REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

CHARLES MORSE, K.C.

REPORTER.

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IN THE EXCHEQUER COURT OF CANADA.

General Order.

In pursuance of the provisions contained in the 87th section of "The Exchequer Court Act" (R. S. 1906, ch. 140) it is hereby ordered that the following Rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:—

1. Rule 23 of the Exchequer Court of Canada is hereby repealed.

2. Rule 166 of the Exchequer Court of Canada is hereby amended by striking out the words "appeals from the Report of the Registrar or other officer of the Court" appearing in the 3rd and 4th lines of the fourth paragraph thereof.

Dated at Ottawa, this 14th day of June, A.D. 1910.

(Sgd.) W. G. P. CASSELS,
J. E. C.

JUDGE

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports :

THE HONOURABLE WALTER G. P. CASSELS.

Appointed 2nd March, 1908.

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable	A. B. ROUTHIER, - - - - -	Quebec	District.
do,	JOHN DUNLOP, Deputy Local Judge - - - - - - - - -	do.	do.
do.	THOMAS HODGINS - - - - (Died January 14th, 1910)	Toronto	do.
do.	JAMES T. GARROW - - - - - (Appointed March 1st, 1910)	do.	do.
do.	JAMES MCDONALD, - - - - -	N. S.	do.
do.	ARTHUR DRYSDALE, Deputy Local Judge - - - - - - - - -	do.	do.
do.	EZEKIEL MCLEOD, - - - - -	N. B.	do.
do.	WILLIAM W. SULLIVAN, C.J.S.C.	P. E. I.	do.
do.	ARCHER MARTIN - - - - -	B. C.	do.
do.	JAMES CRAIG, - - -	Yukon Territory	District

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA

During the period of these Reports :

THE HONOURABLE A. B. AYLESWORTH, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE JACQUES BUREAU, K.C.

NOTE.

Errors in citations are corrected in the Table of Cases cited.

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

BETWEEN

THE NEW YORK HERALD COMPANY ..... } PLAINTIFFS; 1908 June 13.

AND

THE OTTAWA CITIZEN PRINTING COMPANY, LIMITED, *et al*..... } DEFENDANTS.

Trade-mark—Infringement—Specific marks—Title of comic sections of newspapers—Sale of newspapers containing titles without previous copyright—Effect of, on right to register titles as specific trade-marks.

In an action for the infringement of two specific trade-marks, consisting of the words "Buster Brown" and "Buster Brown and Tige" as applied to the sale of comic sections of newspapers, etc., it appeared that the plaintiff had not registered such words, or titles, as trade-marks in Canada until the year 1907, although from 1902 onwards they had been selling in this country comic sections of a newspaper, published in New York, with the words "Buster Brown" and "Buster Brown and Tige" applied to the same without having sought and obtained the protection of copyright therefor under the Dominion Copyright Act.

Held, that, upon the facts, even if the said words, or titles, were the subject of valid trade-marks (*quoad hoc dubitante*), the plaintiffs had abandoned to the Canadian public any exclusive right they may originally have had to use the same as trade-marks.

ACTION for the infringement of trade-mark.

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

May 4th, 1908.

The case was now argued.

R. V. Sinclair, K.C. and *D. H. McLean* for the plaintiffs;

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Argument of Counsel.

J. S. Ewart, K.C. and *F. M. Burbidge* for the defendants.

For the plaintiffs it was contended that under their trade-marks registered in Canada they had an absolute right to restrain the defendants from publishing comic sections of their newspaper setting forth the adventures of "Buster Brown" and "Buster Brown and Tige."

The plaintiffs had been manufacturing and selling comic supplements with the trade-marks "Buster Brown" and "Buster Brown and Tige" applied to them since 1902 in the United States, and in July, 1907, they had registered the trade-marks in Canada. About the time of the registration of the trade-marks in Canada, the defendants had begun to sell and continued to sell comic sections of the "Saturday Evening Citizen" in Canada with the trade-marks of the plaintiffs applied to them.

The above names had been adopted for use by the plaintiffs for the purpose of distinguishing a series of comic sections manufactured and sold by them from similar productions made and sold by others, and so they were the subject of valid trade-mark. (*Partlo* v. *Todd* (1); *McAndrew* v. *Bassett* (2); *Borthwick* v. *Evening Post* (3); *Canada Publishing Company* v. *Gage* (4); *Carey* v. *Goss* (5); *Rose* v. *McLean Publishing Company* (6); *Scrutton on Copyright* (7); *New York Herald Company* v. *The Star Co.* (8); *Dixon Crucible Company* v. *Guggenheim* (9).

For the defendants it was argued that the title of a literary production cannot be the subject of a valid trade-mark under the Canadian statute. It is not a "business

(1) 17 S. C. R. 196.
(2) 4 DeG. J. & S. 380.
(3) L. R. 37 Ch. D. 449.
(4) 11 S. C. R. 306.
(5) 11 Ont. R. 619.
(6) 24 Ont. A. R. 240.
(7) 3rd. ed. p. 109.
(8) 146 Fed. Rep. 204 and 146 Fed. Rep. 1023.
(9) 2 Brewst. (Pa.) 321.

device" within the meaning of R. S. 1906, c. 71, sec. 5. It could not be registered under the English Acts, see *Licensed Victuallers Company* v. *Bingham* (1); *Bradbury* v. *Beeton* (2); *Dicks* v. *Yates* (3); *Schove* v. *Schiminické* (4). None of the English authorities show that an injunction against the use of a literary title has ever been issued upon the ground of it being a trade-mark; but they proceed upon the common law right to prevent deception. The case here presented is under the statute, as the court has no jurisdiction to enforce the common law right.

Secondly, the plaintiffs could not register the names in question as a trade-mark because they were in general use long before they pretend to have adopted them. Nor did they ever acquire any title to their exclusive use. (*Leather Cloth Company* v. *American Leather Cloth Company* (5); *Gage* v. *Canada Publishing Company* (6); *National Starch Company* v. *Munn's Patent* (7).

Thirdly, the neglect to copyright the comic sections with the titles in question attached causes the publications as a whole to become *publici juris*. They were brought into Canada and sold without the protection of copyright, and anyone could reprint them for sale if he saw fit. (*Clemens* v. *Belford* (8); *Singer Mfg. Company* v. *Wilson* (9); *Singer Mfg. Company* v. *Loog* (10); *Jollie* v. *Jaques* (11).

CASSELS, J., now (June 13th, 1908) delivered judgment.

The plaintiffs in this action sue the defendants for an alleged wrong on the part of the defendants in infringing the trade-marks of the plaintiffs.

(1) 38 Ch. D. 139.
(2) 39 L. J. Ch. 57.
(3) 18 Ch. D. 76.
(4) 33 Ch. D. 546.
(5) 11 H. L. C. 546.
(6) 6 Ont. R. 80.
(7) [1894] A. C. 275.
(8) 14 Fed. Rep. 728.
(9) 3 App. Cas. 376.
(10) 18 Ch. D. 395; 8 App. Cas. 15.
(11) 1 Blatch. 618.

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Reasons for Judgment.

There is little dispute as to the facts in question.

On the 6th July, 1907, the plaintiffs registered in the proper office and obtained the certificate of registration required by the statute of a specific trade-mark consisting of the words "Buster Brown" to be applied to the sale of comic sections of newspapers, etc.

On the 15th July, 1907, the plaintiffs registered in the proper office and obtained a certificate of registration required by the statute of a specific trade-mark consisting of the words "Buster Brown and Tige" to be applied to the sale of comic sections of newspapers, etc.

"Buster Brown" is not an ordinary youth generated as other lads, but was conceived in the office of the plaintiffs in New York in the year 1902.

He was a progressive youth of a saintly countenance and apparently born with such a superabundance of mischievous tendencies as required at a very early age the addition to his ménage of a dog called "Tige" who could assist him in his pranks.

From 1902 onwards The New York *Herald* in their Sunday edition, as part of the comic section of their paper, published a serial illustrated story of Buster Brown and his dog Tige.

These comic sections were received over a considerable portion of the world by the manly youth with great eagerness, and while they may have had a tendency to make the lives of parents blessed with boys slightly more unhappy, they became a lucrative source of revenue to the *Herald*.

If the trade-marks in question are the valid subject matter for a trade-mark, I think the plaintiffs entitled to them. I do not think the prior use of the name as detailed by the witness Epstein during the slight lapse of James Crossley from inebriety to sobriety sufficient to invalidate the trade-marks.

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Reasons for Judgment.

Neither can I agree with Mr. Ewart's contention that Buster Brown must be considered as a real personage. If it had been George Washington or Napoleon, or any other distinguished person, of course anyone would have had the right to publish new tales of pranks when these distinguished personages were youths. But Buster Brown is of an entirely different conception.

I have read over the cases cited and the argument, and a great number of other cases.

It has to be borne in mind that this action must be determined by the sole question whether or not the trade-marks are valid and whether the defendants have infringed.

No question of fraud at common law, or of passing off, have been raised, nor would it be within my jurisdiction to try such cases.

In considering the various authorities cited it must be noticed that the greater number are not in reality based on the trade-mark, although language has been used in some apt to mislead.

Many of them are cases in which the newspaper in question was the property of partners and the title passed as part of the assets of the business, but not because the ordinary English words distinguishing the title were capable of being trade-marks.

Other cases depend on fraud, the misleading of purchasers and obtaining the benefit of the business of the plaintiffs.

The case of *The New York Herald Company v. The Star Co.* (1); affirmed by the Circuit Court of Appeals (2); is apparently a strong case in favour of the plaintiffs. I have a high regard for the opinion of these judges, but do not see my way to come to the same conclusion in this case.

(1) 146 Fed. Rep. 204. (2) 146 Fed. Rep. 1023.

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Reasons for Judgment.

The motion in that case was an interlocutory, one and the reasons given are scant.

Filed with me as part of his argument by counsel for the plaintiffs is a judgment of Mr. Justice Dowling of the Supreme Court of New York County in a case of *Outcault vs. Cupples* of date 21st June, 1907. I would gather from this judgment that in addition to the registered trade-marks in the United States the serial picture story has been copyrighted in the United States also. No copyright has been asked for or obtained in Canada.

From 1902 onwards the *Herald* has been selling their paper in Canada without the protection of the copyright statutes and without complying with the requirements of the statutes. The result is that apart from questions of fraud (with which I have nothing to do) anyone in Canada could republish the sheets of the *Herald* including the names of Buster Brown and Tige.

In a very early case *Jollie vs. Jaques* (1); decided by Mr. Justice Nelson, it was held that where in an action on copyright the plaintiff failed to make out title to his copyright the question whether the court will interfere to permit the use of the title of the work upon principles relating to the good-will of trades cannot be entertained, as the court has no jurisdiction of such a question.

"The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected the title goes with it, as certainly as the principal carries with it the incident." (2).

See *also Kerly on Trade-marks*, (3); and case cited of *Clemens vs. Belford*, (4); *Sabastian on Trade-marks*, (5). There are numerous cases such as the reproduction of Webster's Dictionary after copyright had expired, where it was held that the defendant having the right to publish the dictionary the right to the name followed.

(1) 1 Blatch. 618.
(2) 1 Blatch at p. 627.
(3) 2nd Ed. p. 487.
(4) 14 Fed. Rep. 728.
(5) 4th Ed. p. 297.

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Reasons for Judgment.

"But there is no exclusive right to a trade name on a publication which has been dedicated to the public without copyright, or on which copyright has expired." *Hesseltine on Trade-marks*, (1).

I would have thought it extremely doubtful, having regard to the terms of the Canadian statute as to trade-marks, that these words "Buster Brown" and "Buster Brown and Tige" were the suject-matter of a trade-mark. But under the facts of the case they become public property so far as this court is concerned.

I think the action must be dismissed with costs, to be paid by the plaintiffs to the defendants.

*Judgment accordingly**

Solicitor for plaintiffs: *D. H. McLean.*

Solicitors for defendants: *Ewart, Osler, Burbidge & McLaren.*

(1) Ed. 1906 p. 205.

*Affirmed on appeal to the Supreme Court of Canada.

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Feb. 18.

BETWEEN

TORONTO TYPE FOUNDRY CO., LIMITED ..... } PLAINTIFFS;

AND

JAMES T. REID, *et al* ..... DEFENDANTS.

Patents of Invention—Infringement—Defence—Demurrer—Jus tertii.

As a defence to an action for the infringement of a patent of invention it was pleaded that the patent was the property of certain joint-owners who were not the plaintiffs.

Held, that this was in effect pleading a *jus tertii*, and was not a good defence in law to the action.

ACTION for the infringement of letters-patent for invention.

Demurrer to an allegation by way of defence that the patent was not the property of the plaintiffs but of third persons not parties to the action.

The grounds of the demurrer are stated in the reasons for judgment.

February 10th, 1908.

W. Cassels K.C. and *F. H. Markey* in support of demurrer;

Glyn Osler, contra.

SIR THOMAS W. TAYLOR, Judge *pro tempore*, now (February 18th, 1908,) delivered judgment.

The plaintiffs' statement of claim alleges that one Rogers obtained letters patent in Canada, granting him the exclusive right and privilege of constructing, using and selling to others, a certain linotype machine of which he was the inventor. This patent, it is asserted, the defendants are infringing by constructing and using linotype machines which contain the invention covered thereby. The plaintiffs, therefore, seek to have such

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alleged infringement restrained, to obtain damages sustained, and for relief in several other respects.

The plaintiffs' title to the patent, as they set it out, is an assignment by Rogers to one Dougall, and a further assignment by Dougall to them; these assignments being both duly registered in the Patent Office at Ottawa.

The defendants by their pleas, allege ignorance of the plaintiffs being an incorporated company, next, admit their own existence as a co-partnership, and then deny every other matter contained in the statement of claim. They also plead that Rogers, Dougall and the plaintiffs, abandoned the alleged invention, whereby it became the property of the public, with the right to use and enjoy it. The plaintiffs' title to the patent is denied, as is also any infringement of it by the defendants Then follow a number of pleas, which appear to have become almost matters of course in actions like the present. With these, there is a plea, the 13th, which sets up that the patent is the joint property of the Mergenthaler Linotype Co. of New York and John R. Dougall, and any transfer by the latter, as alleged, is illegal, null and void.

To these pleas the plaintiffs have replied, at the same time filing a demurrer to the 13th as bad in law.

The plaintiffs contend that it is not open to the defendants to set up the *jus tertii*, as they do when they allege the ownership of the patent by the Mergenthaler Linotype Co. and John R. Dougall. The cases cited, and on which they rely, *Greenstreet* v. *Paris* (1); *Bank of Toronto* v. *Cobourg, &c. Rail. Co.* (2), and *McDougall* v. *Lindsay Paper Mill Co.* (3), fully sustain their position.

Then, the plaintiffs set out their title; this is denied, so they are put to the proof of it, and must prove it as alleged. When the plaintiffs come to prove their title, the

(1) 21 Gr. 229.

(2) 10 Ont. R. 376.

(3) 10 Ont. Pr. R. 247.

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Reasons for Judgment.

defendants, having denied it, can, it seems to me, without this plea, show that the plaintiffs have not the good title they set up, and on which their right of action is founded. If they fail to prove the title they claim to have they cannot succeed in their action.

To allow the plea to stand would open up an issue causing great embarrassment at all events. If the plaintiffs have an assignment from Dougall at all, it cannot, as the plea says, be illegal, null and void.

As far as the plea goes the Mergenthaler Linotype Co. can have only some undisclosed equity or claim, for there is no suggestion even that they have any such registered assignment as seems required by sec. 27 of *The Patent Act*, R.S.C. c. 69.

I therefore allow the plaintiffs' demurrer to the 13th plea, with costs.

This also disposes of the demurrers in the other three cases of the same plaintiffs against Moffet, Robertson, and the Germania Printing & Publishing Co.

Solicitors for the plaintiffs: *Smith, Markey, Montgomery & Skinner.*

Solicitors for defendants: *Lafleur, MacDougall and McFarlane.*

BETWEEN

THE MINISTER OF RAILWAYS AND CANALS FOR THE DOMINION OF CANADA ..... } PLAINTIFF; 1908 Oct. 31.

AND

THE QUEBEC SOUTHERN RAILWAY COMPANY AND THE SOUTH SHORE RAILWAY COMPANY ..... } DEFENDANTS.

In re

HIRAM A. HODGE.....CLAIMANT (CONTESTING);

AND

THE BANK OF ST. HYACINTHE, THE ATTORNEY-GENERAL FOR CANADA AND HIS MAJESTY THE KING..... } INTERVENING PARTIES ANSWERING CONTESTATION.

In re

FRANK D. WHITE.....CLAIMANT (CONTESTING).

AND

THE BANK OF ST. HYACINTHE, THE ATTORNEY-GENERAL FOR CANADA AND HIS MAJESTY THE KING .... } INTERVENING PARTIES ANSWERING CONTESTATION.

Railways—Rights of purchaser at sale—Incorporation of company—51 Vict. chap. 29—Promoter—Fiduciary relationship to company—Profit on sale of railway—Directors' salary—Set-off.

A purchaser of a railway does not acquire an absolute right to the railway. What he acquires is an interim right to operate the railway to be followed up by incorporation as provided by sec. 280 of 51 Vict. c. 29. (See now sec. 299 of the *Railway Act*, R. S., 1906, c. 37.)

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HODGE & WHITE'S CLAIM.

Statement of Facts.

2. While an independent purchaser buying with his own money and selling at an enhanced price to a company, with full disclosure and without fraud, can claim his profit, promoters, who stand in a fiduciary relationship to the company, cannot take such profit. Hence, where promoters bought with the moneys of a company incorporated by themselves, to whom they turned over the property, they were not permitted to recover against the company any profits on the transaction.

3. A resolution of shareholders is necessary to authorise the payment of salaries to directors of a company.

4. Having regard to the provisions of Arts. 1031 and 1187 C. C. P. Q., creditors were allowed by the Referee to set off the claims of certain debtors, officers of the company, for salaries taken by them without proper authority, and for expenditures made by them out of the company's funds for a purpose *ultra vires* of the company. No objection was taken to this ruling before the Referee, and the court, on appeal from his report, confirmed such ruling, but expressed some doubt as to the jurisdiction of the Referee to set off such claims.

APPEALS from the report of the Registrar acting as Referee.

The general facts of the proceedings before the court, as well as before the Referee, appear in the reasons for judgment; but it is necessary to a clear understanding of the general issues involved to state them with some detail here.

On the 21st March, 1904, a Receiver was appointed for the above-mentioned railways. The railways having been sold by order of court (1) under the authority of 4–5 Edw. VII, c. 158, the Registrar was empowered by order of court to make enquiry and report as to the Receiver's account and to ascertain and investigate the claims of the several creditors.

On the 12th December, 1906, the Referee made a provisional report upon the evidence then before him, for reasons therein set out, and sent a copy of the same to all the creditors, with a request that all those who might be dissatisfied with that report should file their contestations,

(1) See *Minister of Railways and Canals* v. *Quebec Southern Railway Co. et al.*, 10 EX. C. R. 139.

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HODGE & WHITE'S CLAIM.

Statement of Facts.

also giving them notice that otherwise such report would become absolute.

Eight contestations were then filed. Evidence respecting such contestations was received, and the Referee's findings upon the same were embodied in a final report, dated the 25th May, 1908, together with his findings upon all the claims. The final report dealt with three hundred and sixteen claims in all, but the findings upon six only of the contestations were made the subjects of appeal to the Judge of the Exchequer Court.

In respect of the appeals of Hodge and White, the following facts are taken from the Referee's provisional and final reports herein.

Frank D. White, of the City of Vermont, U.S.A., filed before the Referee four claims as follows:

1. A claim for $3,945 representing an alleged loan to the original Quebec Southern Railway Company on or about the 3rd July, 1900, together with the sum of $945 as interest thereon.

2. A claim for the sum of $193,750 and interest, alleged to be due him in respect of 193¾ 4 per cent. bonds of what was known in the proceedings as the $900,000 issue.

3. A claim for $23,845.30 representing the sum of $19,137.99 alleged to have been paid by him to the Bank of St. Hyacinthe on the 2nd December, 1902, to cover amount of Quebec Southern Railway Company's overdraft, together with $5,607.36 interest thereon, less certain sums received on account.

4. A claim for $1,500 and interest, for salary as Vice-President and Treasurer of the amalgamated Quebec Southern Railway Company for a certain period.

5. A claim for $370,000, representing $42,000 of what was called the $3,500,000 bond issue, and $328,000 of the income bonds.

Amounting in all to the sum of $593,040.30.

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HODGE & WHITE'S CLAIM.

Statement of Facts.

Hiram A. Hodge, of Boston, Mass., was President of the Quebec Southern Railway before the road was placed in the hands of a Receiver. He filed two claims, as follows:—

First, for salary as such president ($200 per month) and expenses, amounting to $1,596.17.

Secondly, for the value of bonds to the value of $193,750 of what was known as the 900,000 issue; $42,000 of the $3,500,000 issue, and $328,100 of the income bonds, in all amounting to.....$ 563,750 00

The total of Hodge's claim being.....$ 565,346 17

By his final report, the Referee dismissed both the claims of Hodge and White in respect of unpaid salaries on the following grounds:—

"The first item of Hodge's claim is for salary, at the rate of $200 per month from 1st October, 1903, to 21st March, 1904, amounting to $1,150, together with $446.17 balance of expenses still remaining unpaid, making the total sum of $1,596.17.

"Hodge began paying himself a salary at such rate from the time he took actual possession of the road during August, 1900, and although he was still receiving his salary of $6,000 to $7,000 a year as Traffic Manager of the Rutland Railroad Company up to November or December of that year. The total amount of salary so paid would appear, from Plaintiff's Exhibit P–12, to have been the sum of $7,825.00.

"With respect to this question of salary, the undersigned can only repeat what he has already said in his provisional report. Under what authority was the salary paid, is the first question which suggests itself. There was no resolution of any kind either from the shareholders or the directors to that effect. Without any resolution of the shareholders authorizing such payment to directors, no such salary can be paid. Hodge being a direc-

tor could not pay himself a salary without a resolution from the shareholders. *Earle* v. *Burland*, 1902, A. C. 101, has been cited by both parties on this point. The Court in that case allowed Burland's salary as Secretary to continue when he was appointed Vice-President, but it was because there was a resolution fixing his salary as Secretary, and that notwithstanding the change in the distribution of offices, Burland continued to do the same class of work as he had done as Secretary. It is obvious from the judgment that their Lordships of the Privy Council reached this conclusion on their theory that no salary can be paid to a director without resolution. *Lindley on Companies* has already been cited in the provisional report upon this point, but a few additional citations therefrom may be given, viz : Vol. 1, 6th ed. p. 419 : "Directors have no power to vote themselves fees for salaries," etc. Apparently the shareholders have that power, but not the directors. The individual consent of directors cannot avail inasmuch as this is a matter of internal management, and inasmuch also as Hodge and White were not ignorant of the informality. The case of *Dunston* v. *Imperial Gas Co.*, 3 B. & Ad. 125 (cited at p. 512 of *Lindley*) is further authority that directors are not impliedly entitled to any pay for their services. Citing *Lindley* again at pp. 539, 540, we find : 'Directors of companies are generally allowed compensation for their trouble by express agreement; but where there is no such agreement they cannot, without the sanction of the shareholders, charge the company anything for their services.'

"The salary claimed as remaining unpaid covers the period of the amalgamation, when Hodge and White were no longer the whole company. The minority interest, or shareholders, has or have never shown any consent to such payment, as they very likely never knew of it.

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HODGE & WHITE'S CLAIM.

Statement of Facts.

"The position of President of a company is not *de jure* one of remuneration, it requires the votes of shareholders to make it so. It might perhaps be different if the President had been at the same time General Manager. Sec. 1, ch. 9 of 59 Vic. (amending sec. 58 of ch. 29, 51 Vict.) the Act in force at the time of this transaction, provides that the directors may make by-laws and pass resolutions for the appointment of all officers prescribing their duties and the *compensation to be made therefor.* The same provision is also to be found in sec. 80 of *The Railway Act*, 1903. This is the only provision respecting remuneration for services which can be found in the Railway Act, and surely it cannot be contended that under this provision directors could vote salaries to themselves. That is a matter for the shareholders exclusively, and in the present case there is no resolution whatsoever either from the Directors or the shareholders. *Abbott's Railway Law of Canada*, at p 25, par. 35, says: "Directors of "companies are generally allowed compensation for their "time and attention to the company's business by *express* "*agreement*; but where there is no such agreement, they "cannot, without the sanction of the shareholders, charge "the company anything for their services." And the sanction of the shareholders can only be had by a resolution.

"The claim for salary is therefore dismissed, and the said amount of $17,825.00 unduly paid Hodge in the past for salary, and the balance of expenses still remaining unpaid and due him, will be set off against such amounts as are hereinafter mentioned as either due or accountable by the company to him. ....

"All of the above which is said respecting the question of salary, ... equally applies to the claim of White. He was, however, Vice-President and Treasurer; but being a director, he cannot recover without a resolution authorizing a salary. The office of Treasurer may

be said to be remunerative *per se*, but being a director, in the absence of a resolution, he cannot recover unless he could come within the case of *Earle* v. *Burland*." (*supra.*)

The Referee, by his provisional report, having disallowed the claims of both Hodge and White, they subsequently filed contestations of such report.

With regard to the claims of Hodge and White in respect of shares and bonds held by them the following is taken from the Referee's report :—

H. A. Hodge's Claim.

"Under section 93 of the Railway Act, 1888, (51 Vict. ch. 2) the directors, subject to the provisions therein mentioned, are given power *for the purpose of raising money for prosecuting the undertaking to issue or pledge the bonds at the best price and upon the best terms and conditions which*, at the time, they may be able to obtain.

"The first mortgage bonds issued by the company were for the sum of $900,000, at the rate of $10,000 per mile, under Deed of Trust of 7th March, 1902. These are the bonds referred to in the Deeds of the 2nd day of December, 1899, issued by the company as composed of the United Counties and the East Richelieu Valley Railways.

"The second mortgage bonds were for $100,000 under Deed of Trust also of the 7th March, 1902. These bonds were never issued beyond the passing of a Trust Deed, and were never even printed. The issue was subsequently cancelled.

"The third issue was made by the company when composed of the United Counties, the East Richelieu Valley and the South Shore Railways, under Deed of Trust of 10th June, 1902, for the sum of $3,500,000, at the rate of $12,000 per mile, and was to extend over the road and the territory covered by the franchise of the South Shore Railway. And whatever bonds of this issue were signed—a great number are still in the hands

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of the printer—were so signed about three weeks before the appointment of the Receiver. Hodge and White each claim 42 of these bonds.

"There was also an issue of $2,000,000 Income Bonds upon which Hodge and White made claim originally, but that claim was abandoned in the present contestation.

"Under one of the deeds of the 2nd December, 1899, between the Bank of St. Hyacinthe and H. A. Hodge, it is, among other things agreed that the former sells to the latter the United Counties Railway for the sum of $400,000, payable as follows:—

In cash.....	$ 25,000 00
In promissory notes	75,000 00
And the sum of..... ..	300,000 00
in First Mortgage four per cent. Gold Bonds of an issue upon the entire system not exceeding $10,000 per mile.....	
	$400,000 00

"Under the other deed of even date, between the same parties, which deeds are agreed to be read together, it is also, among other things, agreed that the bank under the conditions therein mentioned, will endeavour to sell to Hodge the East Richelieu Valley Railway for the sum of $100,000, and that the *consideration or price shall be of first mortgage four per cent. gold bonds of an issue upon the entire system* not exceeding $10,000 per mile, which system including the two lines of railway, with sidings and branches, is fixed, as between the parties, at 99 miles or an issue of $900,000 on the entire system. And it is further agreed that if the bank is obliged to pay for the East Richelieu Valley Railway a sum in excess of the amount stipulated, that Hodge will pay half of the said excess up to $25,000 in bonds, making a total amount payable to the said bank for both lines of railway of $500,000, or $512,500, as the case may be.

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"The East Richelieu Valley Railway was subsequently sold on the 30th May, 1900, for the sum of $125,000, calling for cash, or its equivalent, to M. E. Bernier as Trustee of the Quebec Southern Railway.

"In addition to such consideration price for the United Counties Railway stipulated in the concurrent agreement at $400,000, it was agreed that Hodge would give a further sum of $100,000 of bonds of *like issue*, provided a reasonable traffic agreement with the Intercolonial Railway and the United Counties Railway has been entered into. Such contract was duly entered into and such traffic arrangement obtained.

"Recapitulating these two deeds of the 2nd December, 1899, we find the payments thereunder are as follows:—

Cash	$ 25,000
Promissory Note	75,000
Bonds U. C.	300,000
Bonds E. R. V.	112,500
Bonds I. C. R.	100,000
	$612,500

"That is $100,000 practically in cash and $512,500 in bonds. Subsequently thereto, on the 7th August, 1900, another deed between Dessaulles and the Quebec Southern Railway Company was passed, under the rather peculiar circumstances known to the parties, by which Dessaulles, going partly beyond the mandate he held to discharge the obligations contained in the deed of the 2nd December, 1899, bartered the United Counties Railway at an increased price. G. C. Dessaulles, the President of the Bank of St. Hyacinthe, under deed of January, 1900, between the Bank, Hodge and himself, had agreed and undertaken to purchase the United Counties Railway at Sheriff's sale to carry out the terms and conditions of the Deeds of the 2nd December, 1899, and on

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the 25th January, 1900, he actually did purchase at Sheriff's sale the United Counties Railway, when he gave possession of the railway to Hodge and White, under a new lease, and on the 7th August, 1900, was asked and did sign this deed of even date by which the price of sale had been changed to the following figures:—

In paid up non-assessable stock.....	$ 749,000
In First Mortgage Bonds bearing interest at 4 per cent. to be issued.....	750,000
And in promissory notes payable one year after date of issue..	151,000
	$1,650,000

"All these deeds are referred to in the case of the Bank of St. Hyacinthe at pages 5 and following. Under the deed of the 7th August, 1900, the railway passed out and out to the Quebec Southern Railway, with full possession.

