a long established custom in these waters that all vessels engaged in the fishing industry afford to each other in the common interest and for their joint benefit voluntary and gratuitous assistance to crews and vessels in distress in any of the frequent accidents which are incidental to vessels of various descriptions engaged in that industry, and that this mutual assistance is not confined to the vessels attached to or employed in connection with the various canneries, but accidents to those which carry on independently the fishing business in its various aspects.—*Held:* That the above custom has been sufficiently established with reasonable certainty as being so notorious and generally acquiesced in that it may be presumed to have been known to all persons engaged in that industry who sought to inform themselves on so important a matter as it was incumbent upon them to do in working under local conditions.—2. That such a custom was in the interest of humanity and industry, was not unreasonable and could be successfully invoked in favour of the *R.S.*; and that in consequence the present action should be dismissed. THE FREIYA *v.* THE GAS BOAT R.S..... 87

SHIPPING AND SEAMEN—*Continued.*

2 —— *Towage — Collision — Negligence—Unsuspected obstruction to the view—Lights—Judicial observation.*] On the 15th August, 1920, about 1.00 a.m., off Port Atkinson, B.C., the S.S. *Tyndareus*, a large ship collided with a crib, in tow of the tug *Alcedo*.—The crib was 90 feet long and 40 feet wide and stood about 15 feet out of water at the top of the shingle bolts, and was about 600 feet astern of the tug. The weather was calm and the night clear, but dark and hazy with a low-lying cloud bank of smoke in places which might conceal one vessel from another at water level. The tide was nearly slack on the ebb, at the point of collision. The *Alcedo* was proceeding east at about one knot an hour, when the *T* suddenly appeared on her quarter 25 yards from the crib into which she crashed before anything could be done to avoid collision.—No signals were given by either vessel, and neither changed their course or speed.—Both vessels were displaying proper lights and bright look-outs were kept.—*Held:* 1. That, on the facts, the defendant was not guilty of any negligence; the collision being due to the vessels not discovering each other in time, because of the unsuspected obstruction to the view caused by the low-lying smoke cloud aforesaid, or to the entire absence of, or inadequate, lights on the crib.—2. *Judicial observation:* That the light on a boom or crib being towed should be of at least the same visibility as a ship's white light (5 miles) as required by Article 2 (a) of the Sea Regulation for "Bright white lights" in general, if not indeed of greater visibility because of its lying so much nearer to the water. PEERS ET AL *v.* SHIP TYNDAREUS 93

3 —— *Towage — Negligence — Efficient equipment — Limitation of liability — Onus of proof — Contract reformed — Appeal.*]—*Held* (by the trial judge): In a contract for towage there is an implied contract that the tug or ship towing shall be efficient and properly equipped for the service.—2. A contract may be re-formed in a case where it is admitted that by inadvertence certain terms agreed upon were omitted.—3. The provisions of R.S.C. 113, s. 921 (d) relating to limitation of liability apply to a towage contract, and in ordinary cases where loss has occurred without the

actual fault or privity of the owners a limitation of liability is permitted; but, where the evidence discloses facts and circumstances which indicate knowledge on the part of the owners of the insufficiency of the tug or its want of capacity either in structure, equipment or in the crew provided to carry out a contract of towage, limitation of liability will not be allowed.—4. In case of loss by improper navigation the onus is cast upon the owners of showing that what occurred was due to causes which arose without their actual fault or privity or was not contributed to by those causes, and failure to satisfy that onus, prevents the application of the provisions of the statute above referred to as to limitation of liability.—*Held:* On appeal (affirming the judgment appealed from) that the owners being in control of their tug and crew, and having exercised this control by a telegram to the master, reading: "Point Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it. If you can save this scow without risk to your tug do so;" thereby became privy to and partakers in responsibility with all its legal consequences in respect to all actions of the tug subsequent thereto, and there should be no limitation of the liability provided for by R.S.C. 1906, ch. 113, sec. 921. POINT ANNE QUARRIES, LIMITED *v.* THE SHIP M. F. WHALEN AND OWNERS..... **99**

4 —— *Merchant Shipping Act — Bill of sale—Form thereof—Bad faith—Entry in register of shipping not conclusive as to ownership—Maritime law of England.*]—*Held:* That where the vendee of a ship bought in bad faith, knowing that his vendor was committing a fraud, the sale should be set aside.—2. That where the bill of sale of a ship had not been executed in accordance with the provisions of sec. 24 of the Merchant Shipping Act, it did not transfer the ownership therein.—3. That where a question of ownership is raised, the entry in the register of shipping is not conclusive, and the court may inquire into the validity of the bills of sale and into all other circumstances affecting the right of property in the ship.—4. That although the Exchequer Court of Canada on its Admiralty side sits in Canada, it administers the maritime law of England in like manner as if

the cause of action were being tried and disposed of in the English Court of Admiralty. ROBILLARD *v.* SLOOP ST. ROCH & CHARLAND..... **132**