"On reference to the Minute Book of the Quebec Southern Railway, we find, among other things, that at the very first meeting of the Provisional Directors on the 5th January, 1901, confirmed at subsequent meetings, Hodge and White take, hold and appropriate to themselves, in the relative proportion of 1,250 shares or $125,000 each, all the shares of the company without any consideration whatever.

"Then, two days later, at the meeting of the subscribers of the stock, on the 7th January, 1901, composed practically again of Hodge and White, resolutions are passed by which the Directors are empowered to purchase the United Counties and the East Richelieu Valley Railways, for a sum not exceeding $1,900,000, payable as follows (Exhibit 6, Deed 7th August, 1900):—

In paid up shares.....	$ 749,000

Bonds of the $900,000 and of the $100,000 issue	1,000,000
and	
In promissory notes the sum of.....	151,000
Making a total of.....	$1,900,000

"The Directors were further empowered and authorized to issue and allot to the vendors the said 7,500 shares in consideration of the transfer to the Quebec Southern Railway of the said railways.

"Coming to the Bonds, we find that, at the same meeting, the Directors, after the issue of $1,000,000 four per cent. bonds, of which $900,000 were to be first mortgage and $100,000 to be second mortgage, they are authorized to use the said bonds in part payment for the acquisition of the two railways and of such other property, services and contracts as they may decide.

"Then at the meeting of the Directors of even date, at which Hodge is elected President, and White Vice-President and Treasurer, the balance of the issue of the first mortgage bonds, to wit, $150,000 and the entire issue of the second mortgage bonds of $100,000, (these $100,000 are claimed herein by Hodge and White in proportionate ratio on the $3,500,000 issue at $84,000) are given to Hodge and White for the purpose of effecting and perfecting the purchase and acquisition by the Quebec Southern Railway of the East Richelieu Valley, and of the contract with the Government of Canada and for certain other contracts, franchises, privileges, properties and services for the benefit of the company.

"At another meeting of the same date (7th January, 1901), intituled "A meeting of the Subscribers of the Stock of the Company," Hodge and White are again directed to purchase the two railways in question, and are given the stocks, bonds and notes for that purpose, but they also engineer the following gift in their favour,

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by authorizing the directors to pay to Hodge and White the sum of $250,000 as follows:—

In cash ..... $ 25,000
and the sum of 225,000

by issuing in their favour 2,500 paid up shares of the company, in respect of which it is alleged they have already paid $25,000, and discharging them of any further liability in respect of the said shares—the whole alleged to be in order to pay and reimburse Hodge and White their outlay on behalf of the company, materials, and services of engineers and contractors, for fees, expenses and disbursements in procuring the passing of the Special Act of incorporation of the company, and for surveys, plans, estimates, reports, audits, accounts, legal and notarial charges, travelling expenses, and all other matters, and things in connection with the acquisition of the property acquired and the organization of the company.

"Then at the meeting of the Directors this substantial gift of $25,000 in cash and $225,000 in 2,500 paid up shares, as above mentioned, upon which the bold statement of a payment by them of 10 per cent. is repeated, is confirmed and effected.

"From the above and from the perusal of the pleadings it will be seen that the stock is of no value, as even alleged by Hodge and White in their own pleadings. Clearly it is of no value, but because the law has been avoided. If the stock had been sold for consideration, instead of being appropriated without consideration by Hodge and White, and the proceeds thereof put into the company for its improvement, the stock would have been worth par. However, as between Hodge and White and the creditors, the stock has its par value. Under Art. 1031 C. C. creditors can exercise all the rights of their debtors; so, if the company could complain, the creditors would also have that right. They have the right to make Hodge account, and that is what is done here by refusing them

their large undue profits. Hodge and White have to-day to account to their creditors for their shares. The stock is of no value, because Hodge and White issued it without consideration; and, indeed, there is no company which could afford doing so without taking away any value the stock might have; and the very allegation by Hodge and White that the stock has no value is a plain admission that it is the result of their dealings and in thus pocketing the stock to the detriment of the creditors. The fact that Hodge and White were the only shareholders at the beginning and at the time they transferred the stock to themselves, is no answer; they were not free to impair in this manner the stock of the company, they were bound to think of future subscribers who would necessarily come in. *Society of Illustration of Practical Knowledge* v. *Abbot* (1); *Lindley on Companies* (2).

"It is true under sec. 39 of 51 Vict. ch. 51, (the Railway Act in force at the time in question,) that the directors may allot and hand over shares of the company in payment for right of way, plant, rolling stock or materials of any kind and also for the services of contractors and engineers; but in the resolution making a gift to Hodge and White of $25,000 in cash and of the 2,500 shares, it is alleged these shares are given for a good many purposes, among which materials and services of engineers and contractors would come within the statute. However, most of the consideration mentioned in the minutes for which these shares are given do not come within the scope and provisions of the statute, and Hodge was examined upon each of these items, and to say the least, his testimony upon this point was very unsatisfactory. So much, however, which can be conceived to have been proved as expended within the scope of the statute might be deducted from the total amount.

(1) 2 Beav. 559.

(2) Ed. 1902, vol. 1, pp. 509, 510.

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leaving still a very large balance, for which they will have to account.

"Dealing with the bonds, and turning to the above extract from the Minute Book and the two deeds of the 2nd December, 1899, it will clearly appear from the latter deeds that the purchase price is payable by the company partly by its note and partly by its bonds, and that Hodge on that occasion is acting as agent for a company he undertakes to incorporate. The consideration named for the purchase price of the East Richelieu Valley is also the bonds of the company. Hodge was buying for the company and was under an obligation in pursuance of the deed to transfer the railway to the company at the price agreed upon and the vendors accepting bonds in payment. The vendors were interested to protect the value of the bonds and Hodge could not re-sell to the company at any fancy price, because he could thus destroy and annihilate completely the value of the bonds, to the great detriment of the vendor, and under paragraph 10 of the deed of the 2nd December, 1899, he could not sell at a higher price.

"It also appears from the minutes of the company that in such purchase Hodge and White are acting under a specific mandate from the company, and that the company hands them the bonds for the very purpose of purchasing these two railways. Assuming as good the resolution giving all these bonds to Hodge and White in the very terms of the resolution, are they entitled after paying the purchase price of these two railways, to retain for their own use and as their property the residue of such bonds and thereby injure and impair the very value of the bonds themselves? Indeed, by claiming these bonds to-day they further defeat payment to the vendors, who have the right to be paid first, and to be free from prejudice at the hands of purchasers who have appropriated the bonds without consideration. (See Arts. 1158 and 1159

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C. C.) How can Hodge and White come to-day and claim the price of bonds upon a property they bought and never paid for? See Art. 2014 and Notes 19, 20 and 21.

"It will be noted that sec. 39 of the Railway Act only applies to shares, and that, under sec. 93 thereof, the bonds can be disposed of *at the best price and upon the best terms and conditions and for the purpose of raising money for prosecuting the undertaking.*

"Can Hodge and White to-day contend, ignoring the deeds of the 2nd December, 1899, that they retain and justly make claim for what is left of the bonds, after allowing for the payment of the two railways, in compliance with the resolutions of the 7th January, 1901, and the provisions of sec. 93? Hodge and White were directors of the company and they were to some extent the trustees of the company, and as such were bound to administer it in the interests of the company and with honesty to other people. If they have been misapplying the money or the bonds and shares of the company, they are jointly and severally liable for the losses arising therefrom.

"Again under all the circumstances Hodge is buying for the company, and under his contract he was bound to transfer without profit, and the minutes of the company make this position stronger. The bonds were given to them in trust under a specific mandate, and they are not entitled to profit as they were acting in a fiduciary capacity, and it was their duty as officers of the company to purchase at as low a price as possible. It is well to remember also that the company was not a party to the *contre-lettre* of the 7th August, 1900, under which the shares, bonds and note were put in escrow with the object of distributing the same in such manner as to give Hodge and White $51,000 out of the note of the company and a large number of bonds and shares. This

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contre-lettre is not mentioned in the minutes of the company. It is clear that under all the circumstances the contractual relations between Hodge and White on the one side and the company on the other was that Hodge and White were mere agents acting under a specific mandate, and that they could not pocket stock, bonds and a part of the promissory note.

"This practically disposes of the claim of Hodge, with the exception of the claim for the value of ten shares of stock of the South Shore Railway. These shares again, it must be presumed, were acquired without consideration, but there is no evidence upon that point, and they will be set off, if they are of any value, against what Hodge owes and for which he has to account to the company."

F. D. WHITE'S CLAIM.

"All of the above which is said respecting the questions of salary, shares and bonds equally applies to the claim of White. He was, however, Vice-President and Treasurer; but being a director, he cannot recover without a resolution authorizing a salary. The office of Treasurer may be said to be remunerative *per se*, but being a director, in the absence of a resolution, he cannot recover unless he could come within the case of *Burland* v. *Earle* (1). What did he do as Treasurer? Was not the very duty of Treasurer to protect and look after the finances of the company? But we see him at the outset joining Hodge to spoliate and deplete the very treasury under his care by the depredation of $25,000.

"White further claims the sum of.....$ 3,000 00
with interest thereon from 3rd November, 1900, (amended from original claim which was claiming from 3rd July, 1900, see evidence p. 339).

(1) [1902] A. C. 83.

There is also the further sum of $19,137 00 with interest from 2nd December, 1902, to 8th November, 1905, upon which he received on 10th March, 1903 $500 00 and on 22nd August, 1903.. ..... 400 00

——— $ 900 00

——— $18,237 00

and also by amendment, the further sum of (this sum was not asked in the original claim) 6,300 00

And this latter sum is claimed by privilege, alleging it is covered by the Bond of the United Counties Railway (see Hansons' claim, p. 52, and claim of Bank of St. Hyacinthe, pp. 8 and 9 where the sum of $6,300 is mentioned), making the total sum of ..... $ 27,537 00

From the above it will be seen that the only meritorious claims made are White's claim for loans amounting to ..... $ 27,537 00

And for Hodge's expenses..... 446 17

$ 27,983 17

And in either case they are more than set off in the manner hereinafter set out.

"Coming now to the expenditure on the Montreal subway, all that it is necessary to say is that the Quebec Southern Railway had no power to spend its money in getting for Hodge and White the charter of the Montreal Subway Company, which they probably contemplated selling later to the Quebec Southern Railway at an enhanced price. The amount which they have thus spent on the subway is $20,965.25, as appears by Exhibit P–10 (1).

(1) See Lindley on Companies, 6th ed, pp. 520, 537.

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The directors are jointly responsible when they authorize the payment of moneys not justified by the charter; if they spent money out of their charter, fraud or no fraud, they are liable. This actually amounted to a tort under the Civil Code, and the directors are therefore responsible jointly and severally for the same, and it can be set off against what may strictly and legally be coming to them herein.

"Admitting that this sum of $27,983.17 was actually due, there can be no doubt that the creditors have to-day the right to set off against them the several amounts appropriated or misapplied by either Hodge or White, they being both jointly responsible.

"Under the Civil Code this rule as to the imputation of payments under Art. 1161 obtains with respect to set-off as enacted under Art. 1195. That is, where there are several debts overdue, the imputation must be made on the debts that the debtor has the greatest interest to discharge. There cannot be any doubt that the law of set-off obtains here, as provided under Arts. 1187 and following of the Civil Code.

"That brings us to consider the claim of $6,300, and that part of the salary from 1st February, 1904, to 21st March, 1904, during the period of the Railway Act, 1903, which came into force on the 1st February, 1904, and under which the salary would be allowed for that period as privileged under the head of 'working expenditure.'

"This sum of $6,300 claimed as mentioned on this contestation with the privilege attached to the debentures of the Old United Counties Railway, was not asked by the original claim made herein. Without deciding whether or not there would be a privilege attached to the same under the judgment of the 4th April, 1901, as the case of *Connolly* v. *Montreal Park & Island Railway*

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Company (1) decides that in a case like the present one a hypothec cannot be created by a judgment; it is sufficient to state that this amount of $6,300 will be the first to be set off, as it would be the most onerous for the company. One might further say that if the judgment of the 4th April, 1901, did not create a hypothec, there would be no privilege attached to the bond or debenture in question of the United Counties Railway, as it was discharged by the Sheriff's sale during January, 1900.

"The sum of $6,300 is claimed against the company and thus paid back by way of set-off, and the Bank of St. Hyacinthe, on the other hand, gives credit to the company for the same, as part of the purchase price.

"The amounts to be set off against any claim Hodge and White may make, are as follows:

"1. The sum of..... appropriated by Hodge and White and which they actually took out of the company's treasury, under resolution by which they allowed to themselves by their own votes and that of their nominees and which they have been unable to justify to any degree although examined at length on the subject.	$25,000 00
"2. The sum of..... appropriated also by Hodge and White under the same resolution, being the balance which remained unpaid upon the shares and which is still due by them to the company and its creditors.	225,000 00
"3 The salary Hodge paid himself, without any authority, being the sum of.....	7,825 00
"4. The salary White paid himself, without any authority, being the sum of.....	7,100 00
"5. The misapplied amount of..... expended for the Montreal subway.	20,965 25
	$285,890 25

(1) Q. O. R. 22 S. C. 322.

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"6. To these amounts must also be added the sum of..... ..... 21,471 33

which the intervenants Pilling *et al.* will recover under the bonds which are here claimed by Hodge himself.

"Making the total sum of..... $307,361 58

to which should also be added the large amount of bonds they appropriated to themselves.

"Not only should this sum of $307,361.58, together with the large amount of bonds appropriated as above mentioned, be set off against the above mentioned sum of $27,983.17, but it is a question for the creditors to decide whether Hodge and White should not be made to disgorge and pay up this large sum, or any part thereof, for which they are responsible and liable to them.

"Admitting that Hodge and White would have rendered some service and made some reasonable outlay within the meaning of the Act and the above mentioned resolution, they have certainly failed to disclose consideration for any substantial amount of this $250,000 mentioned in the resolution of the 7th January, 1901, and supposing a certain portion thereof, in a reasonable measure were allowed, there would still remain more than is necessary to off-set the amount for which they today present a claim deserving consideration.

"From all that has happened does it not clearly appear that Hodge and White came to Canada from the United States, took possession of the Quebec Southern Railway without disbursing a cent (as for the little White ever paid later he is now claiming it back), for a while operated the road in a most unsatisfactory manner, collected the revenues, failed to account for the same in the books of the company, which were kept in a very disgraceful manner, absorbed the spare bonds of the company and

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every cent of security on which money could be realized, ran accounts everywhere to the largest amounts they could, brought the company into insolvency, and finally for want of even paying the men's wages, provoked a strike and stopped operation, when the Minister of Railways and Canals acting, in the interests of the public, took proceedings in this Court and had the railway put into the hands of a Receiver. What happens next? These two gentlemen attack in a most extraordinary manner all the proceedings before this Court, and come in with all manner of claims against the proceeds from the sale of the railway, asking to be collocated *pari passu* with their own creditors, their claims being based upon salaries illegally paid to themselves, and bonds and shares appropriated to themselves without consideration. White further claims loans alleged to have been made to the company, so that even to the last cent, invested in an enterprise which was their own—and in which they were the beneficiaries—is now claimed back. But what have Hodge and White done with the revenues of the company? With the substantial loans made from creditors now filing claims? They have illegally used and misapplied some of these monies on the Montreal subway to the extent of over $20,965.25, a private enterprise of their own and absolutely foreign to the Quebec Southern Railway, paid themselves without proper authority salaries to the extent of over $14,000 and are now making claim for the salaries of the few months preceding the receivership.

"Can persons in our days come to Canada, obtain from Parliament a franchise to operate a railway, ignore the duties they owe to the public in the operation of such railway, and with immunity run such an enterprise deeper and deeper into debt every day and then set up claims in the nature of those above mentioned and deprive their creditors from recovering? If the laws of Canada permit

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of any such thing being done, they are more open to criticism than I have hitherto ventured to believe.

"The contestations by Hodge and White are dismissed with costs.

"And on the question of costs it may be said that even if they were successful on these contestations, they should not have costs, because they persistently refused to submit to the jurisdiction of this Court when asked to submit to examination, as set forth in the finding of the Provisional Report herein."

The argument of these appeals was heard at Montreal on the 25th, 28th, 29th and 30th September, 1908.

A. W. Atwater, *K.C.*, and *G. A. Campbell*, appeared for Hodge;

T. C. Casgrain, *K.C.*, and *G. A. Campbell* for White;

A. Geoffrion, *K.C.*, for Minister of Railways and Canals;

F. L. Beique, *K.C.*, and *E. Lafleur*, *K.C.*, for Bank of St. Hyacinthe.

A. W. Atwater, *K.C.*, contended, in respect of Hodge, that Dessaulles was the lawfully authorized agent of the Bank of St. Hyacinthe, in fact was the bank itself, in respect of the transactions with the claimants in controversy in these proceedings. Hence it is clear that the excess over and above what the bank agreed to take by its deed for the railways belongs to Hodge. It is not open to the bank under Quebec law to repudiate the act of its agent. The bank cannot now raise the question that the sale of 7th August, 1900, was not valid. (Cites Arts. 1727, 1730 C. C. P. Q.) Hodge gave good consideration for the bonds, namely, his money, his time and his expenses. Hodge was neither an agent of the railways nor a promoter of the company; he stood in no fiduciary capacity. (Cites *Burland* v.

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Earle (1). Dessaulles dealt with Hodge openly and the company knew of it as well as the bank. There was no case of secret profits. (Cites *Palmer's Company Precedents* (2). Hodge was acting for himself only.

As to Hodge's salary there is nothing by statute or common law to prevent directors receiving reward for their services. In any event, Hodge cannot be asked to surrender the amount paid him as salary. Acquiescence for three years by the directors and shareholders in the payment of salary to him constitutes an implied contract to remunerate him for his services while he acted for the company. (Cites *Burland* v. *Earle* (3).

As to White, the whole transaction whereby he became a claimant on bonds was legal and proper. The bank has not the remotest status to question his rights. On the question of White's right to compensation he cites *Ryland* v. *Delisle* (4).

T. Chase Casgrain, K.C., followed, contending that the Minister of Railways and Canals had no status in the present proceedings; he became *functus officio* when the road was sold. The object of the minister is attained when the public utility is made operative again. (Cites C. C. P. Arts. 768, 881 and *Salomon* v. *Salomon & Co.* (5).

G. A. Campbell followed, arguing that the Referee had erred in not distinguishing between the salary of a president of a company and that of a director. The former is entitled to salary as a matter of right. (Cites *Am. & Eng. Ency. of Law* (6). Having accepted the services of an officer, the company is bound on an implied contract to pay for them.

As to the bonds, the Bank of St. Hyacinthe is the only party interested in the proceedings, and we raise an

(1) [1902] A. C. at p. 93.
(2) 9th ed. pp. 108, 109. Arts. 1032, 1039 and 1040 C. C. P. Q.
(3) [1902] A. C. 83.
(4) 14 L. C. J. 12, in Privy Council.
(5) [1897] A. C. 22 at p. 42.
(6) Vol. 21, pp. 906, 907.

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estoppel against the bank. (Cites *Lindley on Companies* (1)).

E. Lafleur, K.C., on behalf of the Bank of St. Hyacinthe, based the contestation on the deed of 2nd December, 1899, and placed the right of the bank, as creditor, on the fiduciary relation subsisting between Hodge and the company. The bank was not bound by Dessaulles' act of August, 1900, because he exceeded his mandate. There is no estoppel created against the bank. We were always ready to convey the property under the contract of 1899. As to the bonds, there was no room in the transaction between the company and Hodge for a profit to be made by the latter. (Cites, *In re Hess Manufacturing Company* (2); *Emma Silver Mining Company* v. *Grant* (3). Hodge was obliged by the contract and by *The Railway Act* to transfer the property to the new company. (Cites *Society for Illustration of Practical Knowledge* v. *Abbott* (4)). We contest Hodge and White's claim in the interest of the company, if the company is loaded down with debts for which it is not legally liable, the railway will never be able to be operated. It would be against public policy to allow Hodge and White's claims. Then, again, to allow the claims would be to sanction a secret profit; they themselves were the only shareholders cognizant of what they were doing. (Cites *Lindley on Companies* (5). As to salary, that can only be paid upon resolution of the company. It is a question of law, not of equity. Art. 1031 C. C. justifies the bank in intervening in behalf of the company. (Cites *Mignault's C. C.* (6). Arts. 1032 and 1033 C. C. have no bearing on this case as it is not an *action paulienne*.

F. L. Beique, K.C., followed. The minutes of the meetings of the company do not disclose any notification such as

(1) 6 ed. vol. 1 pp. 513, 517.
(2) 23 S. C. R. at p. 656.
(3) L. R. 17 Ch. D. 122.
(4) 2 Beav. 559.
(5) 6th ed. vol. 1, p. 491.
(6) Vol. 5, pp. 285, 287.

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that set up by Hodge and White. The bank stands by the deed of 2 December, 1899, but does not recognize that of a later date except in so far as is mentioned in the answer to the protest by this company. The claimants having appropriated salaries to themselves, the Referee was justified in setting-off the moneys so appropriated against any claim they may have on bonds. But with respect to the bonds they never gave consideration for them. (Cites *Great North-West Central Ry. Co.* v. *Charlebois* (1).

A. Geoffrion, K.C., for the Crown, contended that as the Crown as owner of the Intercolonial Railway was a creditor, it had a right to intervene as against Hodge and White's claim, because if that were allowed the assets of the company would be diminished *pro tanto*. The Referee had a perfect right to set off the claim for salary and expenses against the claims, if any, of Hodge and White on the bonds. As to the money advanced for the Montreal Subway that was improper and *ultra vires*, and is set off by operation of law. The rule is that when a debt can be ascertained without completed proof, it is a liquidated debt and capable of set-off. (*Beauchamp's* C. C. Art. 1188, Nos. 89 and 110).

As to the bonds, Hodge and White purchased the railway for the company, and there was a clear fiduciary relationship established. They paid nothing for the bonds and they cannot be collocated on bonds which they so obtained. (*Great North-West Central Ry Co.* v. *Charlebois* (2).

Mr. *Atwater* replied for the claimants. The bank was a party to the agreement of 7th August, 1900, which was the actual instrument of transfer of the railway. The bank is estopped by its deed. (Cites *Robert* v. *Montreal Light, Heat and Power Co.* (3); *Palmer's Com-*

(1) [1899] A. C. 114.
(2) [1899] A. C. 114.
(3) 12 R. L. N. S. 78.

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pany Precedents (1); *North Western Transportation Co.* v. *Beatty* (2.))

CASSELS, J., now (October 31st, 1908) delivered judgment.

The appeals from the report of the Referee bearing date the 25th day of May 1908, being twelve appeals and cross-appeals in six cases, were argued before me in Montreal on the 21st September last and following days, the arguments lasting for about eight days.

The questions of law and fact are intricate and difficult. I have been ably assisted by the various counsel and no undue time was occupied in the discussion of these various appeals.

After the very exhaustive statement of facts by the Referee it may be unnecessary for me to repeat, but as it may facilitate an understanding of my views (before dealing with the various appeals), I will state briefly the facts relating to the various companies, the subject-matter of the controversy. The railways in question are the United Counties, The East Richelieu Valley, The South Shore, and the Quebec Southern.

The United Counties Railway Company.

This company was incorporated by statute 46 Vict. cap. 90 of the legislature of Quebec. By statute 59 Vict., cap. 60 of the legislature of Quebec the charter was amended.

The Bank of St. Hyacinthe had advanced large sums of money to this railway, and with the object of securing a portion of the indebtedness procured a sale of this railway by the sheriff under an execution issued at the instance of one Ledoux. At this sale one Dessaulles who was the president of the bank became the purchaser. The sale was made on the 25th January, 1900.

(1) 9th ed. vol. pp. 801 *et seq.* (2) 56 L. J. P. C. 102.

The Quebec Southern Railway Company was incorporated by statute of the Dominion 63–64 Vict., cap. 76. The preamble of this statute recites the fact that the United Counties Railway was at the time of sale a corporation existing under the jurisdiction of the Parliament of Canada. It was assumed on the appeals by all counsel representing clients who have any status that such was the case. The preamble also recites that the purchaser bought and became vested with the said property for the purpose of holding, maintaining and operating the said railway, its property and appurtenances, and also recites "whereas it is expedient to incorporate a company "with all the powers and privileges necessary for the said "purpose, etc." Then follow the enacting clauses. Clause 8 of the statute confers the power to acquire the railway of the United Counties Railway Company mentioned in the preamble. On the 7th August, 1900, Dessaulles conveyed the railway of the United Counties Railway Company to the Quebec Southern Railway Company. This deed was registered on the 26th June, 1901.

In dealing with the various questions raised it will be necessary to consider the provisions of the various documents. At present I am merely tracing the history and manner in which this United Counties Railway was acquired by the Quebec Southern Railway Company.

The East Richelieu Valley Railway Company.

This railway company was incorporated by statute of the legislature of the Province of Quebec, 54 Vict. cap. 91. By section 9 of the statute incorporating the Quebec Southern Railway Company, cap. 76, 63-64 Vict. (Dom.) the Quebec Southern was authorized to acquire the whole of the road of the East Richelieu Valley Railway Co., or the whole of its interest therein as far as the International Boundary line. It might also acquire the charter privileges and franchises of the railway.

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On the 30th May, 1900, the East Richelieu Valley Railway Company purported to convey to one Bernier, notary, acting as trustee for the Quebec Southern Railway Company, the line of railway and property of the East Richelieu Valley Railway Company for the sum of $125,000, payable in cash. This method of conveying a railway is novel. Subsequently the Quebec Southern Railway Company acquired the railway of the East Richelieu Valley Railway Company, which with the United Counties Railway Company became merged into the Quebec Southern Railway Company. No question arises as to the conveyance of the East Richelieu Valley Railway Company, the latter company has been paid the amount due out of the proceeds of sale.

The South Shore Railway Company.

The South Shore Railway Company was incorporated by statute of the legislature of Quebec, 57 Vict. cap. 72. Section 17 of this statute conferred certain powers as to selling or leasing its railway.

By cap. 10, 60 Vict. (Dom.) the railway was declared to be a work for the general advantage of Canada.

Section 11 of 63-64 Vict. cap. 76, the statute incorporating the Quebec Southern Railway Company enacts that the Quebec Southern may amalgamate with the South Shore Railway Company (among other companies). Certain provisions are contained in this section 11 as preliminary requisites to such amalgamation. These will have to be discussed later.

On the 14th January, 1902, a deed of amalgamation was executed between the Quebec Southern Railway Company and the South Shore Railway Company. The shareholders of both companies had previously ratified the agreement.

Section 11 Cap. 76 of 63-64 Vict. required that the agreement should receive the sanction of the Governor in Council.

This sanction was given on the 15th April, 1902, as appears by the Order in Council.

The validity of the amalgamation is attacked by one of the appellants and must be dealt with later.

After this date the Quebec Southern Railway Company was operated—the railway consisting of what were formerly the three railways, namely, the United Counties Railway, the East Richelieu Valley Railway and the South Shore Railway.

On the 10th March, 1904, pursuant to the provisions of 3 Edw. VII, cap. 21 (Dom.) the Minister of Railways and Canals suing as claimant filed a statement of claim making the Quebec Southern Railway Company and the South Shore Railway Company respondents. The statement of claim alleges that both these railways exist under federal statutes. The claimant sets out the following as his reasons for joining the South Shore Railway Company as a party respondent:—

"15. The two said railway companies have under the provisions of section 11 of chap. 76 of the statute 63-64 Vict, Dominion of Canada, amalgamated together under the name of the first mentioned of the said two railway companies, to wit:—The Quebec Southern Railway Company.

"16. Since such amalgamation, the railways of the two said companies have been operated by the said Quebec Southern Railway Company.

"17. As there may be doubts whether the amalgamation is valid and complete, and whether, under its terms, the railway of the South Shore Railway Company has become directly the property of the Quebec Southern Railway Company, the present proceedings for the appointment of a receiver and an order and decree for the sale of the railways of the two said companies, are instituted against the Quebec Southern Railway Company alone, in so far as the railway which did not origin-

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ally belong to the South Shore Railway Company is concerned, but against both companies and against either of them as regards the railway which originally belonged to the South Shore Railway Company, so that the appointment of a receiver and the order and decree for the sale as to the latter railway, be made against both or either of the said railway companies, as may be found necessary."

The claimant prays for the appointment of a receiver until sale, and sale of the railways.

By order of 21st March, 1904, granted by the late Mr. Justice Burbidge, a receiver was appointed for the two railways, with powers of management, etc., as provided by the terms of the order.

The next step is the enactment of 4-5 Edw. VII, cap. 158, intituled an Act respecting the South Shore Railway Company and the Quebec Southern Railway Company. This statute was assented to on 20th July, 1905.

It is well to quote the preamble of this statute in full as well as section 4, as considerable argument was based on these provisions:—

"Whereas, by chapter 10 of the statutes of 1896 (second session), the undertaking of the South Shore Railway Company was declared a work for the general advantage of Canada and the company was constituted a body corporate and politic within the legislative authority of the Parliament of Canada; and whereas, by chapter 101 of the statutes of 1902, the delay for the building and completion of the company's railway, as described in section 8 of the said chapter 10, was extended to the 5th day of October, 1905; and whereas by chapter 76 of the statutes of 1900, the Quebec Southern Railway Company was incorporated by the Parliament of Canada, with power to acquire the railways of both the United Counties Railway Company, and the East Richelieu Valley Railway Company, which railways have since

been acquired, and with power to amalgamate the said railways with that of the South Shore Railway Company; and whereas the said South Shore Railway and its accessories, and the Quebec Southern Railway and its accessories, are in the hands of a receiver, duly appointed according to law, and it is necessary that the said railways be sold under an order of the Exchequer Court; and whereas the said companies have, by their petition, prayed that it be enacted as hereinafter set forth, and it is expedient to grant the prayer of said petition as hereinafter set forth, and to provide for the sale of the said railways: Therefore His Majesty by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows;—

4. In the distribution of the proceeds of the price of sale of said railways, or either of them, the priority according to law, and any amalgamation, merger or sale of either of said railways which might exist, shall not in any way defeat or prejudice any legitimate claim existing against either of the said railways previous to such amalgamation, merger or sale, or affect its priority."

Section 2 of this statute contains provisions as to sale by the Exchequer Court. Orders were made by the late Mr. Justice Burbidge on the 11th September, 1905, ordering a sale of the railways, and an order made subsequently approving of a sale.

By subsequent orders of 19th December, 1905, and of 1st June, 1906, it was referred to Louis Arthur Audette, Registrar of the Exchequer Court, for enquiry and report as to the Receiver's account and to ascertain and investigate the claims of the several creditors.

The Registrar proceeded with his arduous duties and reported on 316 claims referred to in his voluminous report of 25th May, 1908. The purchase money received from the sale was the sum of $1,051.000. This amount has to be distributed when the report is finally settled.

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Of the 316 claims, appeals have been lodged with respect to six of them.

Having set out the above statement of facts I proceed to deal with the various appeals.

Appeals of Hodge and White.

It will be convenient to take up first the appeals of Hodge and White. White became interested with Hodge shortly after the 2nd December, 1899, and can claim no higher right to the stocks and bonds in question on his appeal than Hodge to his stock and bonds. The appeals were therefore argued together.

Hodge and White appeal from the report of the Registrar disallowing their claims as against the Quebec Southern Railway Company for the excess of purchase money which they claim against the Quebec Southern Railway over and above the price at which they purchased the United Counties Railway from the purchaser at sheriff's sale, namely, Dessaulles, the President of the Bank of St. Hyacinthe.

The Registrar has disallowed the claims on the ground that having regard to all the circumstances surrounding the transaction, Hodge and White are not entitled to saddle the Quebec Southern Railway Company with an excess of purchase money to be appropriated to themselves.

The Bank of St. Hyacinthe and others support the finding of the Referee, and in addition to the ground that a promoter cannot make money as against the company he is promoting, the bank claims that by virtue of the dealings between them and Hodge there is an implied covenant that the railway will be turned over to the Quebec Southern Railway Company at the sum agreed to be paid by the agent of the Quebec Southern Railway Company.

The origin of the transaction is as folllows:—

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The bank was in jeopardy of losing its claim if the United Counties Railway Company ceased to operate their railway. The bank thereupon entered into an agreement with Hodge evidenced by two documents bearing date the 2nd December, 1899, but which were intended to form one agreement.

It may be well to set out *in extenso* these two documents:—

"This deed of agreement made and executed this second day of December, eighteen hundred and ninety-nine, between the St. Hyacinthe Bank, a body corporate and politic, having its head office and principal place of business in the City of St. Hyacinthe, hereinafter called the 'Bank', party of the first part, and H. A. Hodge, of the City of Rutland, in the State of Vermont, one of the United States of America, party of the second part, witnesseth:

"That whereas the said bank is the creditor in a large sum of money of the United Counties Railway, said railway company owning a line of road extending from St. Robert Junction to Iberville.

"And whereas the said bank is about to take such proceedings as may be necessary to secure a clear title to the said railway and equipment;

"And whereas the said bank is desirous of disposing of the said railway when the same shall have been so acquired;

"And whereas the said party of the second part is willing to purchase the said line of railway, and in the meantime to use and operate the same, upon the terms and conditions as hereinafter set forth.

"Now therefore this agreement witnesseth:—

"1. It is agreed between the parties hereto that the board of directors of the said railway company will be reorganized forthwith and the said bank will use their best endeavours to have elected upon said board three

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directors, two to be named by the party of the second part, and one by party of the first part if they so desire, and at the annual general meeting called for the election of directors, the said bank will support, as far as they can, the election of three directors to be named by party of the second part, and one director to be named by party of the first part.

"2. The net profits to be derived, if any, from the operation of the said railway shall and will belong to the party of the second part, and should the party of the second part have to pay out the same for the purposes of the said railroad for liabilities incurred previous hereto pending the temporary holding under the present agreement, then and in that case the amount so paid out as aforesaid by him shall be deducted from the purchase price of the said railroad as hereinafter stipulated for. No such payment shall, however, be made by party of the second part without the previous consent and approval of the said bank.

"3. The party of the second part shall pay from the earnings of the said railroad the expense of operating the same from the date of his coming into possession thereof with his nominees as such directors under the present agreement.

"4. The bank shall, however, protect and hold harmless the party of the second part from all debts and liabilities of the said railway company created up to the present date, or which may be hereafter created without the consent and approval of the party of the second part, between the date hereof and the time when the said bank shall hand over the title of the railway free and clear to the said party of the second part.

"5. Any and all sums of money which said party of the second part may pay with the approval of the bank, on account of the debts of the railway company, the payment of which is guaranteed under this agreement by

the bank, such sums of money shall be deducted out of the eventual purchase price of the said road from the money payment to be made, or shall be recouped to party of the second part by the bank in the event of this agreement not being carried out.

"6. In addition to the provisions hereinbefore stipulated regarding payment of any of the debts of the railroad by party of the second part, it is further agreed that any amounts paid out by party of the second part by reason of *bons* or time checks of the railway company, the same shall be recouped to him immediately by the said bank, but in the payment of the said *bons* they shall first be submitted to the bank for its approval unless such *bons* or time checks shall be declared valid by A. Ouellette, and the said party of the second part is hereby authorized to pay any *bons* or time checks which the said A. Ouellette declares valid; but there shall not be any obligation on the part of the party of the second part to pay *bons* or time checks of the said railroad unless he sees fit.

"7. When the bank shall have obtained and will be in possession and able to give to party of the second part a deed of said line of railway from St. Robert Junction to Iberville, including all its appurtenances and equipment, and shall have executed said deed to the party of the second part, or his nominee, the said party of the second part will pay for the same a sum of four hundred thousand dollars ($400,000), as follows:—

(*a.*) A sum of twenty-five thousand dollars ($25,000) in cash.

(*b.*) The promissory note of the said railway company (to be organized as hereinbefore provided) endorsed by party of the second part for the sum of seventy-five thousand dollars, payable at one year from the date of the transfer of said railroad, with interest at the rate of four per cent. per annum.

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"(*c*) A sum of three hundred thousand dollars in first mortgage four per cent. gold bonds, payable at such time in principal as the party of the second part may elect, the principal thereof not being repayable for a period of less than twenty years, nor more than thirty years.

"8. No part or portion of the above named consideration for the purchase of the said United Counties Railway shall become payable or exigible until the bank shall have caused to be executed and delivered over to party of the second part a good and indefeasible title free and clear of all liens to said line of railway and its appurtenances, including all rolling stock, and also subject to the fulfilment of all of the conditions of the present agreement.

"9. The bonds on the said railroad so to be given by party of the second part to the bank as the purchase price of the said railway shall be first mortgage bonds of an issue of the entire system, not exceeding ten thousand dollars per mile.

"10. The party of the second part will with due diligence after the said bank are in a position to transfer the said road cause to be incorporated a company by Act of Parliament to take over the said line and issue the bonds so to be given for the purchase price of the said road.

"11. The trust deed securing the bonds shall be the usual trust deed in use by railroads generally.

"12. The bank will proceed with all diligence possible to secure a title free and clear of all the property and appurtenances of the said road, including all rolling stock now in use on said road whether owned by the railway company or other persons, and when so obtained will deed the same to the party of the second part.

And the parties have signed this agreement at the City of St. Hyacinthe the day, month and year first above written.

(Sgd.) G. C. DESSAULLES, *President.*
" H. A. HODGE."

"This deed of agreement made and executed this second day of December, eighteen hundred and ninety-nine,

Between

The St. Hyacinthe Bank, a body corporate and politic, having its head office and principal place of business in the City of St. Hyacinthe, hereinafter called the "Bank," party of the first part,

And

H. A. Hodge, of the City of Rutland, State of Vermont, one of the United States of America, party of the second part,

Witnesseth:—

"That whereas the said parties hereto have executed this day, of even date herewith, an agreement referring to the purchase of the United Counties Railway;

"And whereas it is desirable in the interests of the said bank that the agreement should be executed as two agreements, but it is understood and agreed between the parties hereto that the true agreement executed between the parties hereto consists of the said agreement referring to the United Counties Railway and the present agreement, which two said agreements shall be read together and all obligations upon either party in either of said agreements are to be taken as referring to both agreements, and the one agreement is absolutely contingent upon the other;

"Therefore the parties hereto agree:—

1. The said bank hereby agrees that the United Counties Railway Company will assign to the party of the second part all and every right and claim which the said Railway Company has, or othir persons have, to any claims to the capital stock of the East Richelieu Valley Railroad, and all other rights of every nature and kind (save and except any personal interest or right which one C. D. Maze may hold) in order to enable the obtaining posses-

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tion and control of the said East Richelieu Valley Railroad.

"2. The said bank will cause to be begun and prosecuted with due diligence all actions, suits and claims which will assist in vesting the said United Counties Railway or their assigns in their rights to the said East Richelieu Valley Railroad, in order that when the said bank shall have by Sheriff's sale, or otherwise, obtained an indefeasible title to the line of railway to the United Counties Railway, they shall also be in possession of an indefeasible title free and clear of all incumbrances to the East Richelieu Valley Railroad, consisting of about twenty-two miles of railway, and running between Iberville and Noyan Junction.

"3. The cost of such litigation looking to the obtaining of a title to the said East Richelieu Valley Railroad shall be borne by the parties hereto in equal proportions, but no litigation shall be commenced or be continued without the consent of the bank.

"4. The bank agrees that the control of the said stock shall be turned over to the said party of the second part, or more than fifty-one per cent. if more shall be obtained.

"5. It is, however, understood between the parties hereto that no litigation shall be commenced until all reasonable means of amicable settlement and negotiations with the East Richelieu Valley Railway Co. have been exhausted.

"6. The said party of the second part agrees that so soon as the bank are in a position to give him title to the said line of railway owned by the United Counties Railway and the line owned by the East Richelieu Valley Railroad, that he will with all due diligence procure a charter for the working of the two systems under the one corporation, and will issue bonds to the said corporation so to be organized and the same to be secured upon the entire system of the East Richelieu Valley Railroad and the United Counties Railway.

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"7. The consideration price of the said East Richelieu Valley Railway shall be one hundred thousand dollars of first mortgage four per cent. gold bonds, which shall form a part of the entire issue provided for in the preceding section, making a total issue payable to the said bank for both lines of railway of five hundred thousand dollars of first mortgage bonds.

"8. Should, however, the said bank be obliged to pay for the East Richelieu Valley Railway a sum in excess of the amount stipulated in the preceding section, the said party of the second part will pay one-half of said excess up to an amount of twenty-five thousand dollars in bonds, making the total consideration which said party of the second part will be liable for one hundred and twenty-five thousand dollars.

"9. It is understood and agreed that in the negotiations for acquiring the said East Richelieu Valley Railroad that the parties will meet one another in a fair spirit and will give and take with a view of making mutual concessions in order to the ultimate success of negotiations to acquire said East Richelieu Valley Railroad.

"10. The bonds on said railways so to be given by party of the second part to the bank as the purchase price of the said two railways shall be first mortgage bonds on the entire system not exceeding ten thousand dollars per mile, which system including the two lines of railway, their sidings and branches is fixed as between the parties hereto at ninety miles or an issue of nine hundred thousand dollars on the entire system.

"11. The said party of the second part has entered into the present agreement upon the distinct understanding that both lines of railways must ultimately be conveyed to him and without which this agreement would not have been executed, and if the said bank are unable to give and grant to said party of the second part a title vesting him with the proprietorship, free and clear of incum-

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brances of the lines of railway of the East Richelieu Valley Railway and the United Counties Railway, he shall have the right and option to refuse, if he deems best, to take the title of the United Counties Railway as provided for under the other concurrent agreement, and shall have the right to cancel the present as well as the said other agreement.

"12. In addition to the consideration price for the United Counties Railway stipulated in the concurrent agreement herewith, of four hundred thousand dollars, it is agreed that the party of the second part will give a further sum of one hundred thousand dollars in gold bonds of four per cent. of like issue with the bonds mentioned for the purchase price in said concurrent agreement, provided a reasonable traffic agreement with the Intercolonial Railway has been entered into with the United Counties Railway, or its successors, said contract to be approved by party of the second part.

"13. The said contract must be a contract applicable to the United Counties Railway as the same shall be reconstructed and reorganized and as contemplated under the present agreement.

"14. In the event of the present agreement not being carried out and the road or roads not being acquired by the party of the second part, the party of the second part shall not have the right to demand repayment of any moneys he may have paid out for maintenance of right of way.

"15. In the event of any extraordinary expenditure being necessitated by any unforeseen cause, such as wash out, bridges falling, or other expenses of like nature, happening on either line of railway during their operation under the present agreement by party of the second part, and for which an expenditure of more than five hundred dollars would be required, then such expenditure shall be recouped to party of the second part, but

the works shall be carried on under the joint supervision of the parties hereto.

"16. The said repayment provided for in the preceding clause shall only be made by the bank in the event of the party of the second part not taking over the said roads, but if the present agreement is carried out and the party of the second part acquires the said lines of railway there shall be no returns by the bank to party of the second part of said expenditure.

"17. In the cost of operating the said two lines of railway temporarily under the present agreement the amount payable by the United Counties Railway to the East Richelieu Valley Railway as rental under an agreement between the said two companies shall not be assumed by the party of the second part, and he shall in no way be liable for the same during the time he operates the said two lines of railway under this agreement.

"And the parties hereto have signed the present agreement at the City of St. Hyacinthe the day, month and year first above written.

(Sgd.) G. C. DESSAULLES, *President.*
" H. A. HODGE."

This agreement was followed up by a sale of the United Counties Railway at Sheriff's sale and a purchase by Dessaulles acting for the bank. At the time of the sale and purchase by Dessaulles, the provisions of the Railway Act of the Dominion, 51 Vict. cap. 29, sections 278, 279 and 280, were in force. These sections are as follows:

"278. If, at any time, any railway or any section of any railway is sold under the provisions of any deed of mortgage thereof, or at the instance of the holders of any mortgage bonds or debentures, for the payment of which any charge has been created thereon, or under any other lawful proceeding, and is purchased by any person or corporation which has not any corporate powers authorizing the holding and operating thereof by such pur-

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chaser, the purchaser thereof shall transmit to the Minister, within ten days from the date of such purchase, a notice in writing stating the fact that such purchase has been made, describing the termini and line of route of the railway purchased and specifying the charter or Act of incorporation under which the same had been constructed and operated, including a copy of any writing, preliminary to a conveyance of such railway, which has been made as evidence of such sale, and immediately upon the execution of any deed of conveyance of such railway, the purchaser shall also transmit to the Minister a duplicate or an authenticated copy of such deed, and shall furnish to the Minister, on request, any further details or information which he requires.

"279. Until the purchaser has given notice to the Minister in manner and form as provided by the next preceding section, the purchaser shall not run or operate the railway so purchased, or take, exact or receive any tolls whatsoever in respect of any traffic carried on, but after the said conditions have been complied with, the purchaser may continue, until the end of the then next session of the Parliament of Canada, to operate such railway and to take and receive such tolls thereon as the company previously owning and operating the same was authorized to take, and shall be subject, in so far as they can be made applicable, to the terms and conditions of the charter or Act of incorporation of the said company, until he has received a letter of license from the Minister, —which letter the Minister is hereby authorized to grant —defining the terms and conditions on which such railway shall be run by such purchaser during the said period.

"280. Such purchaser shall apply to the Parliament of Canada at the next following session thereof after the purchase of such railway, for an Act of incorporation or other legislative authority, to hold, operate and run such

railway, and if such application is made to Parliament and is unsuccessful, the Minister may extend the license to such railway until the end of the then next following session of Parliament, and no longer, and if during such extended period the purchaser does not obtain such Act of incorporation or other legislative authority, such railway shall be closed or otherwise dealt with by the Minister as is determined by the Railway Committee."

The effect of these provisions as supporting such a sale is fully dealt with in the cases of *Redfield* v. *Wickham* (1), and *Toronto General Trusts Corporation* v. *Central Ontario Ry. Co.*, (2)—where the learned Chancellor of Ontario deals with the change effected in the law by reason of this enactment.

This judgment was affirmed by the Board of the Privy Council (3) where Lord Davey elaborately deals with the whole subject.

To my mind it is important in considering this question to bear in mind that a purchaser of a railway does not acquire an absolute right to the railway. It is an interim right to operate to be followed up by an Act of incorporation to be obtained as prescribed. If no Act of incorporation is obtained then under section 280 of 51 Vict.. cap. 29. "such railway shall be closed or otherwise dealt with by the Minister as is determined by the Railway Committee." I have not considered the question of the power of the bank to purchase and operate in the name of its President.

No question of the right of the bank was raised before me, and the preamble of the statute incorporating the Quebec Southern Ry. Co. recites the fact of Dessaulles having become the purchaser, and the railways were subsequently conveyed to the Quebec Southern Ry. Co.

(1) 13 App. Cas. 467.
(2) 6 O.L. R. 1.
(3) [1905] A. C. 576.

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This preamble of cap. 76, 63–64 Vict., Dom., is important because it recites the purchase, and proceeds: "whereas the said purchaser bought and became vested with the said property for the purpose of holding, maintaining and operating the said railway its property and appurtenances, and whereas it is expedient to incorporate a company with all the powers and privileges necessary for the said purposes."

By the terms of the agreement of the 2nd December, 1899, there are provisions for interim operation of the railway. By the 7th paragraph of the first half of the document the consideration money to be paid by Hodge is the sum of $400,000. Of this consideration there is to be paid $25,000 in cash.

"6. The promissory note of the said railway company (to be organized as hereinbefore provided, etc.)

(c.) A sum of $300,000 in first mortgage bonds.

"9. The bonds of said railway to be given as the purchase price shall be first mortgage bonds of an issue not exceeding $10,000 per mile."

Then comes clause 10 of the agreement by which it is provided that Hodge will with due diligence cause to be incorporated a company by Act of Parliament to take over the said line and issue the bonds, etc.

It is also provided that in the event of a traffic arrangement with the Intercolonial railway being obtained, $100,000 additional in bonds shall be paid.

It must be borne in mind that the consideration money payable for the United Counties Railway was, with the exception of $25,000 cash, payable by the road to be incorporated, namely, the Quebec Southern Railway Co., a railway which had to be incorporated in order to carry out the agreement of the 2nd December, 1899, and also to enable the purchaser to comply with the provisions of the Railway Act.

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On the 7th August, 1900, Dessaulles conveys to the Quebec Southern Railway Co., the railway of the United Counties Railway Co. The consideration to be paid was the sum of $1,650,000 as follows:—paid up non-assessable stock to the amount of $749,000; first mortgage bonds for $750,000, and promissory notes for the sum of $151,000.

It was contended by the bank that Dessaulles exceeded his mandate and had no right to convey for any greater consideration than that mentioned in the deed of 2nd December, 1899.

As stated on the argument, if under the circumstances of this case Hodge had the right to bargain with the Quebec Southern Railway Company for a higher price then it would be a mere matter of conveyancing. It would be the same as if Dessaulles had conveyed to Hodge for the consideration mentioned in the document of 2nd December, 1899, and Hodge had them conveyed to the railway for the increased price.

The question must depend on whether, having regard to his agreements with the bank and the circumstances surrounding his purchase and the fact that the purchase money was payable by the Quebec Southern Railway Company, Hodge can legally saddle the company with the increased purchase money for his own benefit.

It was contended that the bank is estopped from raising this question by reason of Dessaulles having acted. Dessaulles was not a stockholder nor was he a director at the organization of this company. It is proved that the bank had no knowledge until after the registration of the deed in 1901 that Dessaulles had acted beyond his authority. The bank repudiated. Besides to my mind, estoppel has no bearing on the case. The company is before the court and those representing the company are objecting, and if contrary to law the com-

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pany could repudiate. (See *Great North-West Central Ry. Co.* v. *Charlebois* (1).

The first meeting of the provisional directors was held on the 5th January, 1901. Hodge and White at this time controlled the company. A meeting of shareholders was called for the 7th January, 1901, notice having been waived, Hodge and White the sole subscribers to the stock being present. A directorate was elected, Hodge having assigned a few shares to qualify a few persons so as to enable the election of the necessary number of directors. Then by their own votes the directors ratified the purchase from themselves of the United Counties Railway. At the meeting of shareholders the following resolution was adopted:—

"It was further unanimously resolved that the directors of this company be, and they are hereby, authorized and empowered to carry out and perfect the contract, agreements, bargains and arrangements effected by this company or on its behalf, or for its use and benefit, or on behalf of the promoters or the provisional directors thereof, in the interest of this company, with the following persons, to wit, George C. Dessaulles, H. A. Hodge, Frank D. White, Hon. M. E. Bernier, and the Bank of St. Hyacinthe, all of the said contracts, agreements, bargains and arrangements relating to and necessary for this company; this company ratifying and confirming and agreeing to ratify and confirm whatsoever the Board of Directors may do in virtue hereof."

At the same meeting of the 7th January, 1901, authority was conferred to issue bonds, a portion of which bonds were to be handed over to the bank as the consideration for the sale by them of the United Counties Railway to the Quebec Southern. At the same meeting the following resolution was carried:—

(1) [1899] A. C. 114.

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"It was duly proposed and carried that in order to pay and reimburse Messrs. Hiram A. Hodge and Frank D. White their outlay on behalf of this company, materials and services of engineers and contractors, for fees, expenses and disbursements in procuring the passage of the special Act of Parliament incorporating the company, and for surveys, plans, estimates, reports, audits, accounts, legal and notarial charges, travelling expenses and all other matters and things in connection with the acquisition of the property acquired by this company or the organization of this company and of negotiations therefor, the directors be, and they are hereby authorized and empowered, under the authority of all the shareholders of the company to pay the said Hiram A. Hodge and Frank D. White the sum of $250,000 and that the said amount shall be paid as follows:—

"1. As to the sum of $25,000, in cash.

"2. As to the sum of $225,000 by the directors causing to be issued and allotted to the said Hiram A. Hodge and Frank D. White, or their nominees, in such amounts as the said Hodge and White may require, 2,500 shares of the capital stock of this company, as fully paid up and non-assessable and free and exempt from all calls, assessments and liabilities of every nature and kind, and that the said shares, so to be allotted, shall be and be deemed to be the said 2,500 shares for which the said Hodge and White have respectively subscribed, in respect of which they have paid a call of 10 per cent., and that the said Hodge and White are hereby discharged free and exempt of and from any further liability in respect of said shares, the same being by the unanimous vote of the shareholders of the company hereby declared to be fully paid up and non-assessable when allotted, and that the officers of the company to be hereafter appointed are instructed hereby to cause the necessary and proper entries to be made in the books of the company estab-

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lishing the fact that the said shares are fully paid up and non-assessable and have been fully paid for by the consideration hereinbefore stated."

I have thought it well to copy these resolutions in full as they show that Hodge and White in their dealings with the company were not acting as independent vendors but merely as promoters and agents.

The company was completely controlled by these gentlemen. They were ratifying on behalf of the company a contract with the company for their own benefit. The company instead of having available for the purposes of the operation of the railway the bonds over and above the purchase price payable to the bank was passing these bonds to Hodge and White, and so with the stock. By a single resolution the stock was paid up.

It is not difficult to understand how, under the management of these gentlemen, the railway is now before the Exchequer Court.

Having regard to all the circumstances, I am of opinion that the Referee was right in his finding.

The cases in regard to promoters and profit obtained from the company promoted by them depend on the particular facts of each case.

An independent purchaser buying with his own money and selling at an enhanced price to the company with full disclosure and no fraud can claim his profit.

The facts of this case are however very different.

I have given careful consideration to the facts and arguments and authorities cited, and am of opinion the Referee arrived at a correct conclusion.

The appeals are dismissed with costs.

Dealing now with the question of salary, I think the Referee was right at arriving at his finding. I have nothing to add except to cite a case decided by the Queen's Bench Division, Ontario. The judgment was

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delivered by a very careful judge now deceased, the late Mr. Justice Street. *Birney* v. *Toronto Milk Co., Ltd.* (1).

In that case the Ontario statute was relied on but the general law is discussed.

I think the appeals should be dismissed with costs.

So far as Hodge is concerned nothing is due him if my findings are correct. Both as respects Hodge and White I shall have later to deal with the findings of the Referee in charging them with liability to the company in respect of unpaid stock, past salary, etc.

Appeal of White from Report of Referee.

The Referee deals with this claim on pages 105 and following. He assumes at page 105 that there is due to White the sum of $27,983.17. This sum is offset by various items which the referee finds due by White. So far as the items of $7,825 for salaries and the amount paid on account of the Montreal Subway, on the evidence if the company were suing I think they would be entitled to recover. The question arises whether these amounts can properly be allowed against White as an offset. The respondents rely on certain articles of the Code of the Province of Quebec—Article 1031 which in certain cases entitles the creditors to set up the rights of their debtors, and Articles 1187 and following, to show that compensation has taken place.

I should doubt very much whether these claims are "*claires et liquides.*" There may also be doubts as to whether they can be made the subject of set-off as compensation in the Exchequer Court.

In the present case, however, I do not propose to interfere with the finding of the Referee so far as he has concluded that any debt due by White is satisfied by compensation. A mass of evidence has been adduced before the Referee, and what was not "*claires et liquides*"

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

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at the commencement of the reference has now become so.

No objection was taken to the jurisdiction of the Referee or to his right to entertain these claims. The railway has been sold and the proceeds are to be paid to the creditors. Had objection been made to the hearing of these claims by the Referee, the Receiver under section 26, sub-section 4 of the Exchequer Court Act, could have taken proceedings and recovered judgment which would have satisfied the present claim.

Sub-section 3 of section 26 of the Exchequer Court Act confers large powers. The court shall have all the powers for "the making of all necessary enquiries, the settling and determining the claims, etc." The orders of the 19th December, 1905, and 1st June, 1906, confer power on the Referee "to investigate the claims, to hear "evidence in respect thereof, or of any objections thereto "or of any contestations thereof."

A full trial has taken place, and it would be inequitable in my opinion to allow White to take a portion ot the creditors' money and leave the company to an action which would result in a judgment which probably could not be realized.

I think any finding in regard to the liability for the stock should be treated as expunged from the report both as regards Hodge and White.

It is only to the extent of compensation the Referee has dealt with the case, and it is unnecessary to deal with that question.

The Appeals are dismissed with costs.

Judgment accordingly.

Solicitor for plaintiff: *A. Geoffrion.*

Solicitors for defendants: *Greenshields, Greenshields & Heneker.*

Solicitors for Bank of St. Hyacinthe: *Beique, Turgeon & Beique.*

Solicitors for Hodge and White: *Hickson & Campbell.*

BETWEEN

THE MINISTER OF RAILWAYS AND CANALS FOR THE DOMINION OF CANADA..... } PLAINTIFF; 1908 Oct. 31.

AND

THE QUEBEC SOUTHERN RAILWAY COMPANY AND THE SOUTH SHORE RAILWAY COMPANY..... } DEFENDANTS.

In re THE BANK OF ST. HYACINTHE (CLAIMANT) ..... } APPELLANT;

AND

THE RUTLAND RAILROAD CO. (CLAIMANTS)..... } RESPONDENT.

In re HANSON BROS. (CLAIMANTS)..... APPELLANTS.

In re F. D. WHITE..... ..... { INTERVENING CLAIMANT AND APPELLANT.

Railway—Sale—Dominion Railway Act—Vendor's lien—Waiver.

The acceptance by the vendor of a railway of the bonds of the company purchasing the road is a waiver by implication of his lien, if any, for a balance of the price remaining unpaid.

Semble:—That a vendor's lien for unpaid purchase money does not obtain in the case of the sale of a railway under the operation of *The Railway Act* (R. S. 1906, c. 37). The rights of the vendor in such a case are limited to the remedies prescribed by the statute.

APPEALS from the Registrar acting as Referee.

The following statement of facts is taken from the Registrar's provisional and final reports herein:—

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"No. 66 LA BANQUE DE ST. HYACINTHE.

The claim made by the bank reads as follows, viz. :

To price of sale of United Counties Railway and East Richelieu Valley Railway, exclusive of balance of the price of the latter railway, $100,000 and interest, remaining due to the East Richelieu Valley Railway and forming the object of the claim.....	$500,000 00	
Less amount paid for stock Hanson Bros.....	6,300 00	
		$493,700 00
Interest on $493,700.00 from August 7th, 1900, to 23rd April, 1906, at 4 p.c.....		112,806 82
To one half of the $25,000.00 paid to the East Richelieu Valley Railway as per deed of the 30th May, 1900.....		12,500 00
Interest on same from the 1st of June, 1900, to the 23rd April, 1906 at 5 p.c.".....		3,684 92
		$622,691 74

E. & O. E.

"For this sum of $622,691.74, the bank claims privilege of *bailleur de fonds*, or vendor's lien, and relies upon the two deeds of agreement of the 2nd December, 1899, made and executed between the Bank of St. Hyacinthe and H. A. Hodge, relying upon the agreement of the 7th August, 1900, in so far only as it complies with the agreements of the 2nd December, 1899.