5——*Priority of wages as against mortgagee—Seamen part owners of ship mortgaged—Shipping register—True ownership*] The W.C.T. Co. were the registered owner of the S.S. *Rochepoint* and 50% of the stock of this Company was owned by the plaintiffs, S.S., C.R. and W. J. Stone. The other plaintiffs had no interest therein. In 1919, S.S. and W. J. Stone, acting for the company, mortgaged the said ship for $4,000, and personally guaranteed payment thereof. In February, 1921, the mortgagees took possession, and whilst technically in their possession a writ was issued on behalf of plaintiffs for arrears of wages claiming condemnation of the ship, etc., which was resisted by the mortgagees.—*Held,* that S.S.S. and W. J.S., Master and Mate respectively of the ship, having personally guaranteed payment of the mortgage, their claim for arrears of wages should not now be preferred or given priority as against that of the mortgagee.—2. That, with respect to the claim of C.R.S. (engineer) as the mortgagees were designedly kept in ignorance of these wage claims, and as the Company as registered owner was being used as a cloak to carry on the operations of the vessel by the three plaintiffs "Stone" as partners behind the screen of registration, this claim for alleged lien was not *bona fide*, and should be rejected.—*Haley* v. S.S. *Comox* (20 Ex. C.R. 86) referred to.—3. That, to determine the question of true ownership, the Court should not allow itself to be misled by documents, but will resort to all the evidence to extract the truth. STONE ET AL *v.* S.S. ROCHEPOINT AND OWNERS..... **143**

6 —— *Re-arrest pending appeal—Foreign owners—Special circumstances.*] Plaintiffs sued the *R.S.* on a claim for salvage which was dismissed. They appealed to the Exchequer Court from this decision and moved to re-arrest the ship pending the appeal.—*Held*:—That where the owners, though foreigners, reside within the jurisdiction and carry on their business therein, the Court will not order the re-arrest of the ship pending an appeal to the Exchequer Court of Canada from

exceptions mentioned in section 191 of the Canada Shipping Act, (ch. 113, R.S. C. 1906), in an action for seaman's wages earned on a ship registered in Canada, where the amount of recovery is less, although the amount sued on is more than $200.00, the Exchequer Court in Admiralty is without jurisdiction.—*The Savoy* and *The Polino* [1904] 9 Ex. C.R. 238, referred to, and *Cowan* v. *The St. Alice* [1915] 17 Ex. C.R. 207 followed. KOUAME *v.* S.S. MAPLE COURT AND OWNERS..... **226**

16 —— *Salvage services — Custom and local usage—Ignorance of custom—Reasonableness, thereof.*] In the defendant's plea to an action for salvage services, it was alleged that it is the custom amongst those engaged in the cannery and fishing business in certain parts of the British Columbia coast, to render reciprocal services to each other in times of need without thereby creating any obligation on the part of the party to whom such services are rendered either by way of salvage or as a contractual liability.—*Held*:—(Reversing the judgment of the Local Judge in Admiralty for the British Columbia Admiralty District), that, even if the alleged usage or custom was valid and binding between cannery people and people engaged in fishing, it did not extend to persons who did not fish but limited their business and avocation to buying fish; nor could it operate to the detriment of the positive rights enjoyed by those outside the class of cannery people and people engaged in fishing.—2. A local usage or custom need not have existed from time immemorial, yet it must be notorious, certain and above all things reasonable, and it must not offend against the intention of any legislative enactment. *Nelson* v. *Dahl* [1879] 12 Ch. D. 568; and *Devonald* v. *Rosser & Sons* [1906] 2 K.B. 728 referred to.—3. That the plaintiff in this case having been ignorant of such usage, and not coming within its reasonable application, he could not be assumed to have acquiesced in it. GAS BOAT FREIYA v. GAS BOAT R.S..... **232**

17 —— *Salvage services — Towage.*] On the 8th November, 1921, the defendant ship was lying anchored by her port anchor in the breakers near the Cape Breton shore at the northern entrance of the Strait of Canso, very near to the beach, and in shallow water, the wind blowing at from 50 to 60 miles an hour from the northwest. She had previously been through rough weather and her sails were in bad condition. She was in a position of great peril, and was only kept from stranding by the back-wash from the beach.—At 9.45 a.m. on the same day the plaintiff steamer hearing of defendant's difficulties, left Port Hastings and went to her assistance, and, at considerable danger to herself, as the schooner could only be approached from the port side, sent two lines aboard the schooner and succeeded in making fast two steel hawsers, finally towing her to safety. No other means of salvage was reasonably available at the time.—*Held*, on the facts, that the services so rendered were in the nature of salvage and not of mere towage. VENOSTA LTD. *v.* THE MARY MANSON GRUENER ETC..... **251**

18 —— *Ship's articles—Termination of voyage—Discretion of master in regard thereto.*] By articles signed at Halifax plaintiff agreed to serve on board the S.S. *Canadian Carrier* * * * on a voyage from Halifax, N.S. to New York, U.S.A., thence to any port or ports between certain degrees of latitude to and fro, as required, for a period not to exceed 12 months. Final port of discharge to be in the Dominion of Canada.—The ship sailed from Halifax on March 4th, 1921, and after calling at New York and other points in the United States sailed for Honolulu and from there to Vancouver, arriving June 3rd, 1921. After taking a cargo to Nanoose Bay, V.I., she returned to Vancouver where she completed her cargo and sailed for Montreal, on June 20th, 1921, via Panama, arriving August 7th, 1921, and finally discharging cargo and paying off the crew at this point which was the final discharge and termination of the voyage. The plaintiff, boatswain, asked to be paid off when the ship first reached Vancouver and when refused left the ship against the master's order.—*Held:* On the facts, that the voyage contemplated was a 12 months' tramp within certain limits, as required by the master and was not terminated till Montreal was reached. That plaintiff being required by the master was, under his Articles, obliged to complete the voyage and to