"At the time these agreements of the 2nd December,

1899 were made and executed the Bank was, as alleged, the creditor, in a large sum of money, of the United Counties Railway, and was about to take proceedings to secure a clear title, as it was desirous of disposing of the railway when acquired. On the other hand H. A. Hodge was willing to purchase it and in the meantime to use and operate the same, upon the terms of these agreements of December, 1899, whereby the Bank agreed, *inter alia*, to sell to H. A. Hodge, or to the Quebec Southern Ry., when organized, the United Railway for the price of

(a) $25,000. in cash.

(b) 75,000. in a promissory note of the said Company to be hereafter organized, endorsed by Hodge, payable one year from the date of the transfer of the said railroad, with interest at 4 p.c.

(c) 300.000. in first mortgage four per cent. gold bonds payable at such time in principal as the Quebec Southern Ry. may elect, the principal thereof not being re-payable for a period of less than 20 years, nor more than 30 years.

And the Bank further agreed, on the same date, to sell to H. A. Hodge or the Quebec Southern Ry., the line of railway owned by the East Richelieu Valley Railway for the sum of

100,000 in first mortgage four per cent. gold bonds.

It was further agreed that should the Bank be obliged to pay for the East Richelieu Valley Railway a sum in excess of $100,000, that H. A. Hodge or The Quebec Southern Ry. would pay one half of the amount of said excess up to $25,000 in *bonds*. The road was paid $125,000 and the Bank paid $25,000 in cash at the time

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12,500. of the sale and is now claiming $12,500.00, half of that amount.

It was further agreed that the Bank had to convey both lines of railways free and clear from all incumbrances, and that, in addition to the consideration price for the United Counties Railway stipulated at $400,000., H. A. Hodge, or The Quebec Southern Ry., would pay a further sum of $100,000 in gold bonds of four per cent. of same issue as above mentioned, provided a reasonable traffic agreement with the I. C. Ry. be entered into with the United Counties Railway.

The said agreement was entered into on the 5th Dec., 1899, and entitled the Bank
100,000. to the sum of $100 000.

$612,500.

"On the 27th January, 1900, an agreement was entered into between H. A Hodge and G. C. Dessaulles, alleging the agreements of the 2nd December, 1899, touching the purchase of the United Counties Railway, alleging further the agreement of the 11th January, 1900, under which the Bank agreed to acquire the said railroad when sold at Sheriff's sale, and in order to be in a position to carry out the terms of the original agreement, the said G. C. Dessaulles thereby agreed and undertook to buy the said railway and carry out the terms and conditions of the agreements of the 2nd December, 1899, and the said Hodge assumed against the said G. C. Dessaulles the same obligations which he had assumed towards the Bank of St. Hyacinthe in the original agreement, and the Bank intervened to this agreement and declared itself satisfied therewith.

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"The United Counties Railway was then sold by the Sheriff of the District of St. Hyacinthe, on the 25th day of January, 1900, to the said G. C. Dessaulles, acting for the bank.

"On the 30th of May, 1900, the East Richelieu Valley Railway was sold to M. E. Bernier, acting a trustee for the Quebec Southern Railway. This part of the claim will however, be treated separately when hereafter dealing with the claim of the East Richelieu Valley, No. 48.

"On the 26th June, 1901, The Quebec Southern Railway, acting by H. A. Hodge, deposited in the office of the notary R. A. Dunton, to remain therein as part of the minutes of the said notary, an agreement bearing date the 7th August, 1900, between the said G. C. Dessaulles and the Quebec Southern Railway, alleging that the said G. C. Dessaulles had purchased the United Counties Railway at Sheriff's sale and that the Quebec Southern Ry. had been duly incorporated and was desirous to acquire the said railway, and whereby it was agreed by the said G. C. Dessaulles to sell the United Counties Ry. to the Quebec Southern Ry. for the sum of $1,650,000, clear of all lien and incumbrances, and give valid marketable title.

"This price agreed upon being payable as follows :—

$749,000 in paid-up non- assessable stock.

$750,000 in first mortgage bonds bearing interest at 4 % per annum, &c.

151,000 in promissory notes payable one year after date of issue.

$1,650,000

* * * * * *

"The claim will be allowed as follows, viz.,

The sum of..... $100,000.00

with interest thereon at 4 p. c. from the 7th August,

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1900, as claimed, to the 8th November, 1905.....		21,019.17
with privilege of bailleur de fonds		
The sum of.....	$300,000.00	
balance of purchase price, with interest thereon from 7th August, 1900, to the 8th November, 1905, at 4 p.c.	63,057.51	
The sum of.....	100,000.00	
with interest thereon at 5 per cent from the 1st June, 1900, to the 8th November, 1905, under agreement of 30th May, 1900, and as representing the cost of the East Richelieu Valley.....	27,191.78	
The further sum of.....	12,500.00	
with interest thereon at 5 p. c. from 1st June, 1900, to the 8th November, 1905, the bank's share of the excess price of same...	3,398.98	
Finally the sum of.....	100,000.00	
with interest thereon at the rate of 4 p. c. from the 7th August, 1900, to the 8th November, 1905, the amount due in virtue of the traffic arrangement with the I. C. Ry.....	21,019.17	
		$627,167.44
making the total sum of...		748,886.61
from which shall be deducted the amount paid for		

stock Hanson Brothers, viz.....		6,300.00
Leaving the net sum of.....		$741,886.61
To which should be added the cost of evidence adduced therein.....		20.60
		$741,906.21
From this amount should be deducted the sum of.....	$100,000.00	
with interest at 5 per cent from the 1st June, 1900, to the 8th November, 1905...	27,191.78	
		$127,191.78
		$614,714.43

which said sum of $127,191.78 is payable to the East Richelieu Valley before that of the bank, and which will be distributed as set forth in claim No. 48.

The United Counties Railway having been sold by the bank free from all incumbrances, there will be deducted from the sum of,..... $614,714.43
coming to the bank, the sum of 8,099.27
as representing the claim of Hanson Brothers more clearly established and discussed under No. 43. $606,615 16

"Subject to the provisions of Sec. 4 of ch. 158, 4-5 Edward VII, the balance of the claim of the Bank of St. Hyacinthe, which remains unpaid, shall be collocated on a *pro*

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rata basis with the chirographic creditors, as hereinafter set forth in "Schedule B".

"The Bank of St. Hyacinthe, being dissatisfied with the above finding made by the Provisional Report, dated the 12th day of December, 1906, filed, on the 28th February, 1907, a contestation of the said Report, asking, *inter alia*, that both the East Richelieu Valley Railway and the Bank of St. Hyacinthe be collocated for the total amount of their respective claims, with the special privilege of *bailleur de fonds* or vendor's lien; and for the portion remaining unpaid after their collocation out of the proceeds of the sale of the East Richelieu Valley and the United Counties Railways, upon any balance remaining out of the proceeds of the sale of the South Shore Railway, after payment of the claims entitled to priority under sec. 4 of ch. 58, 4-5 Edward VII.

"The plaintiff, acting in the interests of the creditors at large, under the direction of the Court, filed on the 4th April, 1907, a plea to this contestation praying for the dismissal of the same.

"The Rutland Railroad Company, a creditor collocated in the said Provisional Report, filed, by leave, on the 11th November, 1907, a plea or answer to the contestation of the Bank of St. Hyacinthe identical with the plaintiff's plea, consenting that the evidence, both written and oral, already adduced at that date, upon the issues between the plaintiff and the bank, avail upon their issue, declaring further they have no further evidence to adduce.

"The hearing of the contestation was proceeded with, at Montreal, before the undersigned on the 2nd, 4th, 8th, 29th and 30th days of November, A. D. 1907, in presence of F. L. Beique, Esq., K.C., and E. Lafleur, Esq., K.C., of counsel for the Bank of St. Hyacinthe; of A. Geoffrion, Esq., K.C., of Counsel for the plaintiff, and of J.E. Martin, Esq., K.C., of Counsel for the Rutland Railroad Co. After hearing read the Provisional Report, the

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pleadings, etc., and upon hearing the evidence adduced and what was alleged by Counsel aforesaid, it is humbly submitted :—

"Dealing first with the question as to whether or not the East Richelieu Valley Railway Company is, under the circumstances, entitled to be collocated by special privilege of *bailleur de fonds* (vendor's lien), it may be said here that, under a special final report made by the undersigned and confirmed by this Court on the 23rd day of December, 1907, it has been found that the East Richelieu Valley Railway Company was entitled to be paid with privilege of *bailleur de fonds*, reserving the question between the parties interested as to whether the amount of the said collocation should or should not ultimately come out of, or be charged to, the collocation of the Bank of St. Hyacinthe.

"Therefore, the only question remaining to be determined on this contestation with respect to the East Richelieu Valley Railway Company, is as to whether the latter as against the proceeds of the sale, having its privilege of *bailleur de fonds*, is not the Bank of St. Hyacinthe, under the deed of the 2nd December, 1899, liable for the purchase price in cash and the Quebec Southern Railway Company entitled to discharge this obligation in bonds.

"That deed of the 2nd December, 1899, between the Bank of St. Hyacinthe and H. A. Hodge respecting the sale of the East Richelieu Valley Railway, is, to my apprehension, somewhat ambiguous. However that may be, both parties have departed from the provisions of this deed, and resorted to the deed of the 30th May, 1900, entered into between the Quebec Southern Railway Company and the East Richelieu Valley Railway Company, which was subsequently followed by the registration and ratification by the President of the Quebec Southern Railway Company. By the first clause of the deed of the 2nd December, 1899, the bank agrees, not to sell, but to

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assign, to Hodge all the rights and claims which the United Counties Railway has or other persons have to any claims to the capital stock of the East Richelieu Valley Railway, etc., *in order to enable the obtaining possession and control* of the East Richelieu Valley Railway. Clause three provides that the cost of litigation therein referred to, shall be borne by both parties in equal proportions, and clause four is an undertaking by the bank to turn over to Hodge the control of the stock or more than 51 per cent. if more is obtained. Would not again these two clauses, coupled with the surrounding circumstances, go to show that the deed was not an out and out sale?

"Now, although the deed of the 2nd December, 1899, is perhaps not as clear as it might be, and that it is somewhat hazy with respect to the obligations of the bank in connection with the East Richelieu Valley Railway, does it not appear therefrom that all the bank undertook under it was to use its best exertions and endeavours in obtaining a transfer of the East Richelieu Valley Railway to the Quebec Southern Railway Company, or to Hodge acting for the company to be organized? The bank did not undertake an absolute obligation to obtain title to the East Richelieu Valley Railway. It undertook clearly to sell the United Counties Railway, because it controlled it, and it was also greatly interested in effecting the sale of the East Richelieu Valley Railway, as the Quebec Southern Railway Company was not obliged to take only one of the railways, if the two were not procured the whole scheme thus falling through. The bank, however, was not, by the terms of the deed, liable for any damages in case it was unable to procure the sale of the East Richelieu Valley Railway.

"The proprietors of the East Richelieu Valley Railway would not, on any account, deal with the bank itself; but were quite agreeable to deal with Mr. Bernier, who had formerly been a director of the bank, and was well dispo-

sed towards it; but who was not, however, representing the bank on the sale. Carrying out the spirit of the deed of the 2nd December, 1899, and partly in discharge thereof, the bank, at a meeting of its directors on the 19th January, 1900, authorized Mr. L. P. Morin, one of the directors, to accompany Mr. M. E. Bernier to negotiate the purchase of the East Richelieu Valley Railway.

"The bank was unable to effect the sale of the East Richelieu Valley Railway under the terms and conditions of the 2nd December, 1899, as the company refused to accept bonds, exacting cash or something equivalent to it. Hodge, of the Quebec Southern Railway, was at that time, unable to pay in cash, and the bank was to endeavor to get the East Richelieu Valley Railway for $100,000 in bonds, and both parties were also willing to go as high as $125,000, each paying half of the excess. However, the sale could not be made for bonds, and Mr. Lafleur, of counsel for the bank, suggests that then both parties fell upon clause 9 of the deed of the 2nd December, 1899, whereby it is understood and agreed that in the negotiation for acquiring the East Richelieu Valley Railway the parties will meet one another in a *fair spirit and will give and take* with a view of making mutual concessions, having in view the ultimate goal of acquiring the road; and the parties made mutual concessions, and the Quebec Southern Railway Company acquired the road, through them or the trustee Mr. Bernier, for cash instead of bonds.

"However true that view may be, bearing in mind that the parties could always give and take without any agreement to that effect, we find in the deed of the 30th May, 1900, by which the East Richelieu Valley Railway is sold to Mr. Bernier in trust for the Quebec Southern Railway Company for the sum of $125,000 in cash, that the bank at the time paid $25,000 in cash, as the vendors were exacting at least that amount in cash. Of these $25,000

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the bank was, it is claimed, paying $12,500, the amount it owned as one-half of the excess over $100,000, and was advancing the balance, the other $12,500, by way of accommodation, to the Quebec Southern Railway Company. The bank, it must be assumed, thus declaring itself satisfied with the deed. But the Quebec Southern Railway Company cannot, on the face of these transactions, hold the bank responsible for the change from bonds to cash. The bank is not a party to the deed of the 30th May, 1900, which, however, must be taken to be in discharge of and in compliance with the deed of the 2nd December, 1899.

"The deed of the 30th May, 1900, was by the Quebec Southern Railway Company itself duly registered as it was. On the 8th July, 1901, Hodge, acting as President of the company, by a deed passed before Dunton, Notary, which said deed is itself registered on the 26th September, 1901, declares that by the deed of the 30th May, 1900, the East Richelieu Valley Railway Company sold and conveyed to M. E. Bernier, therein acting and accepting as trustee for the Quebec Southern Railway Company a line of railway known as the East Richelieu Valley Railway. That the Quebec Southern Railway Company has become vested with the said line of railway so acquired by the said Bernier in trust for the said Quebec Southern Railway Company, giving further the usual notice of registration as provided by the Code.

"This last mentioned deal actually completed the whole transaction which is affirmed by the Quebec Southern Railway Company. The latter is a party to the deed of 30th May, 1900, and ratifies it by the deed of the 8th July, 1901. The acceptance of the deed of the 30th May, 1900, without any reservation, is a waiver by the Quebec Southern Railway Company to stand by the deed of the 2nd December, 1899. If the East Richelieu Valley Railway Company were suing the Quebec Southern Railway

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Company for the purchase price, obviously the Quebec Southern Railway Company could not call the bank in warranty and say: True, we undertook by the deed of the 30th May, 1900, to pay that in cash, but we call upon you under the provisions of the deed of the 2nd December, 1899, to discharge that obligation of ours, and we tender you the necessary bonds in payment. The bank assumed no such obligation under the deed of the 2nd December, 1899.

"It cannot now be said in face of the deeds of the 30th May, 1900, and the 8th July, 1901, and all the surrounding circumstances, that the Quebec Southern Railway Company can turn around and say to the bank you must pay in cash the full amount of $125,000, the purchase price of the East Richelieu Valley Railway, to our discharge and accept bonds in payment.

"Therefore, the undersigned, having been much enlightened by the evidence adduced and argument heard since the production of the Provisional Report, finds that the East Richelieu Valley Railway Company is entitled to be paid with full privilege of *bailleur de fonds* and that the bank is entirely discharged from any liability in respect thereof."

"The claim of the Bank of St. Hyacinthe, for the price of the United Counties Railway with privilege of *bailleur de fonds*, resumes itself upon this contestation into the sole question as to whether or not the bank is entitled to the privilege of *bailleur de fonds* (vendor's lien) for that part of the purchase price, which, under the deed of the 2nd December, 1899, is payable in bonds.

"By reference to the above finding made in the Provisional Report, it will be seen that the undersigned, for reasons therein mentioned, refused that privilege and only allowed such privilege as was attached to the bonds.

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"The deed of the 2nd December, 1899, is nothing but a promise of sale with possession under lease, as already mentioned.

"The agreement of the 7th August, 1900, is a deed by which Dessaulles agrees to sell, and the Quebec Southern Railway Company agrees to buy, the United Counties Railway for a price different from that mentioned in the deed of December, as above set forth. Then the deed goes on and states that Dessaulles, pending the delivery of the purchase price therein mentioned, divests himself of the road and gives absolute possession thereof to the Quebec Southern Railway Company.

"Then we have here a promise of sale with tradition and actual possession, which, under Art. 1478 of the Civil Code, amounts to a sale.

"Furthermore, by this deed of the 7th August, 1900, Mr. Dessaulles undertakes to execute what must be taken to be again in compliance with the deed of 2nd December, 1999, all further agreements, assignments and transfers to more fully vest the property in the company, and procure and have discharged all liens and encumbrances upon the property and perfect the title thereof.

"Following the execution of this deed of the 7th August, 1900, a protest dated the 12th November, 1901, (Exhibit No. 21) is served upon the bank requesting it to free and discharge without delay the railway properties from all liens and encumbrances, mortgages and hypothecs and charges whatsoever, and procure a free and unencumbered and indefeasible title.

"The bank in answer (Exhibit No. 22) to the protest, on the 28th April, 1902, says that, as far as the East Richelieu Valley is concerned, the obligation of the bank was executed by the deed of the 30th May, 1900, and that as far as the United Counties Railway is concerned, the obligations of the bank were executed by the deed of the 7th August, 1900, in so far as that deed purports to

convey to the Quebec Southern Railway Company the property of the United Counties Railway and the registration of such conveyance. The bank further states, among other things, that in so far as anything else is concerned in the said agreement, it does not intend to be committed, reserving its right to repudiate it as being foreign to the carrying out of its obligations and as exceeding the power of Mr. Dessaulles, as resulting from the several deeds of agreement entered into with reference to the said railway property. And the bank further asserts having fulfilled its obligations and declares its willingness to execute any further reasonable deeds, etc., etc.

"Mr. Dessaulles, the President of the Bank, having all along failed to live up to his contract of the 11th January, 1900, and refused to give to both the Estate Chapleau and Hanson Bros. the hypothec he had thereby undertaken to give them, thus breaking faith—if the word does not appear too strong—with these parties who had obliged him by parting with their bond for $150,000 which stood in the way of the purchase of the United Counties Railway, and which furthermore was, by their consent, used as part of the purchase price thereof, an action was instituted by the Estate Chapleau in January, 1901, against Mr. Dessaulles, Hanson Bros. being *mis-en-cause*, to compel Mr. Dessaulles to execute the hypothec in question to the amount of $150,000. Judgment was, on the 4th April, 1901, rendered accordingly, ordering Mr. Dessaulles to execute within twenty-four hours from the service of the said judgment, in favour of the said parties, a good and valid hypothec for $150,000, to be as security for whatever amount of money there might be found to be due to them, and that failing to execute such hypothec within such delay after the service of the said judgment, such judgment should avail in lieu and stead of such hypothec. Mr. Dessaulles having been served with the said judgment and having failed to

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execute a deed of hypothec, the judgment was registered against the property and the hypothec and registration have never been discharged, thus preventing the bank from being in a position to give a clear title to the company.

"The bank settled with the Estate Chapleau on the 9th December, 1901, but the hypothec still remains as an encumbrance of $150,000 against the property as collateral for Hanson Bros.' claim.

"Now, without entering into the merits of this hypothec, and asking whether it is good or bad, it is sufficient to say, for the purposes of this case, that it is an encumbrance upon the property to the amount of $150,000 until discharged, and it does not rest with the Quebec Southern Railway, but with the bank, to have the same set aside, radiated or made disappear in any such manner it may care to. The hypothec, good or bad, is in evidence, and it is for the bank to have it radiated, if it thinks it valueless.

"All this is said to show that the bank, up to this day, is not in a position to give a clear title, and it is in answer to the argument by the bank that the company has never delivered the bonds in question. The sale of the United Counties Railway by the bank is a *franc et quitte* sale, and such sales expressly stipulate that no part of the consideration price should be paid until the property has been freed from all liens and encumbrances (see Civil Code, *Beauchamp*, Art. 1532, n. 4, 7, and 10, and Art. 1535, n, 20, 25, 36 and 37). Would it have been competent for the bank to take an action against the Quebec Southern Railway Company, for the payment of the purchase price before all hypothecs and encumbrances have been removed? No, the question of non-delivery of the bonds does not amount to a serious objection, and as was said in the Provisional Report, the bonds are not offered or given in payment, but are used to determine the privilege

attached thereto, under the provisions of the deed of the 2nd December, 1899.

"The bank attacks the bonds, and says that when the Quebec Southern Railway Company issued these bonds to the amount of $900,000 they made it, by the deed of trust, a condition that the party taking those bonds was to submit to the obligation of suffering the redemption of the same and have them substituted for bonds of any other issue at the rate of $12,000 per mile, in lieu of the rate of $10,000 per mile, as provided in the deed of the 2nd December, 1899. The following cases are authority to say that although the security prove to be inadequate, or wholly void or useless, under the circumstances, there is an implied waiver of the lien. *Kendrick* v. *Eggleston*, 41 Am. R. 90; *Camden* v. *Vail*, 23 Cal. 633; *Partridge* v. *Logan*, 3 Mo. App. 509. If the proper bonds have not been delivered and were not forthcoming at the proper time, when the bank would have been in an position to give a clear title, the company would have been guilty of a breach of contract and the bank had an action to rescind and in damages; but for all that the contract could not be altered, and the bank could only recover in damages or otherwise an amount equal to the value of the bonds, pursuant to the contract. *The bank had contracted itself out of the vendor's lien and accepted bonds in substitution therefor.*

"Now there is no doubt, and it even appears on the face of each bond, that the issue of $900,000 is limited to the amount of $10,000, and it is even called an issue of first mortgage bonds to that extent over an area of 90 miles. That appears both on the face of the bonds and in the deed of trust. The company may never have changed the rate per mile. However, what we have to-day is a bond contemplated and required by the deed of the 2nd December, 1899, and it is the equivalent of that bond

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which is given to the bank and for which it has contracted.

"These bonds were so much issued that part thereof are to-day in the hands of *bonâ fide* persons who made advances to the company and received them as collateral security. And if the privilege of *bailleur de fonds* were given to the bank for that part of the purchase price, which is payable in bonds, these *bonâ fide* bondholders would be deprived from recovering, as the *bailleur de fonds* privilege would wipe out and take all the moneys available on the Quebec Southern Railway, remaining with a small recourse *au marc la livre* under section 4, ch. 158, 4–5 Ed. VII.

"To the back of all these questions, there is a much more serious one, and that is, whether in face of the statute, the Railway Act, the privilege of vendor's lien can exist or can be enforced.

"Under the Railway Act (and the Railway Act guiding us in this case is the Act of 1888, 51 Vict., ch. 29), sec. 95, the bonds, subject to the privilege of the penalties and working expenditure upon the rents and revenues of the railway, as enacted in sec. 94, are declared to be "the first preferential claim and charge upon the company and the franchise, undertaking, tolls and income, rents and revenue and real and personal property thereof, at any time acquired." It would appear from the above that no vendor's lien would exist, and the Supreme Court of Canada held, to some extent, in that sense in the cases of *Wallbridge* v. *Farwell* and *Ontario Car & Foundry Co* v. *Farwell* (18 Can. S. C. R. 1). However, the case must be distinguished from the present. True, in that case Mr. Justice Taschereau (now Sir Elzear Taschereau), who delivered the judgment of the Court, said (at p. 15) that the first charge mentioned in the statute is a first charge second to none, and that it should pass before the privilege of *bailleur de fonds* asked in that case; but that case and the present are very different. The former, among other

many differences, is an action to recover the value of supplies and cars sold to the company, which, it is true, would, under the law of the Province of Quebec, become by destination part of the immoveables, and one of the numerous objections raised was that the sale with the privilege of vendor's lien of the goods so sold would interfere with the operation of the railway, a public utility. In the present case no such objection exists, as the claimant is the vendor of the United Counties Railway, at one time in the hands of a Receiver and now sold by the Court to another railway company, and the Court has under the Exchequer Court Act power to sell a railway or a section of a railway, and the vendors of that section of the railway, sold while in the hands of a Receiver, claim their privilege of vendor's lien upon the proceeds of the sale in the hands of the Court.

"Then a very important fact that must not be lost sight of in this case is that the deed of the 7th August, 1900, by which the property passed to the Quebec Southern Railway Company, was duly registered before the deed of trust respecting the bonds in question.

"Moreover, one of the presumptions and rules of construction is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with irresistible clearness: *Maxwell on Statutes*, 4th Ed. p. 122, and cases there cited.

"Therefore, the Dominion Railway Act should be held strictly to its precise object, namely, to give a certain class of persons a privilege as creditors which they did not

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enjoy at common law. Hence, its provisions must be taken as ancillary and supplementary to the common law respecting legal rights and remedies of creditors, and not as abrogating or destroying them, leaving in existence the paramount privilege of vendor's lien which has always been an underlying principle of the civil law, as well as of the common law, being an inheritance of both systems from the Roman Law.

"True, the undersigned has had to read first the Federal statute (the Railway Act) and read the statutes of the Province of Quebec (the Code) only next. And he has allowed the privilege of *bailleur de fonds* or vendor's lien for the part payable in cash under the contract in question, under the principle set forth in the two preceding paragraphs.

"Mr. Beique's paralled between the position of the bank and that of a proprietor whose land has been expropriated for a section of a railway and who had agreed to accept bonds that were ultimately never issued to him, is not applicable. The bonds in the present case have been issued, and, as already said, some of them are in the hands of third *bonâ fide* parties who are claiming *pari passu* with the bank. Further, the remedy mentioned is given by sec. 143 of the Railway Act for land taken by the railway, and is thereby declared to rank before the bonds if the registration takes place before the trust deed. Furthermore, the right of expropriation is founded on the exercise of Eminent Domain, a right *ne plus ultra* (*supérieur à tout*), and notwithstanding such decisions as *Pell v. Midland and South Wales Railway Co.*,(17 W. R. 506); and *Wing* v. *Tottenham &c. Railway Co.*, (L. R. 3 Ch. 740), and the English Lands Clauses Acts, it is doubtful, to say the least, that a vendor's lien would obtain against a railway company in a case of expropriation under the Railway Act, R. S. 1906, c. 37. See per Lord Macnaghten in *Parkdale v. West* (1887, 12 A. C. at

p. 613); *Dayton &c. Railway Co. v. Lewton*, 20 Ohio, 401; and see 10 Am. & Eng. Rail. Cas., p. 11.

"It has been stated in the Provisional Report, and it is thought advisable to repeat it here again: The deed of the 2nd December, 1899, was never registered. The deed of the 7th August, 1900, was registered on the 6th September, 1901, and the trust deed for the bond issue in question was only subsequently registered.

"While the undersigned has allowed vendor's lien for the part of the purchase price payable in cash, he is unable to find any law allowing him to carry that principle to that part of the purchase price payable in bonds. This is not an alternative sale where the vendor has the option, under the deed, to take payment either in cash or in bonds. He has by this very deed abandoned his privilege of vendor's lien and substituted therefor the privilege the bonds might give him, and he can only recover in pursuance thereof, otherwise he would be recovering more than he bargained for. The jurisprudence in support of that view is overwhelming.

"When the vendor has accepted something in substitution of a money payment, he cannot assert a lien against the immoveable. See *Parrot* v. *Sweetland*, 3 My. & K. 655:—Where a daughter conveyed her remainder in fee to her father, the tenant for life, the consideration being a bond for £3,000 it was held not to be a case of security for the purchase money, but a substitution for the price, which the vendor has agreed to accept, and that the lien for the purchase money was consequently discharged. So likewise *In re Brentwood Brick & Coal Co.*, L. R. 4 Ch. D. 562, where a leasehold brick field was assigned to a company in consideration of £6,000 to be paid to the vendor as follows: 50 per cent. on all moneys to be received from the sale of shares, and 50 per cent. on all moneys borrowed by the company by way of capital, until the £6,000 were paid. The company became abortive.

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No money was received from the sale of shares or borrowed, and ultimately the company were ordered to be wound up, and it was held that the nature of the contract was such as to exclude the vendor's lien, and the vendor had no lien on the leasehold premises. See also *In re Patent Carriage Co. Gore and Durrant's case*, L. R. 2 Eq. 349; and *In re Albert Life Insurance Co.* L. R. 11, Eq. 178.

"In *White & Tudor's Leading Cases in Equity* (6th Ed. 1886) Vol. 1, p. 383, it is said: "Where it appears that the bond covenant, or annuity, was *substituted for* the consideration money, and was, in fact, the thing bargained for, the lien will be lost."

"See *Jones on Liens*, Vol. II, sec. 1073, and sec. 1086, in the latter it being said: "A vendor's lien is lost by taking a mortgage upon other property, or by taking other independent security for the purchase money such as a bond, etc., etc., unless there be an express agreement that it shall not have that effect."

"The intention to substitute may also be implied from the circumstances as in the present case. *Austen* v. *Halsey*, 6 Ves. 483; *Mackreth* v. *Symmonds*, 15 Ves. 348. And if the vendor does any act which manifests an intention to rely upon any security independent of the lien he will be taken to have waived it. *Buntin* v. *French*, 16 N. H. 592; *Coit* v. *Fougera*, 36 Barb. 195. If the security accepted be totally distinct and independent it will become a case of substitution for the lien. Per Eldon, Ld. Ch. in *Mackreth* v. *Symmonds* 15 Ves. 348.

"Girouard, J., in the case of *Quebec &c. Railway Co.* v. *Gibsone*, 29 S. C. R. 358, held that, under paragraph 29 of Art. 5164 of the Quebec Railway Act, the indemnity to a proprietor need not consist in the payment of money, but that the parties may settle it any way they please.

and when the indemnity is made the property passes absolutely to the vendee.

"The law respecting the vendor's lien is practically the same under the English law and the law of the Province of Quebec, subject to the case-law above set forth.

"The bank having accepted, by the deed of the 2nd December, 1899, as part payment for the United Counties Railway, the bonds in question, they are only entitled for that part of the purchase price to the privilege attached to the bonds. It was never contemplated by the parties to the contract that the part of the purchase price payable in bonds would ever be paid in money. Had the company contracted to pay the whole amount in cash, it would have placed itself in an absolutely impossible position to finance and to raise money by bonds for its enterprise. From the bank accepting bonds in payment, there would, it seems result an implied contract giving the company power to issue bonds to third parties for value, since the bank did not absorb the whole issue. Therefore, the interests of other bondholders of the same issue must be respected. The bank, under the present distribution, competing with other bondholders of the same issue, receives the equivalent in money to what the bonds can bring it. The creditors are treated as if the contract was carried out. It is not a question of amount, however, it is a question of privilege. Were the company, for one reason or another, guilty of breach of contract, it would be liable in damages; but this would not change the contract and give the bank a vendor's lien.

"On the question of interest, while it might be said that the bank is not entitled to interest, because it was never in a position to give a clear title, on the other hand we must not overlook the fact that the bank parted with the possession of the railway on the 7th August, 1900, and for that reason it is entitled to interest.

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"For the reasons above set forth, the undersigned finds that the contestation by the bank of its own collocation should be, and the same is, hereby dismissed with costs. And the claim will be allowed as follows,

viz: the sum of.....		$100,000.00
from which should be deducted the amount of..... paid for Hanson Bros.' stock, on the 20th day of January, 1900. There was no imputation of payment at the time this sum of $6,300 was so paid by White, and under Art. 1161 C. C., it should be imputed in discharge of the debt actually payable which the debtor had at the time the greater interest in paying. Leaving the sum of.....		6,300.00 / $93,700.00
with interest thereon at 4 per cent, from the 7th August, 1900, as claimed, to 8th November, 1905, with privilege of *bailleur de fonds*.....		19,684.70
		$113,384.70
The sum of..... balance of purchase price, with interest thereon from 7th August, 1900, to 8th November, 1905, at 4 p.c..	300,000.00 / $63.057.51	
The sum of..... with interest thereon at 5 per cent, from 1st June, 1900, to 8th November, 1905, being the bank's share of the excess price of the East Richelieu Valley Railway.....	12,500.00 / 3,398.98	

Finally the sum of..... with interest thereon at the rate of 4 per cent., from the 7th August, 1900, to 8th November, 1905, the amount due in virtue of the traffic arrangement with I. C. Ry	100,000.00 21,019.17	499,975.66
		$613,360.36
The United Counties Railway having been sold by the bank free from all encumbrances, there will be deducted from these.....		$613,360.36
the sum of..... as representing the claim of Hanson Bros. more clearly established and discussed under No. 43.	$8,099.27	
From which should also be deducted the further sum of..... as representing the plaintiff's costs herein upon the present contestation, taking into consideration that the bank has practically succeeded on the issue respecting the East Richelieu Valley Railway, and after having reduced the costs accordingly and lumped them with the view of avoiding delay.	350.00	
The further sum of..... should be deducted as re-	125.00	

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presenting the costs of the Rutland Rd. Co. upon the said contestation..... $8,574. 27

Leaving the net sum of..... $604,786 09"

These three appeals by the Bank, by Hanson Bros. and by F. D. White were heard at Montreal on the 21st and 22nd days of September, 1908.

F. L. Beique, K.C., and *E. Lafleur, K.C.*, appeared for the Bank of St. Hyacinthe;

J. E. Martin, K.C., and *S. Beaudin, K.C.*, for the Rutland Railroad Company;

R. C. Smith, K.C., for Hanson Bros.;

G. A. Campbell, for F. D. White.

F. L. Beique, K.C., for the Bank of St. Hyacinthe, stated that there was only one important question arising on the appeal from the Referee's report so far as the bank was concerned, viz., whether on the sale of the United Counties Railway the bank had a privilege of *bailleur de fonds* (vendor's lien) for the balance of purchase money unpaid. When a sale is made of railway property for a fixed and determinate price, payable partly in cash and the balance in bonds, does the vendor lose his lien or privilege for the balance by accepting bonds instead of cash? Upon the authorities and the law we submit he does not. In this case the bank, as vendor, is not confronted with an executed contract, because the bonds were not in fact delivered to the bank by the vendee. (Cites Arts. 1534 and 2014 C. C. P. Q.) The Railway Act does not expressly or impliedly cut out the lien. (Cites *Wing* v. *Tottenham, &c. Junction Railway Co.* (1). In any event, the Dominion Parliament could not destroy the vendor's lien as it is a matter of property and civil rights within the province.

(1) [1868] 3 Ch. App. 740.

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E. Lafleur, K.C., followed for the bank, citing Arts. 2009, sub-sec. 8, and 2114. He contended that a vendor's lien is a real right attaching upon the immovable sold. The sale was to Hodge and White, and not to the railway company; hence a clear lien was created which could only be discharged by the will of the parties to the contract of sale. A fair interpretation of the Railway Act would exclude any modification of the legal privilege of a vendor.

J. E. Martin, K.C., for the Rutland Railway Company, contended that the Bank of St. Hyacinthe could not possibly have a vendor's lien because the railway never belonged to them, they were merely creditors. By the deed of 2nd December, 1899, they only agreed to procure a title, they never transferred one by that instrument. No vendor's lien could arise upon such an instrument as that. Again, by accepting bonds for balance of price the bank waived any lien they might have had. Further than that, by the deed of 7th August, 1900, the bank, by Dessaulles, its agent, waived all its privileges against the railway.

Again, as to the question of delivery of the bonds to the bank, the fact is that they were delivered to Matthewson for the bank.

As to the Railway Act overriding the provisions of the Code, the legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sec. 91 of the B. N. A. Act, is of paramount authority even though it touches upon the matters assigned to the provincial legislatures by sect. 92. (*Tennant* v. *Union Bank* (1); *Crawford* v. *Tilden* (2).

S. Beaudin, K.C., followed for the Rutland Railroad Company. He contended that on the face of the instrument of 2nd December, 1899, the bank sold to Hodge, but the intention was to sell to a company to be organized which

(1) [1894] A. C. 31. (2) 6 Can. Ry. Cas. 300.

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Argument of Counsel.

would issue the bonds. No bonds could be issued before the bank abandoned the privilege of vendor's lien. The deed of 7th August, 1900, the only deed registered, was ratified by the bank, and that deed put the company in possession of the road. The bonds were issued by the consent of the bank, and cannot be repudiated. (*Royal British Bank* v. *Turquand* (1); *McMurchy & Dennison's Canadian Railway Act* (2).

G. A. Campbell, for F. D. White, asked leave to intervene in the contestation and to appeal against the Registrar's report in so far as it allowed interest to the bank. The bank undertook, but failed, to sell the East Richelieu Valley Railway to Hodge. The bank never became entitled to the bonds, because they never delivered over the property; hence they are not entitled to interest on the bonds. We do not appeal from the finding of the Referee with respect to the vendor's lien.

F.L. Beique, K.C., replied to the arguments of Mr. Martin and Mr. Campbell, contending that the case of *Crawford* v. *Tilden*, *supra*, referred only to a mechanic's lien, and so was distinguishable from the case of a vendor's lien. A vendor's lien is as important a security for money as a mortgage; it is a privilege. In the Province of Quebec a railway can be seized and sold by a privileged creditor.

The bank never undertook to sell the East Richelieu Valley Railway to Hodge. The bank's undertaking was to sell the United Counties Railway. The East Richelieu Valley Railway would not deal with the bank, and Hodge waived the undertaking of the bank to endeavour to procure it, and bought the railway direct.

CASSELS, J. now (October 31st, 1908,) delivered judgment.

APPEAL OF THE BANK OF ST. HYACINTHE from the report of the Referee.

(1) 5 E. & B. 248. (2) P. 147.

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Reasons for Judgment.

The facts and documents connected with the sale by the bank to Hodge and transfer to the Quebec Southern have been fully set out in dealing with the appeals of Hodge and White (1).

The Referee has allowed the bank a privilege of *bailleur de fonds*, or vendor's lien, to the extent of $100,000 and interest, but refused to allow the balance of the claim as a privileged *bailleur de fonds* claim. The reasons given by the Referee for the refusal to collocate the bank as privileged creditors with the right of vendor's lien is that by their agreement it was expressly stipulated that bonds of the new company to be incorporated were to be accepted as the consideration.

From this finding the bank appeals and claims the right of privilege of *bailleur de fonds* for the full amount.

I think the Referee's conclusion was correct so far as he declined to allow the bank to rank for a vendor's lien for that portion of the purchase money payable in bonds.

It appears from the report of the Referee that the law of England relating to vendor's lien and of the Province of Quebec are practically similar.

The Quebec Southern Railway Company was duly incorporated. The bonds were to be issued, and when issued to be deposited with Frank Mathewson under the terms of the agreement of the 7th August, 1900, entered into between Dessaulles, Hodge and White, and Mathewson. The bonds were subsequently issued, but the bank has not yet fulfilled the obligation imposed upon them by the terms of the deed of 2nd December, 1899, as to making a clear title.

I am of opinion that the Referee erred in allowing the bank the privilege of *bailleur de fonds* for the $100,000. To my mind such a right as *bailleur de fonds* or vendor's lien cannot exist under the circumstances of this case. The bank was purchasing a railway for the purpose of

(1) *Ante pp. 42 et seq.*

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having an act of incorporation pursuant to the statute to operate it. It was a re-organization of the company. I have fully dealt with the facts in the former appeal. How is it possible that as against the reorganized company this equity should exist.

Furthermore, when the bank accepted security in the shape of bonds for the large portion of their claim and agreed to take a note for the balance it became disentitled, if otherwise entitled, to a vendor's lien.

Strong, V.C., when Vice-Chancellor of Ontario in the case of *Anderson* v. *Trott* (1) stated as follows :—

"It is clear both on authority and principle that a vendor who completes a sale and takes a mortgage for part of the purchase money disentitles himself to a lien for the esidue remaining unpaid and unsecured".

The learned Vice-Chancellor quotes numerous authorities.

In *Driffill* v. *McFall* (2) Harrison, C.J., at p. 321 says:—

"A vendor's lien is raised irrespective of contract and is on principles of equity held to exist unless expressly waived, or the facts be such that the Court can safely infer that it was waived."

I would also refer to *Mathers* v. *Short* (3); *Boulton* v. *Gillespie* (4)

Moreover, what was sold was the franchise, railway and property, a blended property for an indivisible sum. A railway is a public utility, a creature of statute with power to create charges as the statute may permit, and I fail to understand how such an equity as *bailleur de fonds* can be held to exist.

It has been held by the Ontario Courts that a workman's lien cannot be created as against a railway. *King* v. *Alford* (5).

(1) 19 Gr. 619.
(2) 41 U. C. Q. B. 313.
(3) 14 Gr. 254.
(4) 8 Gr. 223.
(5) 9 Ont. R. 643.

The principle upon which a vendor's lien is given to the vendor of land which the railway purchases for construction is entirely different. The railway might purchase, paying a portion of the purchase money and a mortgage for the balance. In this case the railway never acquires anything but the equity, and only the equity becomes charged in favour of the bondholders.

The case in question is entirely different. It is the case of a complete operating railway, retaining its continuity, and I fail to see how such a charge as contended for can be allowed.

I think the appeal of the bank should be dismissed with costs.

Had there been an appeal against the allowance of the claim of $100,000 as a privileged *bailleur de fonds*, or if on the appeal of the bank any respondent had raised the question I would have felt bound to vary the report. No claimant however who has any status to object raises the question and I do not think I should interfere.

APPEAL BY HANSON BROS. from finding upon claim of Bank of St. Hyacinthe :—

I have found that Hanson Bros. have no status as creditors, and therefore no right to appeal (1).

Appeal dismissed with costs.

APPEAL BY WHITE from finding of Referee upon the claim of the Bank of St. Hyacinthe :—

This appeal is against the Bank of St. Hyacinthe. The appellant claims that the bank should be charged with the amount paid to purchase the East Richelieu Valley Railway, and receives bonds therefor and ranks as bondholders. The claim is that the Referee was correct in his Provisional Report.

(1) See *post*, p 93.

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Reasons for Judgment.

By the agreement of 2nd December, 1899, Hodge was not bound to acquire the United Counties Railway unless the bank also procured title to the East Richelieu Valley Railway. The bank had agreed to purchase this railway for a sum to be paid in bonds of the Quebec Southern. The East Richelieu Valley Railway Co. refused to accept payment in bonds and required cash. Hodge need not have carried out his purchase of the United Counties Railway. He did so. The East Richelieu Valley Railway Co. sold direct to the Quebec Southern. There is no liability against the bank.

The appeal is dismissed with costs.

Judgment accordingly.

Solicitor for plaintiff: *A. Geoffrion.*

Solicitors for the defendant: *Greenshields, Greenshields & Heneker.*

Solicitors for Bank of St. Hyacinthe: *Turgeon & Beique.*

Solicitors for Hanson Bros.: *Smith, Markey & Skinner.*

Solicitors for F. D. White: *Hickson & Campbell.*

BETWEEN

THE MINISTER OF RAILWAYS AND CANALS..... } PLAINTIFF;

AND

THE QUEBEC SOUTHERN RAILWAY COMPANY AND THE SOUTH SHORE RAILWAY COMPANY ..... } DEFENDANTS.

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Oct. 31.

In re EDWIN HANSON, AND OTHERS (CLAIMANTS)..... .... } APPELLANTS;

AND

THE BANK OF ST. HYACINTHE (CREDITOR)..... } APPELLANTS;

AND

THE MINISTER OF RAILWAYS AND CANALS (PLAINTIFF)..... } RESPONDENT.

Railway—Bonds held as security by creditor—Transfer—Purchase of railway by trustee—Breach of trust—Judgment by original bond-holder against railway—Hypothec—Collocation of claim upon moneys received by vendor of railway.

H. had a claim guaranteed by bonds against a railway. It was agreed between H., together with certain other creditors, and D. that the latter would purchase the railway at Sheriff's sale in trust for such creditors, and that after the purchase D. would execute a mortgage in favour of these creditors, H. to benefit by such mortgage to the amount of his claim guaranteed by the bonds. To facilitate such arrangement H. transferred the bonds to D. The railway was purchased by D. but thereafter he refused to execute the mortgage as agreed. H., on the 4th April, 1901, obtained a judgment against the railway directing D. to execute in his favour a valid hypothec upon the railway, and in default thereof that the judgment should stand in lieu of such hypothec. D. not complying with the direction, H. registered this judgment. D. having allowed a bank, for whom he professed to act in

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purchasing the railway, to assume the right to dispose of the same, the bank sold the road to a company incorporated for the purpose of acquiring it, and D. conveyed the road to the company on the 7th August, 1900.

Held, that although H., upon the facts, was not entitled to assert his claim as a hypothec against the railway in the hands of the company, inasmuch as the bank had guaranteed the purchaser a clear title the claim was allowed to be collocated upon the moneys coming to the bank from such sale.

Statement of Facts.

THIS is an appeal by the Bank of St. Hyacinthe from the finding of the Registrar, acting as Referee, upon the claim of Hanson Bros. and also an appeal by Hanson Bros. from the finding of the Referee upon their own claim, in respect of which the Bank of St. Hyacinthe and the Minister of Railways and Canals were respondents.

The following facts of the case are taken from the two reports (provisional and final) of the Referee:

"Edwin Hanson, of the City and District of Montreal, and William Hanson, of the Town of Westmount, District of Montreal, Financial Agents, carrying on business as such in Montreal aforesaid under the firm name and style of Hanson Brothers, and Frederick G. Finlay, Dame Emma Gault, Frank D. Adams, M.D., and Alexander G. Watson, in their quality of executors to the late Samuel Finlay, in his life time of the same place, Gentleman, are the Claimants.

"Claim $19,722.09, in capital, interest and costs.

"The claimants allege that the United Counties Rail way Company are indebted to them in the said amount and that they hold a hypothec for the same upon that portion of the Quebec Southern Railway running from St. Hyacinthe towards Sorel.

"Under a certain deed of agreement *sous seing privé* of the 11th January, 1900, between Lady Marie Louise King et al., Parties of the first Part; the said Claimants, Parties of the second Part; the Bank of St. Hyacinthe, Party of the third Part; and George C. Dessaulles, Party

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of the fourth Part:—it was covenanted and agreed that the said G. C. Dessaulles would purchase, as Trustee, at a Sheriff's sale, then advertised to take place on the 25th January, 1900, the United Counties Railway and that he would, immediately after obtaining from the Sheriff a title to the said road, execute a first mortgage in favour of the said Lady Mary Louise King et al. to the amount of a bond held by them, with interest, viz.: about the sum of $150,000 and which said mortgage should be held by them as collateral security for whatever amount of money there may be found to be due to them and the present claimants by the said Railway Company. This mortgage was to be executed upon that portion of the road as above mentioned and the present claimants were to rank for the amount of their claim immediately after the claim of the parties of the first part; the said parties of the first part and the claimants jointly holding at the time a first mortgage bond upon the said property for the said sum of $150,000 as collateral security for their claims, which said mortgage bond was to be delivered to the said George C. Dessaulles for delivery to the Sheriff as representing the purchase price of the road, if the same became necessary, in order to settle for the purchase price.

"The said parties of the first and second parts further agreed to discharge any claims which they might have against the said road on receipt by them of the amount respectively due to them and secured by the mortgage bond of $150,000 with interest to date of payment, they becoming mortgage creditors to the amount of their respective claims with interest.

"The said G. C. Dessaulles purchased the said railway at the Sheriff's sale on the 25th January, 1900, and delivered, as alleged, to the Sheriff, as part payment of the purchase price thereof, the said bond of $150,000 and

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obtained a deed of sale from the Sheriff on the 1st May, 1900.

"It appears the said George C. Dessaulles, after acquiring the property, refused to execute the mortgage, as agreed upon, in favour of the said parties of the first part and the said Claimants. On the 30th January, 1901, the said parties of the first part instituted an action against the said G. C. Dessaulles to compel him to execute in their favour a mortgage upon the said road for the sum of $150,000, and in default of his so doing the judgment to be rendered should avail in lieu and stead of such hypothec.

"The present claimants intervened in the said action and also asked that the said G. C. Dessaulles should execute the said mortgage for $150,000 to cover their claim for any money due them and secured by the said bond as well as the claim of the plaintiffs therein.

"By the judgment of the 4th April, 1901, the said G. C. Dessaulles was ordered, within 24 hours after the service of the said judgment, to execute, in favour of the said claimants, a good and valid hypothec upon the said property for the sum of $150,000, to be as security for whatever amount of money there might be found to be due them, and that failing the said G. C. Dessaulles to execute said hypothec within such delay after the service of the judgment, that such judgment should avail in lieu and stead of such hypothec, *à toutes fins que de droit.* Service of the said judgment was accepted on the 10th April, 1901.

"The said G. C. Dessaulles having failed to execute the said deed of hypothec in accordance with the said judgment, the said judgment was duly registered against the said property and the said hypothec and registration have never been discharged.

"This claim appears to have originated in a loan of $8,000 made on the 23rd of March, 1893, to the United Counties Railway by the present claimants.

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"On the 9th December, 1895, the United Counties Railway Company, by a deed of agreement, duly signed by the President and Secretary and under its seal, admitted their liability and indebtedness, at that date to the said claimants, in the sum of $9,868.30, which would appear to represent the principal and the interest accrued at that date. The railway company after admitting and confirming the debt, transferred and conveyed to the claimants as collateral security for the same, the bond of $150,000. This bond was given, subject to a first charge of $43,000 and interest in favour of the Honourable J. A. Chapleau,—as collateral security for the amount of $9,868.30 and interest, subject further to releasing the said bond to the said company after the payment of the said amount.

"The indebtedness is clearly admitted, the amount cannot, it seems, be now questioned. The bond is a valid one. (See. 59 Vict., ch. 60.) When the above-mentioned judgment was registered against the property, the latter stood upon the registers of the Registration Division in the name of the said G. C. Dessaulles, who was the whole time acting for the Bank of St. Hyacinthe, as appears upon the finding of claim No. 66.

"The road was sold by the Bank of St. Hyacinthe free and clear from all debts, liabilities and incumbrances.

"The bank was bound to discharge all incumbrances before being entitled to the purchase price from the Quebec Southern Railway. The claim of the Estate Chapleau, which stood in a similar position as the present one, was duly discharged by the bank. The present claim will be paid out of the amount coming to the Bank of St. Hyacinthe, the latter being liable therefor under its contract.

"The sum of $9,868.30, mentioned in the deed of agreement of the 9th December, 1895, will be allowed with interest from that date to the 8th November, 1905,

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deducting therefrom, however, any payment made on account.

"But it may be said the claimants are not entitled to interest for more than five years. The holding of the bond as collateral security civilly interrupted prescription up to the time it was handed over to G. C. Dessaulles, to be used as part of the purchase price of the railway, and was up to that time an acknowledgment by the debtor of the right of the claimants against whom prescription might run. Art. 2227 C.C.

"This principle was followed in the case of *La Banque du Peuple* v. *Huot*, (1) when it wast held that the fact of the debtor who gave a pledge to his creditor assuring the payment of his debt, leaving this pledge in the hands of the creditor, constituted a constant and incessant acknowledgment of his obligation which interrupts prescription for such time as the pledge remains in the hands of the creditor.

"The bond was parted with only in 1900 when the prescription began to run against the interest, and as interest can only be allowed up to the 8th November, 1905, date of the sale, no part thereof is prescribed.

"The undersigned having been informed that the claimants, at the time the loan was made, had been given by Mr. Maze, President of the United Counties Railway, as collateral security for such loan, a certain number of shares of the said company, and for which the said claimants at the time of the sale, by the sheriff, of the United Counties Railway, threatened to file an opposition and thereby stop the sale, and that in view thereof the Bank of St. Hyacinthe, with moneys belonging to F. D. White, and at the request of the latter, paid on the 20th January, 1900, to the claimants the sum of $6,300 for those shares and in reduction of the present loan.

(1) [1897], R. J. Q. 12 C. S. 370.

"This fact, having been communicated to the claimants' solicitors, was duly confirmed, as will appear by their letter to him of the 10th November, 1906 filed herein, when they allege the following receipt was given therefor:

'24th January, 1900.

Received from J. N. Greenshields the deposit receipt of the Bank of St. Hyacinthe in our favour for $6,300 for 950 shares of the capital stock of the United Counties Railway, which we will transfer to F. D. White, or his nominee. We will assign to you our lien on the bond of $150,000 for the $6,300 to rank after we have been paid the balance of our claim against the road amounting to $6,300. This deposit receipt when it matures three months from now we agree to take 25 per cent. of it in cash and deposit receipt at three months for the balance, if the bank so desires.

(Sgd) HANSON BROS.'

"From the statement of account between the bank of St. Hyacinthe and F. D. White, procured by the undersigned from the bank and which is filed with F. D. White's claim under No. 12, it appears that the sum of $6,300 was actually paid to Hanson Bros., by order of F. D. White, on the 20th January, 1900.

"This payment of $6,300 was actually paid to Hanson Bros., by order of F. D. White, on the 25th January, 1900.

"This payment of $6,300 is also given credit for by the Bank of St. Hyacinthe in its claim under No. 66 on account of the purchase price.

"Under the circumstances the present claim is allowed at the sum of..... $9,868.30.

Upon which interest will be allowed from the 9th December, 1895, to the 24th January, 1900, at 6 per cent, amounting to $2442.98

Out of this sum of $6,300 so paid on

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account on the 24th January, 1900, will be deducted the interest (see Art. 1159 of the Civil Code) accrued up to that date, leaving a balance of 3,857.02

which will be deducted from the principal.

leaving a balance of $6,011.28

with interest thereon from the 24th January, 1900, to the 8th November, 1905 ..... 2,087.99

"Making a total sum of $8,099.27

which will be allowed in settlement of the claim and paid out of the collocation of the Bank of St. Hyacinthe (Claim No. 66) for the reasons above mentioned, and paid over to the claimants upon their giving a discharge of the amount of their claim upon the said bond."

"The Bank of St. Hyacinthe, a creditor collocated herein, being dissatisfied with the above finding made upon the claim of Hanson Bros. by the Registrar's Provisional Report, filed a contestation of the same within the delays assigned by the said Report. Hanson Bros. filed a plea in answer to the said contestation and joined issue upon the same.

"Although the Bank of St. Hyacinthe, in its present contestation, has added to the style of cause, after the name of Hanson Bros., the above mentioned creditors collocated herein, the name of "The Marble Savings Bank et. al.", nothing has been said with respect to these parties, either by its pleading upon the said contestation by the said bank, in adducing evidence or in the argument of the case. No reason has, at any time, been disclosed why "The Marble Savings Bank et. al." have been made parties herein, or which of their rights or

interests are affected by the present contestation. Therefore the undersigned will not mention the claim of The Marble Savings Bank et. al., beyond saying that presumably the Bank of St. Hyacinthe served them with the contestation, because these creditors would be materially affected in case the privilege of *bailleur de fonds* were given the bank for the full amount of its claim. Because in such a case there would be no moneys left or available to the bondholders (or those holding the bonds as collateral security as in the case of The Marble Savings Bank) on the old Quebec Southern, and such bondholders would only come in under section 4 of ch. 158, 4–5 Ed. VII *au marc la livre*, without any privilege, receiving thus only a very small percentage of their claim.

"The bank, by its pleadings, alleges, *inter alia*, (a) That the sale of the United Counties Railway by the Sheriff on the 25th January, 1900, has discharged any liabilities in virtue of the first mortgage bonds above referred to; (b) Because no valid hypothec could be created under the circumstances; (c) Claim not valid against United Counties Railway; (d) because the advances made by Hanson Bros. were made to Maze personally and not to the railway; (e) because any legitimate claim Hanson Bros. may have had has been paid long prior to the filing of the claim.

"With some few additions the claimants Hanson Bros. in answer to the contestation, re-assert their claim as mentioned in the Provisional Report.

"The circumstances under which the loan in question was made, are related in Maze's evidence taken at San Francisco under "Commission Rogatory." He says: 'When we had finished ten miles of the road, we did not get the subsidies at once, but had to wait, and in order not to delay the construction, the Bank of St. Hyacinthe concluded to let us have some money. I did not exactly remember how much at that time. They began to be impa-

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tient about the Government not paying the subsidies and refused to give us any more money. That was only for a short time though, and, in the meantime, I needed money to continue the construction of the railroad and I borrowed that $8,000 from Hanson Bros. and Samuel Finlay. Hanson Bros. asked me for my personal endorsation and I gave them that ..... the $8,000 ..... was expended for the construction of the road.'

"The evidence further disclosed that at the request of the Bank of St. Hyacinthe he also gave his own note and guarantee when borrowing from the Bank of St. Hyacinthe.

"In what relation did Maze stand to the company at the time he made the loan? This should be determined, as before making any pronouncement we ought in fairness look at all the surrounding circumstances.

"Maze was the President of the United Counties Railway between 1892 and the end of 1899: he owned the whole road; was the engineer and manager, building the road without contract, at the expense of the company, which was practically himself, the interests being the same. He owned all the stock of the company, with the exception of a few shares he had given to a few persons to qualify them as directors.

"L. F. Morrison, a Director of the United Counties Railway, called as a witness by the bank, tells us in the course of his testimony that the United Counties Railway was originally incorporated by persons who subsequently sold all their interests to Maze, who, after a time, owned the whole thing. He further tells us Maze built the road, negotiated loans for that purpose and gave his personal guarantee for such loans.

"In whatever aspect we look at all these transactions, we cannot fail to see that Maze at the time was the individual owner of the whole enterprise, managing and conducting it by himself. As we will hereafter see, Maze

had full general power to borrow money for the purpose of the company. He was acting for the company, the latter receiving all the benefit of the moneys advanced, and when Maze did act, although seemingly contracting in his own name, he in reality contracted for the company. He placed in escrow in the hands of Hanson Bros. 95 per cent. of the stock of the company as collateral for the loans in question. Nothing stood in his way to have these transactions ratified by the compay as he went along, if he cared; and nothing stood in his way to have them adjusted and ultimately ratified when the agreement of December, 1895, was entered into.

"It is alleged by the contesting party there was no privity of contract as between Maze and the company. But under Art. 1716 C.C. a mandatary who acts in his own name is liable to a third party with whom he contracts without prejudice to the rights of the latter against the mandator or principal. A person may act for and bind an undisclosed principal; it is only a question of proof. And we have evidence that the railway was Maze's individual enterprise and business at the time, and that the company reaped the benefit of the loan in question herein. *Canada Central Ry. Co.* v. *Murray* (1). In acting as he did Maze was acting in the interests of the company and had clearly no personal interest conflicting with that of the company, since he was the company himself.

"Now considerable evidence has been adduced in going through the books of the claimants, Hanson Bros., and efforts made by the bank to show that the claimants had already been paid. Much has been said about the fact that the account was originally entered in Maze's name and subsequently changed into the name of the United Counties Railway Company, which fact Mr. W. Hanson explains by saying that they had had private dealings with Maze before making loans to the railway, and as a

(1) 8 S.C.R. 313, 320.

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matter of convenience continued the account in his name. However, in consideration of the view the undersigned takes of the case, it is deemed unnecessary to go into the merits of these entries made in the course of business, and the further question as to how far these entries are evidence unless they are corroborated by other circumstances which render it probable that the facts therein recorded really occurred. But disentangling the main question from the details of bookkeeping which have no bearing on the present decision, to my mind the case resolves itself into an interpretation of the agreement of the 9th December, 1895, which reads as follows, viz. :—

'MONTREAL, December 9th, 1895.

MESSRS. HANSON BROS.,

Montreal.

DEAR SIRS.—As collateral security for the debt to you of this company amounting to $9,868.30 and which debt is hereby admitted and confirmed, we hereby transfer and convey to you all our interest in and to one hundred and fifty thousand dollars of this Company's Bonds, and which constitute a first mortgage on that part of the company's road from St. Hyacinthe to Sorel more particularly described in a Deed dated 15th September, 1894, and which were issued on 15th September, 1894, under the terms of said above mentioned deed. This transfer, however, is subject to the following conditions :—

"(1) That the said Bonds shall be subject to a first charge in favor of the Honorable J. A. Chapleau of the sum of $43,000 and interest thereon until paid.

"(2) That after you have been paid the amount of your claim of $9,868.30 and interest thereon you shall release to this company any further claim on said bonds or on the proceeds of the sale of said bonds.

"(Sgd.) CHARLES D. MAZE,
"Prest. U. C. Ry.

'[SEAL] "(Sgd.) J. F. DAWSEY,
"Secy. U. C. Ry.'

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"Maze and Hanson contend there was a special resolution passed authorizing this agreement and to borrow that money. The resolution would have been written out, signed and delivered to Maze by the Secretary and shewn to Hanson Bros. Hanson swears having seen it. After the resolution would have been so shewn to Hanson Bros., it would have been taken back to be entered in the Minute Book of the company. But it was not entered, although a blank page had been left for the purpose, and is still there to-day, as will appear by reference to the Minute Book. Maze says in his evidence he can only account for the resolution not appearing in the ordinary Minute Book of the company, that the Secretary was negligent in not entering it after it had been returned to him for that purpose.

"We have on the one hand Maze and Hanson swearing positively as to this special resolution, and we have Morrison and Brillon swearing they do not remember any such resolution, and that it cannot be found in the Minute Book. The practice in such cases is to accept the positive evidence in preference to the negative. And, perhaps, in view of the well known fact that Maze was the company, its manager, president and engineer, that the company was his own enterprise and that Morrison and Brillon were only two directors qualified by Maze himself, it is probable that Maze would not, in his financial transactions, pay much heed to these directors, would not always consult them, but take for granted they would approve what he was doing.

However, was that special resolution necessary in face of the resolution of the 21st January, 1891? That resolution reads, *inter alia*, as follows: 'The President is appointed 'manager, and is especially authorized to make, in the 'name of the company and for its benefit, all purchase of 'ties, sleepers, pickets for fences, rails, lumber, iron, and 'to sign all notes, bonds, cheques, necessary contracts to

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'that effect and to take all proper measures for the build-'ing of the railway of the company.....'

"Again by the resolution of the 12th August, 1892, the President is vested with further power. The following extract therefrom reads as follows: 'The President is 'authorized to make all necessary financial arrangements 'to procure (*se procurer*) to himself the funds required for 'the construction of *his* railway, with the Bank of St. 'Hyacinthe *or all other banks* and to guarantee all 'advances..... and to give and sign, in favour of the 'said bank all necessary promissory notes for the purpose 'of ascertaining such loans and advances made by the 'said bank and to have the same countersigned by the 'Secretary-Treasurer of the said company.'

"Now does not the whole case turn and rest upon this agreement of the 9th December, 1895? Here is a document signed by the President and Secretary of the company, bearing the seal of the company, by which the latter recognized being indebted to Hanson Bros. in the sum of $9,868.30. The document is practically an account stated as between the parties to this agreement. It is a perfectly legal document in the hands of Hanson Bros. which the company is estopped from attacking. Hanson Bros. are not called upon to enquire into the regularity of the internal management of the company—what Lord Hatherley called the 'indoor management'. The document appears complete, and the officers subscribing thereto appear also to have been acting within the scope of their powers, and further the seal of the company is there affixed to remove any doubt. See *Palmer's Company Precedents* (1). In the case of *Montreal Light, Heat and Power Co.* v. *Robert* (2), Lord Macnaghten lays down the principle that the power given to borrow by irregular meetings does not affect third parties. The company is estopped and cannot set up any irregularities depending

(1) 9th ed. pp. 68, 71.

(2) [1906] A. C. 196.

upon the internal administration of the company.' See also *Thompson* v. *Brantford Electric Co* (1) *Mahoney* v. *East Holyford Mining Co.*, (2) *Bernardin* v. *Municipality North Dufferin*, (3) *Re David Payne Co.*, (4).

"For the reasons above mentioned, both on the present contestation and in the Provisional Report, the undersigned is unable to see any grounds upon which his finding in the Provisional Report should be altered or varied. The undersigned, therefore, finds that the contestation of the Bank of St. Hyacinthe is unfounded in law and dismisses it with costs.

Therefore the said claimants, Hanson Bros., are entitled to recover the said sum of..... $8,099.27
from which should be deducted the sum of 150.00
the amount of A. Geoffrion's costs on the contestation between the plaintiff.....
and the present claimants, leaving the net sum of..... $7,849.27"

APPEAL BY HANSON BROS. UPON THEIR OWN CLAIM.

The following facts respecting the contestation by Hanson Bros., of the Provisional Report, of the collocations or findings made in their favour are taken from the final report of the Referee:—

"Being dissatisfied with the Registrar's Provisional Report with respect to the collocation therein mentioned in favour of Hanson Bros., the latter filed on the 8th March, 1907, a contestation of the same.

"The Bank of St. Hyacinthe joined issue upon the contestation and filed an answer thereto.

"The plaintiff, acting under the direction of the Court, in the interests of the creditors at large, also joined issue upon the contestation and filed an answer thereto, seeking to maintain the said Provisional Report, and asked for the dismissal of the contestation.

(1) 25 Ont. A. R. 340;
(2) L. R. 7 H. L. 869;
(3) 19 S.C.R. 581.
(4) [1904] 2 Ch. D. 608.

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"After hearing the evidence and what was alleged by Counsel aforesaid, the undersigned submits as follows:—

"The pleas to the contestation both by the bank and the plaintiff, respectively, have been treated separately and distinctly, and separate argument has been heard on each issue as between the bank and Hanson Bros. in the one case, and as between the latter and the plaintiff in the other case.

"Dealing first with the contestation as between Hanson Bros. and the bank, it should be stated at the outset that the evidence and the exhibits on this contestation by the Bank of St. Hyacinthe of the claim of Hanson Bros. have been, by consent, made common to both these contestations.

"For the reasons mentioned in the disposal of both the contestations by the Bank of St. Hyacinthe of the claim of Hanson Bros. (which is to be found at page 93), and of the contestation by the Bank of St. Hyacinthe of its own collocation in the Provisional Report (page 61), the undersigned finds that the contestation by Hanson Bros. of the claim of the Bank of St. Hyacinthe, whereby said Hanson Bros. seek to have the bank's claim 'rejected, set aside or amended or varied in such a way that they be collocated prior thereto for the full amount of their claim, interest to date, and all costs' should be, and the same is, hereby dismissed with costs in favour of the Bank of St. Hyacinthe.

"2ndly: Coming now to the contestation as between Hanson Bros. and the plaintiff, it must be borne in mind that under an order of the 6th November, 1907, the evidence adduced by the Bank of St. Hyacinthe on its contestation of the claim of Hanson Bros. is to be used on the present contestation so far as it is applicable to the issue between the plaintiff and the said Hanson Bros.

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"We find upon this contestation that Hanson Bros. ask to be collocated for the full amount of their claim and for a larger amount than that allowed by the Provisional Report. They contend that notwithstanding the fact that White, by a separate and distinct claim, seeks to recover the said sum of $6,300, that it should be paid to them. Perhaps, in addition to what has already been said by the undersigned on the two above mentioned contestations, the following observations may be made with respect to this sum of $6,300. Both claims of F. D. White and of the Bank of St. Hyacinthe have been filed by plaintiff as Exhibits P–1 and P–2, whereby it appears that White himself is claiming these $6,300 and that they are given credit for in the claim of the Bank of St. Hyacinthe.

"Now, under the circumstances discussed elsewhere in this Report, we are met with a claim by White for these $6,300 which were paid out, at his request, by the Bank of St. Hyacinthe out of White's moneys at the time therein deposited, in full settlement of the purchase of 950 shares of the United Counties Railway, with the object of carrying out, without opposition, the sale by the sheriff of the United Counties Railway.

"Clearly the Quebec Southern Railway Company cannot be asked to pay twice. If White elects to claim direct, when he might, if he had cared, have claimed through Hanson Bros., it is not open to Hanson Bros. to claim the same amount. White having claimed, in his own name, his claim was fully entertained under his own contestation. It may here be said by way of explanation that the amount of his claim is really paid to him, as payment may be made by way of set-off or compensation as well as in specie, the former expression being the one used in the Civil Code.

"When White bought the stock from Hanson Bros. he did not only receive the stock but he also secured a claim

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against the company for these $6,300; therefore, since Hanson Bros. agreed to give White such a claim against the company and since the company must pay White, Hanson Bros. cannot ask the company to pay them when the company is paying White.

"On the question of interest, the undersigned cannot see any good reason why Hanson Bros. should be treated differently and in a more favourable manner than the rest of the creditors and be allowed interest until payment. While a bond held as collateral security may interrupt prescription, as above-mentioned, the undersigned is not aware that an hypothec can have that effect. The bond in question was parted with at the time of the sheriff's sale of the United Counties railway, therefore, they cannot recover more than the amount found due to them under the judgment which has been registered against the railway, and which, although attacked, is taken in the present instance to avail as if in full force and effect and valid for all the purposes herein until set aside.

"For the above-mentioned reason, and also for those mentioned in the disposal of both the contestations by the Bank of St. Hyacinthe of the claim of Hanson Bros. (page 93) and of the contestation by the Bank of St. Hyacinthe of its own collocation in the Provisional Report (page 61), the undersigned finds that the present contestation by Hanson Bros. as between themselves and the plaintiff, whereby they seek 'to have the Provisional Report set aside, amended or varied in such manner that in the report to be finally adopted the said Hanson Bros. may be collocated for the total amount of their claim with interest to date of payment and all legal and other expenses incurred by them' should be and the same is hereby dismissed with costs *distraits* in favour of the said A. Geoffrion, Esq., K.C., which said costs, for the purpose of avoiding delay, are hereby fixed at the lump sum of $150, which said sum should be primarily deducted from the amount coming to the said Hanson Bros."

September 23rd and 30th, 1908.

These appeals now came on for hearing at Montreal.

F. L. Beique, K.C., for the Bank of St. Hyacinthe;

R. C. Smith, K.C., for Hanson Bros.

A. Geoffrion, K.C., for the Minister of Railways and Canals.

F. L. Beique, K.C., submitted that it was not open to Dessaulles to register any mortgage against the property. It is the French doctrine that a conventional hypothec cannot be created by a party who is not the owner or in possession. So far as judicial hypothec is concerned the question of registration does not arise at all. (Cites Arts. 2131 and 2034 C. C. P. Q.)

While the Bank of St. Hyacinthe did not desire to attack the validity of the judgment of 4th April, 1901, because the Chapleau claim had been recognized and paid, the bank refused to recognize Hanson Bros.' claim. This refusal went to the merits of the claim and was grounded as the fact that the advances were not made by Hanson to the railway but to Maze personally. There was no privity of contract between Hanson Bros. and the railway company.

R. C. Smith, K.C., contended that the judgment recovered against Dessaulles on the 4th April, 1901, and registered on the 12th April, 1901, by which Dessaulles was ordered to execute a hypothec upon the United Counties Railway for the sum of $150,000 in favour of Hanson Bros., became valid and binding upon the railway from the time of its registration because the railway was then a provincial railway and the property therein stood in the name of Dessaulles. Before the Act of 1905 (P.Q.), c. 27, a railway could be sold in the same way as any other immovable, and there was nothing to prevent a vendee from operating the railway without organizing a

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company. (Cites *Great Eastern Railway Company* v. *Lamb* (1).

By the deed, or agreement, of 11th January, 1900, Dessaulles was constituted a trustee for all concerned to purchase the Railway. The claim of Hanson Bros. on the bond (See 59 Vict. P.Q. c. 60) was part of purchase price so far as they were concerned. Dessaulles was bound to execute the mortgage referred to in the agreement, but he refused. If he had power to sell the railway, surely he had power to mortgage it and so carry out and execute the trust he had accepted.

As to the point that Hanson Bros. made the advances to Maze personally and without reference to the railway, the fact is that Maze held all the shares of the United Counties Railway except such as were given to qualify the directors. (Cites *Canada Central Railway* v. *Murray* (2); and 51-52 Vict. c. 95, s. 14).

When the Bank of St. Hyacinthe lent money to the railway, it always took Maze's note, and Hanson Bros. did the same.

A. Geoffrion, K.C., contended that the Referee's finding upon the Hanson Bros.' claim ought not to be disturbed. It is clearly in the interest of all the creditors. It would be inequitable to re-open the proceedings an the reference now and allow interest to Hanson Bros., or any other preferential creditors, to whom the Referee has not allowed interest by his final report.

CASSELS, J. now (October 31st, 1908,) delivered judgment.

The Appeals of the BANK OF ST. HYACINTHE against the claim of HANSON BROS. and the appeal of HANSON BROS. against the disallowance of part of their claim.

(1) 21 S. C. R. 431.

(2) 8 S. C. R. 313 at p. 325.

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The facts connected with these appeals are complicated and it is necessary to unravel them to obtain a clear conception of the points involved.

I have set out in dealing with the former appeal the history of the railways.

It appears that prior to the sale of the United Counties Railway, Hanson Bros. were secured creditors of the United Counties Railway.

Prior to the sale by the sheriff taking place it was deemed necessary to avoid all opposition from Hanson Bros. and others, and accordingly an agreement was entered into, dated the 11th January, 1900, as follows :—

"This Deed of Agreement made and executed at the City of Montreal, this eleventh day of January, 1900,

Between :

Lady Mary Louise King, widow and executrix of the late Sir Adolphe Chapleau, in his lifetime of the City of Montreal, duly assisted by the Honourable Mr. Justice Wurtele, Henry Barbeau and A. J. Brown, parties of the first part,

And

The Commercial Firm of Hanson Bros., and Samuel Finlay, all of the City of Montreal, herein represented by Edwin Hanson, parties of the second part,

And

The Bank of St. Hyacinthe, a body corporate and politic, herein acting and represented by its President, G. C. Dessaulles, for the purposes hereof duly authorized, party of the third part,

And

G. C. Dessaulles, of the City of St. Hyacinthe, party of the fourth part.

WHEREAS the said parties of the first, second and third parts are the secured creditors of the United Counties Railway,

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And whereas the said railroad is advertised to be sold by Sheriff's sale on the twenty-fifth day of January instant,

And whereas the said parties of the first and second parts have an interest in the bonds issued on that portion of the road running from St. Hyacinthe towards Sorel, in all about thirty-one miles;

And whereas the said parties of the third part have an interest in the bonds issued upon the portion of the road running from St. Hyacinthe to Iberville;

And whereas the parties hereto are desirous of coming to an arrangement for the protection of their several interests as they now exist;

Now Therefore this Agreement Witnesseth:

1. That the said road shall be bought in at the Sheriff's sale by said party of the fourth part as trustee under the terms of the present agreement.

2. The said party of the fourth part will, immediately after obtaining from the Sheriff a title to the said road, execute a first mortgage to and in favour of the parties of the first part to an amount of the bond at present held by them with interest, to wit, about the sum of one hundred and fifty thousand dollars ($150,000), and which said mortgage shall be held by said parties of the first part as collateral security for whatever amount of money there may be found to be due by the said railway company to said parties of the first and second parts, said mortgage to be executed upon that portion of the line presently covered by the bond of one hundred and fifty thousand dollars, and more particularly running from St. Hyacinthe towards Sorel and described in statute 52 Victoria, chapter 60.

3. The said parties of the second part to rank for the amount of their claims against said railway company immediately after the party of the first part, on the said mortgage to be given as aforesaid.

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4. The said party of the fourth part will also execute to and in favour of the party of the third part a mortgage upon the remaining portion of the line, to wit, from St. Hyacinthe to Iberville, for the amount of the bonds held by them with interest, to wit, about two hundred thousand dollars ($200,000).

5. The said party of the fourth part agrees to bid on the said road at said sale up to an amount sufficient to protect the interest of the parties of the 1st, 2nd and 3rd part. The expenses of the sale and whatever amount of money may be required to get the title to said road shall be borne by the parties hereto in proportion to their respective interests, which amounts so paid by them shall be added to their existing claims and will rank with the same priority.

6. The parties of the first, second and third parts will deliver to the said party of the fourth part their respective bonds for delivery to the sheriff as representing the purchase price of the road, if the same becomes necessary in order to settle for the purchase price.

7. The said trustee does not, however, undertake any personal obligation under the said mortgages so to be executed, which are given solely in his capacity as trustee, the said parties limiting themselves to their recourse against the said road for the payment of their respective claims in accordance with their respective privileges and such other recourses as they may have.

8. The said parties of the first and second parts agree to discharge any claims which they may have against the said road on receipt by them of the amounts respectively due to them and secured by the said mortgage of one hundred and fifty thousand dollars ($150,000) with interest to date of payment thereof, and the present agreement shall not in any way be construed as vesting the said parties of the first and second parts with any right of property in the said road, their only claims being

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mortgage creditors to the amount of their respective claims, with interest.

And the parties hereto have signed.

(Sgd.) MARY L. CHAPLEAU.
J. WURTELE.
HY. BARBEAU.
G. C. DESSAULLES, Pres. B. of St. Hyacinthe.
A. J. BROWN.
HANSON BROS.
SAMUEL FINLAY, per Edwin Hanson.
G. C. DESSAULLES."

The sale by the sheriff took place. The effect of this sale was to wipe out all claims against the railway including claims of bondholders of the railway prior to its sale. The effect of this sale, therefore, was to take away from Hanson Bros. any right they might otherwise have had against the United Counties Railway.

I have already pointed out that subsequently the Quebec Southern Railway Company was incorporated; that the East Richelieu Valley Railway became part of the Quebec Southern Railway; that subsequently the South Shore Railway Co. amalgamated with the Quebec Southern. The railway was operated for years and eventually was sold and the proceeds of sale are being distributed by this Court.

The terms of the agreement of 11th January, 1900, were not carried out by Dessaulles. Dessaulles failed to execute the mortgages as provided for in the said agreement. I do not understand how he could legally execute any such mortgage. He had, as I have pointed out before, only a qualified interest in the railway. It became necessary to obtain an act of incorporation. Failing to obtain such act the railway was to be dealt with by the Minister. Could the purchaser meanwhile charge and encumber the railway? I think not. However, he did not execute the mortgage and by the conveyance of 7th

August, 1900, he conveyed the United Counties Railway to the Quebec Southern Railway Co. This conveyance was not registered until 20th June, 1901. An action was commenced in the Courts of the Province of Quebec and a judgment was obtained on the 4th day of April, 1901, which reads as follows :—

"Canada,
Province of Quebec,
District of St. Hyacinthe. } SUPERIOR COURT.

St. Hyacinthe this fourth day of April, one thousand nine hundred and one.

Present:

The Hon. LOUIS TELLIER, J.S.C.

No. 1.

Lady Mary Louise King, of the city and district of Montreal, widow of the late Sir Joseph Adolphe Chapleau, in his lifetime of the said place, herein acting in her quality of sole executrix and usufructuary under the last will and testament of the said late Sir Joseph Adolphe Chapleau, and the Honourable Jonathan L. C. Wurtele, one of the Judges of the Court of King's Bench, Henri Barbeau, Banker, and Albert J. Brown, Advocate, all three of the said city and district of Montreal, and herein acting in their capacity of advisers of the said Lady Mary Louise King, named as such under the will of the said late Sir Joseph Adolphe Chapleau, for the purpose of exercising any rights that they may have in said capacity.

Plaintiffs ;

vs.

George C. Dessaulles, of the city and district of St. Hyacinthe,

Defendant ;

vs.

Edwin Hanson of the city of Montreal aforesaid, and William Hanson of the town of Westmount, in said district, provincial agents, carrying on business together

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as such at Montreal aforesaid under the firm name and style of "Hanson Bros," and Samuel Finlay, also of the city and district of Montreal, gentleman,

Mis-en-cause;

vs.

The said Edwin Hanson, *et. al.*,

Intervenants.

The court having heard the parties, by their respective counsel upon the merits of the action and intervention, which have not been contested, having taken communication of the admissions fyled, examined the proceedings and deliberated: —

Considering that by a certain deed of agreement *sous seing privé*, made at the City of Montreal, on the 11th day of January, 1900, passed between the said plaintiffs, parties of the first part, and the commercial firm of Hanson Bros. and Samuel Finlay, parties of the second part, to wit, the *mis-en-cause*, and the Bank of St. Hyacinthe, a body corporate and politic, party of the third part, and the said defendant, party of the fourth part, the said defendant covenanted and agreed that he would purchase at sheriff's sale that was to be held on the 25th day of January then instant, a certain railway known as the United Counties Railway, and that he would immediately, after obtaining from the sheriff a title of the said road, execute a first mortgage to and in favour of the said plaintiff to an amount of a certain bond held by them with interest, to wit, for about the sum of $150,000, which said mortgage should be held by the plaintiffs as collateral security for whatever amount of money there might be found to be due by the said railway company to them and to the *mis-en-cause*, the said mortgage to be executed upon that portion of the line then covered by the bond of $150,000, and more particularly running from St. Hyacinthe toward Sorel and described in the Quebec statute, 59 Victoria, chapter 60, the said *mis-en-*

cause to rank for the amount of their claims against said railway company immediately after the plaintiffs on the said mortgage to be given as aforesaid, the expenses of the sale and whatever amount of money might be required to get the title to the said road to be borne by the parties to the deed in proportion to their respective interests, the whole upon the terms and conditions more fully set forth in the said deed.

Considering that the parties admit,

"(1). That the defendant received from the plaintiffs the mortgage bond for $150,000, referred to in paragraph two of plaintiffs' declaration, for the purpose of delivering the same to the sheriff as therein stated.

"(2). The defendant admits that he did purchase the railway at sheriff's sale on the 25th January, 1900, and delivered to the sheriff in part payment of the purchase price said bond of $150,000 as mentioned in paragraph three of plaintiffs' declaration.

"(3). The defendant admits that he has not passed the deed of mortgage in favour of plaintiffs, though he has been requested to do so, as mentioned in paragraph four of plaintiffs' declaration.

"(4). That the defendant has not, up to the time of service of process herein, furnished plaintiffs with a statement of the amount due to him, and referred to in paragraph six of plaintiffs' declaration.

"(5). The defendant admits that the description of the portion of the said railway covered by the said mortgage bond and the said trust deed of the 11th January, 1900, is correctly mentioned and given in paragraph seven of plaintiffs' declaration.

Considering that the parties admit that since the institution of the present action the defendant has rendered plaintiffs an account of the moneys expended by him in connection with the sheriff's sale of the United Counties Railway, and has received from them the sum of ($2,000)

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two thousand dollars toward the payment of the expenses of said sale subject to adjustment of reimbursement.

Doth maintain the action and order that the said defendant within twenty-four hours after the signification of the present judgment, do execute in favour of the said plaintiffs a good and valid hypothec upon that portion of the United Counties Railway Company's railway between the city of St. Hyacinthe and the town of Sorel, and which is now particularly known and described as (1) lot number 1408 on the official plan and book of reference of the parish of St. Hyacinthe, in the County of St. Hyacinthe; (1*a*) that portion of the road extending from official lot number 1408 to the first switch between the Grand Trunk Railway and the United Counties main line to St. Damase, in the City of St. Hyacinthe; (2) lot No. 1060 of the official plan and book of reference of the parish of St. Judes, in the County of St. Hyacinthe; (3) lot number 310 on the official plan and book of reference of the parish of St. Barnabé, in the County of St. Hyacinthe; (4) lot number 659 on the official plan and book of reference of the parish of St. Robert, in the County of Richelieu; (5) lot number 642 on the official plan and book of reference of the parish of St. Aime, in the County of Richelieu; (6) lot number 286 on the official plan and book of reference of the parish of St. Louis, in the County of Richelieu, said hypothec to be for the sum of $150,000 and to be as security for whatever amount of money there may be found to be due by the United Counties Railway Company to the plaintiffs and to the *mis-en-cause*, the said *mis-en-cause* to rank for the amount of their claims immediately after the plaintiffs, and that failing the defendant executing such hypothec within such delay of twenty-four hours from the signification upon him of this judgment, that such judgment do avail in lieu and stead of such hypothec *a toutes fins que de droit*; the whole with costs against said defendant in any

event; and doth grant *acte* of the allegations and conclusions of the interventions, which are to the same effect as the allegations and conclusions of the action, but without costs as well in favour of the intervening parties as against them.

True copy.

(Sgd.) ROY A. BEAUREGARD,
P. S. C."

The Quebec Southern Railway Co., were not parties to this action. It is contended, however, that because the deed was not registered until the 26th day of June 1901, the United Counties Railway never passed to the Quebec Southern Railway Co.

I fail to understand how a judge can by judgment create a mortgage against a railway. As I have said Dessaulles could not have executed the mortgage himself. I agree with Mr Beique that in any event the provisions of the Code do not cover hypothec created by judgment. They seem to provide for a judgment for a specific sum of money and whatever effect such judgment may have as creating a charge in favour of the judgment creditor, the judgment creditor is entitled to the benefit. See Civil Code, Arts. 2024, 2037 and 2040. Also the case of *Connolly* v. *The Montreal Park & Island Ry. Co.* (1). Moreover in view of the provisions of the Railway Act and the statute of the Dominion incorporating the Quebec Southern Railway Co., Hanson Brothers were put on enquiry. I think the remedy of Hanson Bros. was against Dessaulles for breach of his covenant and that the claim should not have been entertained in these proceedings.

The Bank of St. Hyacinthe assume responsibility for the liabilities of Dessaulles created under this agreement of 11th January, 1900. Under the agreement with the Quebec Southern they are bound to give a clear title.

(1) Q. R. 22 S. C. 322.

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HANSON BROS.' CLAIM.

Reasons for Judgment.

The bank in the proceedings before the Referee admitted that whatever claim was found due Hanson Bros. should be paid out of the amount found due to them. They have allowed the claim to be filed and presented and large expense incurred, and I think they should be held to their undertaking if Hanson Bros. so elect. If Hanson Bros. decline to accept the offer of the bank then I think their claim should be dismissed, with costs to be paid by them of such proceedings as were occasioned by their contestations.

I think it better with the view to end the litigation to deal with the appeals.

The question raised by the bank is as to an item of $2000 which item the bank claims should be disallowed on the ground that it was not open to Hanson Bros., or Maze to reapply this money.

I think the Referee was right in his finding. It is purely a question of fact, and I think the facts proved in evidence justify his finding.

I also think the finding of the Referee as to the amount due Hanson Bros. is justified by the evidence.

The appeal of the bank and the cross-appeal of Hanson Bros. are dismissed with costs.

Judgment accordingly.

Solicitor for plaintiff: *A. Geoffrion.*

Solicitors for defendants; *Greenshields, Greenshields & Heneker.*

Solicitors for Bank of St. Hyacinthe: *Beique, Turgeon & Beique.*

Solicitors for Hanson Bros.: *Smith, Markey & Skinner.*

BETWEEN

THE MINISTER OF RAILWAYS AND CANALS..... PLAINTIFF; 1908 Oct. 31.

AND

THE QUEBEC SOUTHERN RAILWAY COMPANY AND THE SOUTH SHORE RAILWAY COMPANY..... DEFENDANTS.

In re THE STANDARD TRUST COMPANY OF NEW YORK (CLAIMANT) RESPONDENT;

AND

THE BANK OF ST. HYACINTHE, THE ATTORNEY-GENERAL OF CANADA, AND H. A. HODGE, (CONTESTING PARTIES)..... APPELLANTS.

Railway—Purchasers—Organization of company to operate road—Enhanced price paid by purchasers—Right to profit on transaction.

Where purchasers of a railway, having acquired the same on their own behalf and with their own money, organize a company to operate it, in compliance with the requirements of *The Railway Act* (now found in Sec. 299, R. S. 1906, c. 37), and turn over the railway to such company at an enhanced price, they are entitled in law to their profit on the transaction.

APPEAL from a Report of the Registrar acting as Referee.

The facts of the case are fully set out in the following extracts from the Referee's provisional and final reports.

"This claim, against the South Shore Railway Company, was originally filed on the 1st day of March, 1906, alleging that by agreement of the 2nd December, 1895, between L. Tourville, J. Leduc, J. M. Fortier and

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STANDARD TRUST CLAIM.

Reasons for Judgment.

Hyacinthe Beauchemin, of the first part, and the South Shore Railway Company, of the second part, the latter acknowledged itself to be indebted to the parties of the first part in the sum of $348,000, one-fourth to each, being the price of the purchase of the Montreal and Sorel Railway, bought by the South Shore Railway from the parties of the first part. This sum of $348,000 the South Shore Railway promising to pay to the parties of the first part, to wit: $87,000 to each, with interest at 6 % from 1st July, 1895, payable half-yearly on the first days of January and July, any arrears of interest to be added to the capital and to bear interest as capital, the first payment of interest to become due on the 1st January, 1896; and the principal sum being made payable five years from the date of the said agreement.

"For its indebtedness to the said J. M. Fortier, the South Shore Railway gave a promissory note dated the 2nd December, 1895, whereby five years after date it promised to pay to the order of the said J. M. Fortier the sum of $87,000 at the Bank of Nova Scotia, in Montreal, with interest from the 2nd July, 1895, at 6 % payable half-yearly.

"The Standard Trust Company is now the legal owner and holder of the said note and is vested in the rights of the said Messrs. Tourville, Leduc, Fortier, and Beauchemin, under certain transfers and assignments filed herein, and claims the sum of $348,000 with interest thereon to the 22nd January, 1903, date at which an action had been taken by the Standard Trust Company against the South Shore Railway for the amount of the present claim, as originally formulated, and in which action they were asking further the cancellation of the amalgamation. This said sum of $348,000, and interest, as above mentioned amounting to..... $194,160 00

"The Standard Trust Company further claimed to be the legal owner and holder of

135 first mortgage bonds of the South Shore Railway Company of the par value of $2,000, from 001 to 135, dated 1st January, 1900, and the coupons attached thereto, which with interest accrued on the 22nd January, 1903, amounted to..... 302,400 00
together with interest on interest upon same. 25,000 00

making the total sum of..... $821,560 00
which, after including further interest, as stated in the claim, would amount to over $850,000.00.

"On the 2nd June, 1906, evidence having been adduced, before the undersigned, in support of the claim, at the opening J. E. Martin, of counsel for the claimants, materially amended and reduced this claim, withdrawing the $270,000 and interest respecting the above-mentioned bonds and claiming the sum of..... $348,000 00
and interest thereon from the 1st July, 1895 (Evidence, p. 26), together with the further sum of..... 52,994 84
also with interest thereon from 31st August, 1901; the latter amount representing certain indebtedness of the South Shore Railway Company to the Hochelaga Bank, H. Beauchemin and J. M. Fortier, and which were paid and discharged by the present claimants. This sum of $52,994-84, being made up of the following items, viz.: The sum of... $27,674 53
which the Montreal & Sorel Railway Syndicate (composed of L. Tourville, Leduc Estate, H. Beauchemin and J. M. Fortier) had obtained for the South Shore Railway upon their gua-

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STANDARD TRUST CLAIM.

Statement of Facts.

rantee as a loan from the Hochelaga Bank, at the end of August, 1901, for the benefit of the South Shore Railway, which was the principal debtor for the same. The sum of..... $12,351 88

* * * *

represents the current indebtedness of the South Shore Railway to the Hochelaga Bank, under current account, and which at the end of August amounted to that sum.

The further sum of..... $12,968 43

$52,994 84

is an indebtedness to Mr. H. Beauchemin by the South Shore Railway, and which was specifically reserved in the deed of the 13th of August, 1901, between H. Beauchemin and R. J Campbell, and mentioned in the schedule thereto attached with the other two above mentioned amounts.

"The present claim then resumes itself, 1st, to the $348,000.00 and interest originally due by the South Shore Railway to Messrs. Tourville, Leduc, Fortier, and Beauchemin, and 2ndly, to the $52,994.84, and interest, representing moneys due by the South Shore Railway to the Bank of Hochelaga and to H. Beauchemin and finally paid by Mr. H. Regensberger, acting for Mr. Meyer.

"The claimant's title to the $348,000 is complete and valid. Messrs. Tourville, Leduc, Fortier and Beauchemin were proprietors of the Montreal and Sorel Railway Company valued by them at $648,000. This railway being sold by the Sheriff, Mr. Tourville, in the interest of their syndicate, composed of the four gentlemen above men-

tioned, and to protect them, bought the road at such sale for a nominal sum, which was duly paid.

"Instead of selling the road to the South Shore Railway Company for the price they might think fit or proper, they proceeded differently. Mr. Tourville transferred his adjudication to the company which became, from the entries at the Registry Office, the actual purchasers from the sheriff, with the purchase price paid cash. But they executed an independent agreement or *contre lettre* between the syndicate composed of the above mentioned four gentlemen on the one part and the company on the other part, whereby the purchase price was fixed at $648,000, the estimated value of the debentures of the Montreal & Sorel Railway Company, held by the interested parties, and the latter being debtors of the South Shore Railway for $300,000, the value of the shares subscribed by them, remained creditors for the balance of $348,000.

"This transaction appears to be perfectly valid and made in good faith, and could in any case only be attacked by establishing that the price of $648,000 was not a reasonable one, or that there was fraud. As there is no evidence to show that this price was not a reasonable one; but to the contrary everything points to show that the transaction was made, so to speak, above board and in good faith, and that fraud cannot be presumed, the transaction must be declared valid.

"If this claim of $348,000 was a valid claim in the hands of the Syndicate, there can be no doubt that it has now passed into the hands of the Standard Trust Company, and that it is as good and valid in its hands as it was in the hands of the Syndicate. The transfers are distinct and complete.

"The fact that this part of the claim was not the most important part of the purchase by the American people cannot affect the question. For them, as for the original syndicate, it was the same thing; if they insisted upon

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Statement of Facts.

the payment of their claim their shares became of no value; if they neglected their claim their shares acquired more value. As they held both it was of little importance to them upon which head they claimed. That is the reason why perhaps not so much importance was attached to this claim as might at first appear. And as those claims were clearly existing at the time of the transfers, and there is no doubt they were so transferred, and nothing having occurred since to render them null or void, they cannot now be ignored. The fact that they are not mentioned in the schedule attached to the transfer from Beauchemin to Campbell would appear to be of no consequence. The purchaser exacted a list of the liabilities he was interested to know, debts due to third parties. He did not concern himself about the debts or claims of which he became the holder.

"What would tend to remove any doubt, if any existed with respect to the effect of the transfers, is first the fact that Campbell made the transferrors give him Fortier's promissory note, and 2ndly, the fact that Moore exacted two separate contracts from the Tourville Estate, one being a transfer of the shares and the other a transfer of the claims belonging to that estate.

"Then we must not overlook the fact that in that transfer of Beauchemin to Campbell, to which is attached the list of the company's debts and liabilities, there is no statement to the effect that this list covers all the debts and is exhaustive. Such statement, indeed, would be incompatible with the very terms of the contract, whereas the list mentions no debts whatsoever in favour of Tourville, Fortier, Leduc and Beauchemin, with the exception, however, of the $12,968.43 which the latter reserved to himself; whereas, further, that at this very moment Beauchemin was handing over a promissory note of the company in favour of Fortier, and that Beauchemin, the Leduc Estate and the Tourville Estate,

the latter by a distinct deed, were transferring, besides their shares, their claims against the company.

"The claim is not a privileged one. These South Shore bonds cannot give it any privilege under the circumstances. Indeed it is nowhere stated or mentioned that these bonds were issued or given as collateral security for this claim. It is only mentioned in a resolution that these creditors will not be in a position to exact payment before the bonds are issued, and that then they will be paid out of the proceeds of such bonds, which is not at all the same thing. No privilege is given and the bonds were never issued.

"It cannot be said either that they have the privilege of *bailleur de fonds*. The deed was not registered. The interpretation which the undersigned is inclined to place upon Art. 2094 of the Civil Code is that no privilege is given the privileged creditor who omits to register when registration is required, even upon the ordinary chirographic creditor in a case of insolvency, as the present one. We are not here dealing with creditors who have simply omitted to register their claim, but with creditors who consented to the registration of a deed which upon its face shows they have no claim, because they ceded to the company their adjudication to the Sheriff, and the company accordingly appears at the Registry Office as having purchased directly from the Sheriff and as having paid cash the purchase price. They must then have led third parties and the public to believe that the purchase price had been paid, and this, it must be said, with some hesitation, perhaps, would stand in their way as a bar to the recovery with the privilege of *bailleur de fonds* which cannot subsist under the circumstances.

"The only privilege which can be claimed and the only one distinctly claimed is the one which is given to the ordinary creditor of the South Shore under Sec. 4 of

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4–5 Edward VII, chapter 158, discussed elsewhere in this report.

"The claim is not prescribed, as it only became due in December, 1900. Part of the interest, however, is prescribed as it is payable semi-annually, beginning with the 1st of January, 1896. The claimants are entitled to 5 years interest under Art. 2250 of the Civil Code.

"This sum of..... $348,000 00

with interest thereon from the 8th November, 1900, to the 8th November, 1905, at 6%, payable under the terms of the agreement of the 2nd December, 1895, half-yearly, on the first days of January and July, any arrears of interest to be added to the capital and to bear interest as capital, making the additional sum of..... $119,784 42

Forming the total of..... $467,784 42

which will be allowed against the South Shore Railway, without privilege, excepting, however, such privilege which may be derived from sec. 4, ch. 158 of 4–5 Edward VII.

"Passing to the second branch of the claim for..... $52,994.84

it must be said that this sum has been well established by the evidence adduced. It was due by the South Shore and has been duly paid by Mr. Regensberger for Mr. Meyer.

"Besides resting their claim on both branches upon the *vivâ voce* evidence adduced in support of the same, the claimants also rest upon the following documentary evidence, viz..

1. Resolution of Directors of South Shore of 4th June, 1894.

2. Resolution of Directors of South Shore of 8th October, 1895.

3. Resolution of Directors of South Shore of 7th December, 1895.

4. Sale by Estate Leduc to R. M. Campbell, 30th August, 1901.

5. Transfer by Estate Louis Tourville to B. P. Moore, 9th April, 1902.

6. Sale and transfer by H. Beauchemin to R. M. Campbell, 30th August, 1901.

7. Agreement between R. J. Campbell and Arthur L. Meyer and The Standard Trust Company, 31st December, 1902.

8. Agreement between B. P. Moore and Arthur L. Meyer and The Standard Trust Company, 9th April, 1902.

9. Assignment by R. J. Campbell to Arthur L. Meyer of the 30th August, 1901.

10. Assignment by A. L. Meyer and R. J. Campbell to The Standard Trust Company, 7th November, 1906.

There is no stipulation for interest upon this sum of $52,994.84 and it is not payable at law under the present circumstances."

[By his Provisional Report the Referee allowed this claim at the sum of $520,779.26, against the South Shore without privilege, excepting, however, such privilege as may be derived from section 4, ch. 158 of 4–5 Edward VII]

" The Bank of St. Hyacinthe, a creditor collocated in the Provisional Report, being dissatisfied with the finding of the said Report upon the above claim of The Standard Trust Company of New York, filed a contestation of the same, which said contestation was, by leave, twice amended.

" The Standard Trust Company of New York joined issue upon the contestation of the Bank of St. Hyacinthe.

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St tement of Facts.

"On the 29th November, 1907, the Attorney-General of Canada, a creditor interested herein through the collocation of the Intercolonial Railway, for traffic balances etc., was allowed to intervene and file a contestation upon the same grounds as those set forth by the Bank of St. Hyacinthe's contestation of the claim of the Standard Trust Company, as allowed by the Provisional Report, which contestation was, by leave, once amended. The Bank of St. Hyacinthe then declared that they did not intend to join issue on the contestation of the said Attorney-General.

"The Standard Trust Company joined issue upon the contestation filed by the said Attorney-General.

[Within the period allowed for appealing to the Judge of the Exchequer Court from the Registrar's final Report, H. A. Hodge, a creditor herein, moved for leave to intervene and appeal from the Registrar's finding upon the present claim. Such leave was subsequently granted]

"The above contestations were proceeded with, before the undersigned, at the City of Montreal, on the 6th, 7th, 14th and 24th days of December, A.D. 1907, and on the 11th and 18th days of January, A.D. 1908. F. L. Beique, Esq., K.C., and E. Lafleur, Esq., K.C., appeared for the Bank of St. Hyacinthe; A. Geoffrion, Esq., K. C., appeared for the Attorney-General of Canada; and S. Beaudin, Esq., K.C., and J. E. Martin, Esq., K.C., appeared for the Standard Trust Company of New York. Upon hearing the evidence adduced and what was alleged by counsel aforesaid, the undersigned humbly submits: —

"The evidence adduced upon this contestation has thrown a great deal of light upon many facts which up to then remained unexplained, and has brought the whole matter to a clear understanding.

"The grounds of the contestations of the above claim may be, *inter alia*, summarized as follows:—

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STANDARD TRUST CLAIM.

Statement of Facts.

"1. That the syndicate previous to becoming directors of the South Shore Railway, were promoters.

"2. That at the time of the adjudication of the Montreal and Sorel Railway by the sheriff to Tourville, the members of the syndicate were directors of the South Shore Railway and as such were acting in a fiduciary capacity towards the said company. That they are, therefore, not entitled to make profit out of the purchase, as it is made by the South Shore Railway Company which is entitled to take the property at the price actually paid.

"3. Then in the alternative, that the resolution and agreement by which the price is fixed at $648,000 should be set aside both on account of the fiduciary relationship between the parties and because the price is excessive.

"4. The amount claimed by the members of the syndicate for the transfer of the railway is more than paid by the stock; that the amount due on the stock, $300,000, is more than sufficient to pay anything coming to them.

"The Standard Trust Company joined issue on these allegations, and the main answer rests upon the facts of the case which go to show there existed no trust, no fiduciary relation, as between the syndicate and the South Shore Railway Company, and that the members of the syndicate owned the railway as well before the sale and formation of that company as after; that they bought it with their own money, and that the formation of the company was only a re-organization of their interests and in compliance with the Railway Act. They never acted in a fiduciary capacity for anyone.

"The only two questions to be decided here are: (1) Whether there was any fiduciary relation as between the syndicate and the South Shore Railway Company at the time of the sale; and (2) Whether the price of $648,000 is, under the circumstances, fair and reasonable.

"There must be read with the present finding the finding made upon the Provisional Report, with the object of avoiding repetition.

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"The regularity of the Minute Book with respect to the words "purchase price to be agreed at a later period" has been challenged, but the undersigned finds—if ever there was anything in it—it has been satisfactorily explained by the Secretary, Lalonde, and by Judge Choquet, the solicitor of the company at the time.

"The South Shore Railway Company was incorporated by the Act 57 Vict., ch. 72 (Que.) which was assented to on the 8th January, 1894. The Montreal and Sorel Railway was sold by the sheriff of Montreal on the 1st June, 1894, and the Great Eastern was sold *à la folle enchère* for the last time in 1899.

"The deed of agreement or partnership between the four members of the Syndicate bears date the 1st March, 1893, and by clause 2 thereof, it reverts and dates back to the 4.h November, 1892, and the purpose for which the Syndicate was formed is related in clause 1 of that deed, which states that it is with the object of completing and equipping the Montreal and Sorel Railway between St. Lambert and Sorel, to put it, and maintain it, in good working order, in compliance with the provisions of ch. 88, par. BB of 54 Vict. (Que.), and with the further object of operating the said railway generally and of acquiring it, if deemed advisable (*s'il y a lieu*).

"Now the very intention of the Syndicate is disclosed as far back as 1892. Their object is to operate the road and acquire it. If they acquire it, a company must be formed, as under the Railway Act a company alone can operate a railway, and can it be said that because they so comply with the Act they become in a fiduciary relation with that company which is themselves? Where is the *cestui que* trust and where is the trustee? While directors in name after or before purchasing the property, they nevertheless remained the principals and the owners in fact before and after the incorporation. They actually were the vendors and vendees. The whole transaction resumes itself into a re-organization, that is all.

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"This is said at the outset in view of the terse statement made by Mr. Geoffrion of the gravamen of the whole argument and pleadings which is based on the elementary legal principle that 'If a person instructs another as his agent to go and buy something for him, and that other person goes and buys it for $10,000, or any other price, he is bound to turn it over for the same price to his principal,' adding further that this principle is applied to the case of promoters before a company is formed; the promoter, he claims, would be in the position of an agent.

"Now, what are the actual facts? Dealing with that view there could be no agency or mandate, since that company was not even organized when the Syndicate started buying and improving the road and investing large sums of money in it. As far back as 1892, before the South Shore Railway Company is incorporated, before the road is sold at Sheriff's sale, the Syndicate start working together with the object mentioned in the deed of the 1st March, 1893. Judge Choquet in his evidence (p. 186) tells us that upon his own application, as provided by the Code, a sequestrator was appointed on account of frivolous oppositions having been made. The sequestrator represented the bondholders of the Montreal and Sorel Railway. Subsequently, the Syndicate purchased 1,453 bonds out of a total of 1,500 for the sum of $170,322.40, and operated the road with the consent of the sequestrator. Now, when the Syndicate took possession and began to operate the Montreal and Sorel Railway, it consisted of very little (so Secretary Lalonde informs us, p. 93); it was only the right of way on rails, and at that time the road was not being operated; it was stopped from the winter of 1893, and they opened it up in 1894. At the time of the taking of such possession there was no rolling stock, no locomotives—practically no locomotives—they were renting them from the Grand Trunk or the Canadian Pacific Railways, and the roadbed was in an awful condition (Secretary Lalonde's evidence, p. 70).

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Statement of Facts.

"In the first days there was no profit, no return to cover anything like interest on the amount expended. However, from the day they took hold of the road, the Syndicate improved it all along with their own money. Fortier, one of the members of the Syndicate, heard as a witness, tells us he disbursed as his share alone $48,630.-81, equal to $194,523.24 by the Syndicate. Then Lalonde tells us the earnings over operating expenses from the 1st June, 1894, down to 1901, amounting to $73,208.25 were all put into the company for improvements 194,523 24

73,208 25

$267,731 49

Exhibit 12a would show, as explained by Lalonde, that Beauchemin would have paid 4,850 42

more than the others, having remitted later. $272,581 91

"Then Leduc, one of the members of the Syndicate, had obtained judgment, on 10th February, 1893, against the Montreal and Sorel Railway for $250,576.92 and interests and costs. The Syndicate had bought the bonds, had spent good money in improvements and had bought the Great Eastern Railway, which was partly paid by subsidies.

"From the above it will clearly appear that in 1892, these four gentlemen bought the bonds and improved the road with their own money, having the ultimate intention of acquiring the road. Can it be said, after they have acquired the road, they are not at perfect liberty to do what they like with it? Keep it or sell it, and sell it for what they like.

"What happened? One Lamb, collector of revenue, sued the road for taxes and brought it to a sale, when on the 1st June, 1894, it was sold and adjudicated, by the Sheriff, for the sum of $1,600 to Mr. Tourville acting for

the Syndicate. The Syndicate being the owners of the hypothecary bonds, as above mentioned, were already practically the owners of the road and the bonds also practically represented most of the purchase price—the $1,600 being the amount, or thereabouts, of the Sheriff's costs It is to be presumed that the plaintiff had been settled with in the meantime for the amount of $675.00 interest and costs, recovered by that judgment.

"As already stated, the South Shore Railway Company had been incorporated by the four members of the Syndicate with the object of operating the road, after it had been sold by the Sheriff with the object of securing a clear title. On the 4th of June, 1894, Mr. Tourville, the *adjudicataire* reports to the South Shore Railway Company, at a meeting of that date, that the Montreal and Sorel Railway had been sold by the Sheriff and purchased by him in the manner mentioned, and he then proposes, and it is approved to transfer to the new company, the South Shore Railway Company, the title which the Sheriff of Montreal will give and to substitute for his name the name of the South Shore Railway Company as purchaser of the Montreal and Sorel Railway, the purchase price to be agreed upon at a later period. The President and Secretary being authorized to sign said deed of sale.

"Now these very words 'purchase price to be agreed upon at a later date' which have been so much spoken of will go to show that the Syndicate were just as much sole proprietors of the railway before as after the sale. If, indeed, they had not been acting the whole time for themselves,—if they had sold, as was contended, to a company which was not themselves, they would certainly have fixed the price then and there and they would not have taken the risk of leaving that important question undecided as it would have been a nest of litigation for the future, and they would not have left it to be ascertained and fixed at a later period. They then subscribed

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$75,000 in the South Shore Railway Company and paid these sums by handing over the Railway to the company, retaining a claim against it for the balance of the purchase price, viz.: $348,000.

"In other words, this consideration price of $648,000 was credited to the four members of the Syndicate, each for the sum of $162,000. Then each member of the Syndicate subscribed for 750 shares at $100 equal to $75,000 for each and for the four equal to $300,000, which went in as contra account with what the company owed them for the railway as part of the contra account, or out of the total value of $648,000, this sum of $300,000 being deducted from the $648,000, left a balance due to the four of the sum of $87,000 each, or a total of $348,000.

"The whole of the transaction was recorded in the books of the company. In the minute book, stock ledger, the ledger and the journal, each member being credited in the books of the company with the sum of $87,000.

"One of the members of the Syndicate, J. M. Fortier, received a further acknowledgment of that indebtedness by the South Shore Railway Company to him of the sum of $87,000 in the form of a note dated also of the 2nd December, 1895, the same date as the agreement, and when Fortier sold his interest to Beauchemin the note was in the bank (this note is not filed, but is fully described in E. Wing's evidence), from where he withdrew it and gave it to Beauchemin after endorsing it without recourse. This note is now in the possession and is the property of the present claimant, The Standard Trust Company, who, from the transfer of the Syndicate's rights, stands absolutely in the same position, having the same rights as their transferors had and in whose hands the note was a negotiable paper taken in due course.

"The giving of that note to Fortier goes further to show the intention of the company of carrying out the

contract entered into and to pay these people each the sum of $87,000.

The journal entry of the arrangement reads as follows:

"JOURNAL, Page 141."

	FOLIO		
Rolling Stock	397	$58,906 39	
Stations and Buildings	397	15,250 00	
Roadbed, Track and Siding	397	570,000 00	
Tools and Machinery	69	3,843 61	
Hon. L. Tourville	411		$162,000 00
H. Beauchemin	411		162,000 00
J. M. Fortier	403		162,000 00
Joel Leduc	402		162,000 00
		$648,000 00	$648,000 00
Hon. L. Tourville	411	$75,000 00	
H. Beauchemin	411	75,000 00	
J. M Fortier	403	75,000 00	
Joel Leduc	402	75,000 00	
Capital Stock	412		$300,000 00
J. M. Fortier	403	$87,000 00	
Bills Payable	410		$87,000 00
Note dated October 8th at (5) five years from date bearing interest at 6 % per annum, payable semi-annually; further information see motion passed by the Board of Directors, October 8th, 1895.			

"Now this price or value of the road at $648,000 was arrived at in the most ordinary business-like manner. Mr. Lalonde, the Secretary of the company, a gentleman who has been railroading for over 35 years, a person of great experience, and I would say an expert in such

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matters, made, at the request of the four gentlemen in question, a full inventory of the road and its rolling stock; taking the value of everything entering into the enterprise, the stations, buildings, road bed, track, sidings, tools, machinery, etc., etc.. It is unnecessary to go into the details of this valuation. There were 45 miles of railway, together with 12 miles of sidings, making a total of 57 miles. Placing a value of say, $12,000 per mile, would alone make the total sum of $684,000. The road was bonded at $15,000 a mile; and we must not lose sight of the fact that there were several important bridges within the territory travelled by the railway, and furthermore, that in ascertaining the value, Mr. Lalonde says he did not take the franchise into consideration and did not give it a value,—valuing only what was actually tangible. Now this witness asserts that it was his opinion that the $648,000 was but a fair and reasonable price, that it is yet, and has proved to be since.

"Both Mr. Fortier and Judge Choquet confirm Mr. Lalonde in the valuation. These three gentlemen are called and heard as witnesses on behalf of the contesting parties and their testimony remains uncontroverted. There is no other evidence on the subject, and it is adduced by the very parties who contest it. Judge Choquet goes still further on this question of value. After stating that the $648,000 was a fair value at the time of the sale, he is asked by the referee: "Do you go beyond that, Judge, and say that you thought is was the actual cost of the road?—A. It was not the actual cost. It would have cost that probably to build a road like that; it has cost a great deal more than that: it has cost over a million."

"Now, in face of this uncontroverted evidence adduced by the contesting parties, it is unnecessary to go into the full details of the several amounts and items going to make up these $648,000.

"Therefore, the undersigned finds in face of this overwhelming evidence that the price of $648,000 is a fair and reasonable price.

"Then Judge Choquet, the solicitor of the syndicate, tells us, at p. 179 of his evidence, how the matter was adjusted and the settlement arrived at: 'The value of 'the road was then fixed at $648,000 It was an estimate. 'There was at the time over 45 miles of road (45 of road 'and 12 of sidings), engines, stations, side tracks, etc. 'and they made an estimate of exactly how much it had 'cost; it was about the cost price, and they made it at '$648,000, which represented the cost price of the Mon-'treal and Sorel Railway as this was the property of the 'Syndicate,—that is, it was bought by the Syndicate. I 'advised them to subscribe $300,000 of stock of the South 'Shore Railway Company, which they did. They signed 'for $300,000 equally divided between themselves, and as 'I understood that they were owners each of ¼ of the 'Montreal and Sorel Railway, which they estimated at '$648,000, I said, deduct the $300,000 from the $648,000, 'leaving a balance of $348,000 for which they were 'creditors. That was the idea I had and that they had 'also, and it was carried out in that way.'

"The railway was practically their own after they had bought the bonds. It was legally their own at the date of the sale on the 1st June, 1894, having bought with their own money without any mandate from anybody, and it remained their own when they passed it over to a company, which was still themselves and which, under the Railway Act, they had to organize and which they organized for the purpose of operating it. The railway belonged to the Syndicate up to the time it was sold in 1901 to the Standard Trust Company for about $458,550.37, following, as witness Fortier says, a period of business depression between 1896 and 1901. Now, in November, 1905, this railway was, at a forced sale by the

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Court, sold for about $503,000, after having materially deteriorated under Hodge's management (as stated by witness Lalonde) who operated it without either keeping it in repair or improving it. True, some necessary repairs and improvements were made during the Receivership, but what was done was only what was absolutely necessary to operate the road, which, at the date of the appointment of the Receiver, had been found in a most dilapidated state.

"The agreement between the Syndicate and the South Shore Railway Company, and bearing date the 2nd December, 1895, which has already been mentioned, is filed as exhibit No. 11 and is confirmed by and embodied in a resolution of the South Shore Railway Company of the 7th December, 1895. The agreement reads as follows, viz.:—

'This agreement made between the Hon. Louis Tourville, manufacturer; Joel Leduc, gentleman; Joseph M. Fortier, manufacturer, all of the City of Montreal, and Hyacinthe Beauchemin, of the City of Sorel, contractor, hereinafter called the parties of the first part, and the South Shore Railway Company, a body politic and corporate, having its chief place of business in the said City of Montreal, hereinafter called the party of the second part, and duly represented by Edouard C. Lalonde, its Secretary, duly authorized, WITNESSETH:

'That whereas the parties of the first part as hypothecary creditors and bondholders of the Montreal and Sorel Railway Company were the real owners of the Montreal and Sorel Railway now owned and operated by the party of the second part;

"Whereas said Montreal & Sorel Railway was bought at a Sheriff's sale by the Hon. Louis Tourville for the benefit of the party of the first part, and that the title was transferred to South Shore Railway Company with the

understanding that the purchase price would be agreed at a later period;

'Whereas the purchase price or value of the said Montreal & Sorel Railway, including the rolling stock now used and in possession of the party of the second part, was agreed to and fixed at the sum of six hundred and forty-eight thousand dollars, out of which an amount of three thousand dollars, was credited as payment of the capital stock subscribed by the party of the first part, leaving a balance of three hundred and forty-eight thousand dollars due by the party of the second part to the party of the first part, with interest and hereinafter mentioned;

'The South Shore Railway Company, party of the second part, does hereby acknowledge to owe and to be indebted to the said party of the first part into the sum of three hundred and forty-eight thousand dollars, one fourth of which is due to each of them as follows:

To Hon. Louis Tourville, eighty-seven thousand dollars;

To J. Leduc, eighty-seven thousand dollars;

To J. M. Fortier, eighty-seven thousand dollars;

To H. Beauchemin, eighty-seven thousand dollars;

With interest at six per cent. per annum from the first of July last, payable half-yearly on the first days of January and July, and arrears of interest to be added to the capital and to bear interest as capital, first payment of interest to become due on the first of January next (1896).

'It is agreed that the said sum of $87,000.00 shall be paid by the party of second part to each of the parties of the first part, or their representatives, out of the proceeds of the bonds to be issued by the South Shore Railway Company within five years from this date, or otherwise, at an earlier period at the option of the party of the second part, with interest as above mentioned.

"It is also agreed that the said party of the first part and each of them, or their representatives, shall not claim

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and shall not be entitled to claim their money before the expiration of the delay of five years just above mentioned.

'Passed and dated at Montreal this second day of December, 1895.

(Signed) THE SOUTH SHORE RAILWAY COMPANY,
ED. C. LALONDE, Secretary of the South Shore Railway Company.
L. TOURVILLE,
H. BEAUCHEMIN,
J. M. FORTIER,
J. LEDUC.
(Signed) F. X. CHOQUET,
Witness'

"Now, from all the circumstances above stated, it obviously appears that the *raison d'être* of the Syndicate from its very inception was to operate the road and to acquire it. They improved the road very materially, operated it, bought bonds with their own money, formed a company to take over the enterprise, as they were bound to do, bought the railway with their own money, without issuing any prospectus and calling for outside money.

"When they bought the road there was clearly no obligation upon the Syndicate to sell it to the South Shore Railway Company more than to anybody else, or to sell it at all, and for all that they might just as well have sold it to the Grand Trunk or the Canadian Pacific Railway Company as to the South Shore Railway Company. No more obligation to sell it to one than to the other, as there existed no mandate. When Tourville bought for the Syndicate he clearly had no mandate from the South Shore Railway Company, and was not acting in a fiduciary capacity for that company. If any mandate he had it was clearly from the Syndicate and nobody else, and he bought to protect himself and the members of the Syndicate. However, they had under the Railway Act to pass it over to a company for operation.

"There is nothing at common law" says Sedgewick, J., (*Hood* v. *Eden*, 36 Can. S.C.R. 484) "to prevent two 'mercantile establishments carrying on two separate busi- 'nesses, uniting for the purpose of forming a new part- 'nership, each association contributing as its share of the 'capital of the new partnership whatever property it 'possesses. And in the absence of bad faith or fraud 'there is nothing to prevent the members of the new 'partnership from alloting, as among themselves, the 'share of the capital with which each member of the 'partnership may afterwards be credited, even although 'the amount so allotted to him may be from a purely 'monetary point of view largely in excess of its market 'value.'

"Of course in this case it appears that the amount of $618,000 was not in excess of the market value, but the authority is cited merely to show that when the amount is in excess of the market value, the parties are still at liberty to re-organize in the manner therein set forth. There were here no creditors, no one but the Syndicate interested.

"There was full disclosure of all the transaction to everyone having any interest. No one had any right to complain, no one did complain. The contract was ratified, adopted and confirmed by the company which took the benefit of it, operated it, sold it and it has now passed into other hands. It is a question unnecessary to discuss as to whether the contracting parties have, under Arts. 1031, 1039 and 2258 of the Civil Code, any right or interest upon this contestation as they are posterior creditors whose rights would be prescribed.

"Bearing now in mind the well established fact that the four gentlemen forming the Syndicate bought the railway in question with their own money, improved it, formed a company, as was called for by the Act, re-organized their business under the name of the new com-

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pany, under the name of the South Shore Railway Company, always owned the railway as well before as after the sale and the formation of the South Shore Railway Company, that this company, which was themselves, never furnished any funds to them, nor did it give them any authority or mandate to buy the railway, let us examine the jurisprudence bearing upon the subject.

(Cites *Burland* v *Earle* (1).

"Clearly, this case of *Burland* v. *Earle* sets down the principle which must guide us in arriving at a decision upon the present issues. Repeating what has already been said, the company was organized long after the Syndicate agreement was entered into, if that has anything to do with it. These four gentlemen were shareholders and directors of the company from the days of its incorporation and could not in any way be called promoters, they were always proprietors of the enterprise as well before as after the formation of the company who could not give them any mandate or authority, as it would mean giving a mandate and authority to themselves. Then they brought and used their own money in the whole transaction, the company never supplying any funds. They had, undoubtedly, the power to buy a property with the object of transferring it to a company which they intended to organize, and actually did organize. There is certainly no impropriety in this.

"The present case comes within the four corners of the *Burland* case. *Burland* had no mandate, but he was a director, that is all. *Burland* occupied the position Tourville occupies here. He was a creditor. Tourville was a creditor. He was a director of the company. Tourville was also a director. The lower courts in that case said that as *Burland* had bought the property with the intention of selling it to a new company that he must pay the profits; but that was set aside by His Majesty's Privy

(1) [1902] A. C. 93.

Council, and yet in that case he did not own all the stock as the Syndicate did in the present. No rescission of contract is here possible, but what is asked is to force on the vendors a contract to sell at another price. * * * *

"A number of authorities have been cited. Most of the leading ones are discussed in the *Burland* case and actually go to support the view taken by the undersigned upon the present contestation, arriving at the conclusion (1) that the price of $648,000 was fair and reasonable; (2) That as the four members of the Syndicate were proprietors of the new company which was still themselves, and as they bought with their own money and not with money supplied by the company, no fiduciary relation existed between themselves and the company and no mandate could possibly have ever existed. The parties admitted at the argument that the claimants should succeed for the $52,994.84 mentioned in the Provisional Report and as above set forth.

"The contestation of the Bank of St. Hyacinthe and of the Attorney-General are accordingly hereby dismissed with costs."

September 23rd, 24th and 30th, 1908.

The questions arising on the appeals were now argued at Montreal.

A. Geoffrion, K.C., for the Attorney-General of Canada.

F. L. Beique, K.C, and *E. Lafleur, K.C.*, for the Bank of St. Hyacinthe.

J. E. Martin, K.C., and *S. Beaudin, K.C.*, for the Standard Trust Company.

G. A. Campbell, for H. A. Hodge.

A. Geoffrion, K.C., on behalf of the Attorney-General for Canada, contended that the Standard Trust Company was estopped from recovering the amount of its claim by

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the effect of clauses 6 and 7 of the deed of amalgamation, notwithstanding sec. 4 of the Statute of 1905. Neither the Trust Company nor its predecessors in title could receive a profit on the transfer of the railway, but must account to the company for the whole amount of the moneys received. (Cites *Gluckstein* v. *Barnes* (1); *In re Olympia, Limited*, (2); *Erlanger* v. *New Sombrero Phosphate Co.* (3).

F. L. Beique, K.C., for the Bank of St. Hyacinthe, contended that there was a clear estoppel upon the facts of the case against the claim of the Trust Company. (He cited Arts. 1,508 and 2,048 C. C. P. Q.)

E. Lafleur, K.C., followed for the Bank of St. Hyacinthe, arguing that while the fair meaning of sec. 4 of the Act of 1905 was that no claim of any creditor should be prejudiced by the merger, it did not relieve anyone of the effect of his contacts or any estoppel that might arise out of his conduct. The statute did not operate to revive any claim that was extinct or barred before its passage. (Cites *Great North-West Central Ry. Co.* v. *Charlebois* (4).

J. E. Martin, K.C., for the Standard Trust Company, contended that the members of the syndicate were never, in any way, trustees of the old road because they had recovered judgment against the road in their individual capacity. It is impossible to raise an estoppel upon such a state of facts. (Cites 60 Vict. (P.Q.) c. 10; *Hood* v. *Eden* (5); *McCracken* v. *Robison* (6). Our property cannot be taken away except upon consideration. There is no waiver by any shareholder of his claim or rights. Such an issue was not raised in the pleadings; if it had been we would have been ready with evidence to meet it. The amalgation was never perfected, nor did it receive the sanction of Parliament. The deed of 24th

(1) [1900] A. C. 240.
(2) 16 T. L. R. 564.
(3) 3 App. Cas. 1,218 at p. 1,235.
(4) [1899] A. C. 114 at p. 126.
(5) 36 S. C. R. 476 at pp. 484 *et seq.*
(6) 57 Fed. Rep. 375.

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January, 1902, was between the two railways and not between the shareholders; it could not be treated as a waiver by the latter of any of their rights. The claim of the shareholders was never paid or discharged under the covenants of the deeds of the 16th October, 1900, and 24th January, 1902. Every right we had was revived by the Act of Parliament.

S. Beaudin, K. C., followed for the Standard Trust Company, contending that the question raised by the bank at the last moment was one of fact, and not of law, and should have been raised by the pleadings. Evidence could have been adduced to show that the amalgamation was in fact never effected. The grounds of the contestation before the Referee admitted our claim. There was no waiver or abandonment. Not having raised the issue in the pleadings it cannot be raised now. It should have been threshed out before the Referee. The Act of 1905 expressly states that it was for the purpose of selling the South Shore Railway. The South Shore Railway is treated there as in existence as a separate entity, to be separately sold. The syndicate was bound to form a company to operate the railway. Moreover, by the order of the court appointing a Receiver, directions were given to keep a separate account respecting each railway. (Cites Arts. 1039, 1040, and 2258 C. C. P. Q.)

The bank cannot contest our claim because it existed before the bank became a creditor of the road.

A. Geoffrion, K.C., in reply, argued that the Crown had a status to contest the claim of the Standard Trust Company because the proceedings here are in the nature of a winding-up. Hence Arts. 1039 and 1040 C. C. P. Q. do not apply. (Cites *Gluckstein* v. *Barnes* (1).

The question is not only one of estoppel but of release. The Trust Company stands in the place of Myers who signed the deed of agreement.

(1) [1900] A. C. at p. 256.

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The Trust Company cannot invoke the irregularities of the amalgamation authorized by Myers.

Mr. *Martin, K.C.*, cited *In re Lady Forrest (Murchison) Gold Mine, Ltd.* (1); *Chappelle* v. *The King* (2).

G. A. Campbell, in support of the appeal of H. A. Hodge, contended that there should have been a resolution of the shareholders ratifying the transfer of the property to the Standard Trust Company.

CASSELS, J. now (October 31st, 1908,) delivered judgment.

APPEALS of the BANK OF ST. HYACINTHE and the ATTORNEY-GENERAL, and of *Hodge* against allowance of claim of the STANDARD TRUST CO. of New York.

The grounds for the contestation, and the facts relating to the claim are fully set out in the report of the Referee at page 101 and the following pages.

There is practically no objection to his findings of fact except as to the capacity of the witness Lalonde to value the assets of the railway. All the arguments against his valuation are mere inferences drawn from previous and subsequent sales. Everything connected with the transaction was carried out in good faith. I think the Referee came to the only conclusion open to him on the evidence adduced. I think his conclusion as to the legal result of the transaction is correct. The chief authorities relating to sales by promoters are set out in his reasons for judgment.

A question has been raised before me not raised before the Referee, namely, that by the documents of 16th October, 1901, and 24th January, 1902, there was a release of the claims.

The validity of the amalgamation between the Quebec Southern and the South Shore Railways has been questioned. It is certainly a question of grave doubt whether

(1) [1901] 1 Ch. 582. (2) [1904] A. C. 157.

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or not an amalgamation ever took place. The petitioner in this case had grave doubts otherwise the South Shore Railway would not have been parties to this proceeding. The question being one of doubt and certain shareholders of the South Shore claiming that no legal amalgamation had taken place, Parliament solved the riddle by the statute enacted in 1905, cap. 158 4–5 Edw. VII. I have copied the preamble and section 4 in the previous judgment. (See *ante* pp. 40, 41.)

It will be noticed that section 4 of the statute does not declare the amalgamation void, and if in point of fact the amalgamation was valid intervening rights would be protected. But I think the effect of the statute is that while intervening rights may be protected all claims validly existing against the South Shore Railway are protected notwithstanding the amalgamation. The South Shore is to be sold separately, which could hardly be done if for all purposes there was an effective amalgamation.

In the case in question the terms of the agreements of 16th October, 1901, and 24th June, 1902, were not carried out.

It would be a hardship on the Standard Trust Company if their claim be defeated on a technicality. I think Parliament has protected them, and that the appeals should be dismissed with costs.

Judgment accordingly.

Solicitor for plaintiff: *A. Geoffrion.*

Solicitors for defendants: *Greenshields, Greenshields & Heneker.*

Solicitors for Bank of St. Hyacinthe: *Beique, Turgeon & Beique.*

Solicitor for the Standard Trust Company: *J. E. Martin.*

Solicitor for H. A. Hodge; *G. A. Campbell.*

BETWEEN

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Oct. 31.

THE MINISTER OF RAILWAYS AND CANALS FOR THE DOMINION OF CANADA ..... PLAINTIFF

AND

THE QUEBEC SOUTHERN RAILWAY COMPANY AND THE SOUTH SHORE RAILWAY COMPANY ..... DEFENDANTS.

HIRAM A. HODGE AND FRANK D. WHITE ..... CLAIMANTS;

AND

JOHN B. PILLING, EDWARD H. LOWELL, CHARLES K. LAWTON, JOHN HASSELTINE AND WILLIAM BLOOM ..... INTERVENING CLAIMANTS AND APPELLANTS.

THE ATTORNEY-GENERAL OF CANADA AND THE BANK OF ST. HYACINTHE ..... RESPONDENTS.

THE ATTORNEY-GENERAL OF CANADA AND THE BANK OF ST. HYACINTHE ..... APPELLANTS;

AND

JOHN B. PILLING, *et al.* ..... RESPONDENTS.

Railway—Bonds—Irregularity in issue—Trustee—Notice—Enquiry—Transfer of bonds—Bona fide holders—Sale—Negligence in custody of bonds—Liability of company.

A railway company issued bonds under the usual deed of trust. The N. T. C., a body corporate, was the original trustee, but after having executed the deed, resigned. Another trustee was appointed who signed and issued a number of the bonds a few days before the company passed into hands of a receiver. The bonds on their face recited that they should not be "obligatory until certified by the

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N. T. C., trustee." D., the new trustee, signed the bonds in the name of the original trustee, adding thereto "succeeded by D." The bonds were also signed by the president and secretary of the company.

Held, that the apparent irregularity in the signature of the bonds by the trustee was not sufficient to put a *bonâ fide* purchaser for value upon enquiry, and that the bonds were valid in his hands.

2. A certain number of the bonds were handed to H., the president of the company, by the trustee D., after he had signed them. H. borrowed money for his own use from R., and gave some of the bonds as collateral security, also depositing sixteen of them with R. for safe keeping. R. used all the bonds as collateral for a loan subsequently obtained by him for his own use. The holders of these bonds for value and without notice made claim, and they were allowed to recover against the company on the ground that the company had by their negligence in allowing H. to have the bonds under his control made it possible for the bonds to find their way into the hands of *bonâ fide* purchasers.

APPEAL from the Registrar acting as Referee.

The facts of the case as presented to the court on the appeal fully appear in the following extracts from the Referee's final report herein.

JOHN B. PILLING, *et al.*

"On the 13th of March, 1907, quite a while after the sale of the railway, which took place on the 8th November, 1905, the Intervening Claimants, John B. Pilling, Edward H. Lowell, Charles K. Lawton, John Hasseltine and William Bloom were, by leave of the Court, allowed, upon giving security for costs in the sum of $200.00 each, to file their claims and to intervene in the contestations by Hodge and White of the Provisional Report, respecting the bonds of the $3,500,000 issue part of which being claimed both by the said intervening parties and by the said Hodge and White. On the 15th May, 1907, their intervention was filed.

"All parties to the contestation of the said five intervening claimants having consented to the consolidation of the five claims, upon application, an order was made to that effect, on the 13th May, 1907. Thus, while

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there are five separate and distinct claims, there is only one set of pleadings on behalf of the said intervening claimants.

"The plaintiff in the present case, acting in the interests of the creditors at large, under direction of the Court, filed a separate and distinct plea to the intervention of the five intervening parties.

"The Bank of St. Hyacinthe, a creditor herein, on the 14th March, 1908, applied for leave to file a contestation of the said intervention of Pilling *at al.* to the same effect and purport as the one filed by the plaintiff, declaring that the evidence already adduced upon this issue should avail upon its present contestation, having no further evidence to adduce, and leave, as prayed, was granted the bank who then and there filed a contestation in the form and effect above mentioned, under the express terms and conditions that no costs herein be, in any event, allowed the said bank either upon its present application or upon its contestation of the said intervention.

"Hodge and White also filed a joint answer or contestation to the intervention of Pilling *et al.*, and were ordered to give security for costs in the usual manner in favour of the intervening parties, Pilling *et al.* Having subsequently been ordered to give additional security for the costs of the said Pilling *et al.*, and failing to do so, Hodge and White's contestation of the said Intervention of said Pilling *et al.*, was, on the 26th November, 1907, dismissed with costs, and the above plaintiff, or some other party, was ordered to continue on behalf of the creditors the contestation of the said intervention of the said intervening claimants. This leaves, at present, the plaintiff and the Bank of St. Hyacinthe alone to contest the intervention.

"The hearing of the contestation, of the intervention of he said claimants Pilling *et al.*, was proceeded with partly at Boston, on the 18th day of October, 1907. when E. F.

Surveyer, Esq., and Mr. French of the Boston bar, appeared for the five intervening claimants; G. A. Campbell, Esq., appeared for Messrs. Hodge and White; A. Geoffrion, Esq., K.C., appeared for the plaintiff; and Hon. F. L. Beique. K. C., held a watching brief for the Bank of St. Hyacinthe. having only taken part in the issue since the 14th March, 1908. The case was further proceeded with at Montreal, on the 4th and 30th days of November and on the 2nd day of December, 1907, in presence of the aforesaid counsel, excepting Mr. French, the American counsel, the Honourable F. L. Beique, and after the 26th November, 1907, Mr. G. A. Campbell ceased to appear for Hodge and White.

"The said intervening parties claim as follows:—

"John B. Pilling claims the sum of ..... being the face value of 29 bonds of $1,000 each, with interest thereon up to May, 1907, date of the intervention.	$31,320 00
"Edward H. Lowell claims the sum of... being the face value of six bonds of $1,000 each, with interest as above mentioned.	6,480 00
"Charles K. Lawton claims the sum of... being the face value of six bonds of $1,000 each, with interest as above mentioned.	6,480 00
"John Hasseltine claims the sum of ..... being the face value of three bonds of $1,000 each, with interest as above mentioned.	3,240 00
"William Bloom claims the sum of..... being the face value of one bond of $1,000, with interest as above mentioned.	1,080 00
Making the total sum of..... with interest as above mentioned.	$48,600 00

"The evidence, whether plaintiff's or defendant's, whether offered on behalf of Hodge, White or Pilling *et al.*, or the Bank of St. Hyacinthe, on the Hodge and

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White contestation, has been made common to all the issues.

"It will be noted that although the intervening parties only received possession of these bonds as collateral security, they are all now making claim for the face value of the said bonds. Unless a regular sale of the bonds has been made they clearly can only recover the amounts for which these collaterals were pledged.

"This claim originated in the following manner: H. A. Hodge, the late President of the Quebec Southern Railway Company and a claimant herein, claims as his, 42 bonds of the $3,500,000 issue which he says he took in exchange for 50 bonds of the $100,000 second mortgage issue which, as we have already seen, had been cancelled by the company. His claim for the 42 bonds, numbered from 43 to 84, inclusive, has been dismissed on his contestation of the Provisional Report. (See *supra.*)

"Some time after the railway had been placed in the hands of the Receiver and after the sale of the railway had been ordered and notices calling for tenders had been published, both in the American and Canadian papers, the said H. A Hodge placed in the hands of one G. I. Robinson, jr., a broker of Boston dealing in real estate, mortgages and notes, 29 of his bonds of the issue just mentioned, as collateral security for a loan to him for his personal use and advantage, on a note of $5,000. This note bears date the 23rd December, 1904, and is filed as Exhibit P—1.

"Hodge contends (p 104) that the note after it left his possession was altered by adding the words "three months"; that there was no delay mentioned at first, and that the addition was made without his consent and knowledge.

"Now on this note of $5,000, Hodge says he was to receive $4,775, but only actually received $3,500. Asking Robinson for the balance of the amount which should

have been advanced to him under the terms of the note, Robinson suggested the second note for the same amount, dated the 28th March, 1905, being a renewal of the note of the 23rd December, 1904, giving Hodge a receipt or document showing the latter had only received $3,500 on the note. This receipt is filed herein as Exhibit P—3.

"The loan was never completed, and the bonds were disposed of by Robinson without Hodge's knowledge, he never being called upon to pay the loan or informed that the bonds would be disposed of in accordance with the terms of the loan by Robinson, although the latter knew what was Hodge's address and could have notified him had he wished to do so.

"Robinson also came into possession of 16 other bonds of the same issue under the following circumstances. These bonds are numbered from 85 to 100 inclusively.

"Hodge tells us that he was on his way to the Trust Company to deposit these bonds in a safe deposit box he had there, and Robinson, in whom he then had great confidence, said to him: 'Why not leave them here with me, why pay box rent, I have a safe, etc.' Hodge then left these 16 bonds with Robinson, for safe keeping only. The latter gave him in return a receipt for the same dated 4th February, 1905, filed herein as Exhibit P—4, and reading as follows: 'Received of H. Hodge, 16 Quebec Southern Railway Company bonds, 85 to 100 inclusive, to be returned on call.—(Signed) George I. Robinson, jr.'

"Hodge says (p. 116) he considers these 16 bonds as the property of the company, because they had never left the company for value, and he was not the owner of them. He had found these 16 bonds among papers of the company he had in Boston, and as an officer of the company he entrusted them to Robinson for safe keeping only.

"These 16 bonds will be designated as "stolen bonds" when we come to deal with them, Robinson having no property whatever in them, and no right to give them

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out as collateral security on loans for his own use with the further right to sell in default of payment.

"Having established how all these bonds came into the hands of Robinson, the person who handed them over to the several intervening claimants herein, we will now deal with the claim of each of the intervening claimants."

JOHN B. PILLING.

"On the 15th day of March, 1905,—that is, between the date of Hodge's first note (23rd December, 1904,) and his renewal note (28th March, 1905,) John Hasseltine, a note broker of Boston, and an intervening claimant herein, came to Pilling with 29 bonds of the Quebec Southern Railway, numbered from 57 to 85, inclusive, representing that these bonds came to him through Robinson who had told him they were worth 60 cents on the dollar, and, acting for Robinson, asked to borrow $12,000 on them. Pilling then went to Robinson, who told him other people were buying these bonds, and that they were being accumulated at Montreal, to get them together to be sold to a railway company, and that he had already sold some to Collins & Fairbanks, but made no inquiry from this firm, relying entirely on what Robinson said. The latter further added that the bonds were scattered around, and that at present various people had bought them. He was raking them together, and the money he was getting on the loan was for the purpose of purchasing some more.

"At the time Pilling made the loan, he did not know Hodge and of the company being in the hands of a Receiver.

"After hearing what Robinson and Hasseltine told him, he made the loan of $12,000, taking the 29 bonds as collateral, and was also given the note from some one of the name of Shepherd, whom he did not know. The note reads as follow:—

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'$12,000. BOSTON, March 15, 1905.

Four months after date for value received, I promise to pay to myself, or order, Twelve thousand dollars, having deposited as collateral security for payment of this or any other direct or indirect liability or liabilities of ours (mine) due, or to become due or that may hereafter be contracted, the following property:

$29,000 Quebec Southern 1st Mtge. 4s.

With full power and authority to sell, transfer, assign and deliver the whole of said property, or any part thereof, or any additions thereto, without notice or demand, either at public or private sale, or otherwise, at the option of the holder of this note, upon the non-payment or non-performance of this promise, or the non-payment of any or either of the liabilities above mentioned, at any time, and after deducting the legal or other costs or expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale so to be made to pay any, either or all of said liabilities as said holder shall deem proper, returning the surplus, if any, to the undersigned. Should the market value of any security pledged, in the judgment of the holder or holders hereof, decline, I hereby agree to deposit on demand, which may be made by a notice in writing, sent by mail or otherwise to my residence or place of business, additional security, so that the market value shall always be at least 20 per cent. in excess of $12,000. Failing to deposit such additional collateral, this note shall be deemed to be due and payable forthwith anything hereinbefore expressed to the contrary notwithstanding, and the holder or holders may immediately sell at public or private sale, the collateral then held for the payment of this or any other liabilities above mentioned, and apply

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the net proceeds, after deducting the costs and expenses, to pay this, either or any of said liabilities as said holder may deem proper.

It is agreed that the holder or holders of this note or any person in his or their behalf may purchase at any or either sale or sales of said collateral.

Due July 15th, 1905.

Payable at any Bank or Trust Company in Boston.

(Signed) FRANK H. SHEPHERD,
Notify at 34 School St.

(Endorsed) FRANK H. SHEPHERD,
GEO. I. ROBINSON, Jr."

"When the loan was made he paid no attention to this note, relying on the collateral, which Robinson told him, belonged to Shepherd. From the evidence it would appear that Sheperd was a fictitious person, although his address appeared at the foot of the note in the following words under his signature: "Notify at 34 School St."

"At the maturity of the note Pilling went to Robinson with his note and collateral for payment, and has constantly tried, without success to get the money. Pilling then gave instructions to Hasseltine, who is a licensed auctioneer, to sell the bonds under the terms and conditions of the note, with the object of obtaining the property in the bonds. Hasseltine, in compliance with his instructions, gave notice to Robinson and Pilling. The bonds were accordingly sold on the 19th January, 1907, by Hasseltine, and Pilling became the purchaser for $13,180. Filed as exhibit 1, C–13, is an extract of his minute book showing such sale.

"On the note of $12,000, Pilling received $240.00 at the time of discounting it.

"Neither Hasseltine nor Pilling ever removed any of the coupons from the bonds.

"On reference to the note it will be seen that it is therein provided that after the bonds are sold, in the

manner therein set forth, and after the payment of the liabilities therein mentioned, *the surplus* is to go to the maker of the note. Thus the claimant holding first these bonds as pledge and becoming the owner of the same after the sale, subject to the conditions mentioned in the note, remained practically in the same position as a pledgee, with the difference, however, that he is to add to the amount due him the costs or expenses of collection, sale and delivery.

"The claimant is therefore entitled to recover the amount of the loan with interest. Now there is no interest, or rate of interest, mentioned in the note; therefore he is entitled to recover the rate of interest mentioned in the bonds. There is no evidence respecting the costs or expenses for collection, sale and delivery.

The amount recoverable is, therefore.....		$12,000 00
with interest thereon from the 15th March, 1905 (date of the note), to the 8th day of November, 1905 (date of the sale of the railway), at the rate of 4% per annum, viz:.....	$312 99	
from which should be deducted the sum of.....	240 00	
the amount of interest or the discount paid at the time the moneys were paid, leaving the sum of.....	72 99	72 99
which should be added to the capital, making the total sum of...		$120,72 99"

EDWARD H. LOWELL.

"The claimant was cashier of the Winsmett National Bank for 17½ years, and while in such employment, during July, 1905, he negotiated a loan to Robinson for $3,375, when the latter placed with him six bonds of the Quebec Southern Railway as collateral, telling him they were worth 60 cents on the dollar. The claimant negotiated

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two separate cheques, one on Georgetown and one on the First Ward National Bank of East Boston, and cashed the two cheques, holding the bonds as collateral. One cheque has John Hasseltine as maker and was for..... $ 875 00

and the other had Burnham of Georgetown as maker and was for 2,500 00

$3,375 00

and he cashed these cheques in his capacity as cashier of the bank, with the bank's money.

"At maturity the cheques were not paid, and claimant assumed the obligation.

"These six bonds are part of the stolen bonds and no overdue coupons were attached to them at the time of the delivery of the same to the claimant.

"On the 25th January, 1906, George I. Robinson, jr., sold, transferred and assigned these bonds to the claimant as appears by Exhibit I.C—10, filed herein, in settlement of all Robinson's obligations to him.

"A discount of $5 was paid on the $875 cheque, and one of $25 on the $2,500 cheque. The claimant received $275 from the Plunger Co. in full settlement of the $800 mentioned in Exhibit I.C.—9, and incurred expenses to the amount of $50 on the Ross note (p. 72),

"These six bonds having been sold to Lowell in payment of Robinson's obligations, Lowell is now entitled to the face value of these bonds, i.e.... ..... $6,000 00

with interest thereon at the rate of 4%, say, from the 8th July, 1905, to the 8th November, 1905..... 80 00

making the sum of..... $6,080 00

which is the largest amount to which claimant can be entitled.

"There is absolutely no evidence, either documentary or oral, establishing that any interest is recoverable, or if so, at what rate. We have then to come to the bond to establish this rate of 4%.

"Now Lowell says at page 67 of his evidence that he cannot give the date at which this loan was made, but that it was in July, 1905, and I have found for the purposes of this case that it is the 8th, to make an even four months of interest.

From the amount so allowed should be deducted all the claimant has received on account, viz.:—

The sum of.....	$5 00	
and.....	25 00	
respectively received by way of discount at the time the loans were made.		
Then coming to his letter of the 18th February, 1907, filed herein as exhibit I.C.–9, it would appear therefrom that the claimant received, on account of all these obligations of Robinson for which the bonds were ultimately transferred, the sum of...	$275 00	
Less expenses amounting...	50 00	
leaving the sum of.....	$225 00	
Then the sum of.....	700 00	
on account of the $2,500 note, together with the interest on $2,500, on which the interest has been paid from October 6th, 1905, to May 16th, 1906; representing the sum of.....	240 82	
making the sum of.....		$1,195 82
which should be deducted from the grand total, leaving the net sum of....		$4,884 18

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which the claimant is entitled to recover.

CHARLES K. LAWTON.

"The above mentioned Geo. I. Robinson, jr., in the course of the month of February, 1906, several months after the sale of the railway herein, approached one Costello Converse and asked him for a loan of $1,200 for one month, on the collateral of six bonds of the Quebec Southern Railway. The bonds are numbered respectively 91, 92, 96, 97, 98 and 99, and form part of the sixteen stolen bonds above mentioned. Robinson then stated to Converse that the bonds were worth 40 cents on the dollar, and thought that within a short time, probably a month, they would bring more. He then looked up the *Financial Chronicle* and found out that the Quebec Southern Railway was a long road and that the road was in the hands of a Receiver. Converse did not make any inquiry to verify whether the bonds were worth 40 cents nor did he ask Robinson how they came into his possession.

"Converse then discounted the note, which was at one month's time. That note of $1,200 was dated the 21st February, 1906, at one month. The note was taken up and another one given at the end of the month for another month, and then month by month until the note of Oct. 22nd, 1906, was finally given at one month, Albert Adamson, Jr, being the maker and Geo. I. Robinson, Jr., endorsing it. The note is filed as Exhibit I.C.-6. Converse says he does not know who Adamson is. Robinson paid $6.00 each month when the notes were renewed. The sum of $6.00 had been paid also at the time the note of October, 1906, was discounted.

"Later on Converse endorsed the note to his clerk, C. K. Lawton, without recourse, and the bonds were placed in the latter's hands as a matter of convenience to Converse. The present claimant holds them for him and Lawton has filed the claim.

"The bonds are still held by Lawton as collateral or pledge as they were never sold, and although the coupons of October, 1905, are cut from the bonds, they are pinned to the six bonds respectively.

"Charles K. Lawton, the present claimant and the general clerk and secretary of Converse, was present when Robinson came to make the loan in the manner above mentioned, and confirms Converse's statement that Robinson said the bonds were worth 40. He then turned up the *Commercial and Financial Chronicle* and found, among other things, that G. C. Dessaulles, on 21st March, 1904, had been appointed Receiver, and that an application to issue $20,000 Receiver's certificates made (p. 46.) Then referring from this quarterly to a weekly issue of the paper found that tenders would be received for the purchase of the road until November 2nd, 1905, etc., etc.

"After maturity, when inquiries were made, Robinson would say that the matter was progressing; but no demand was ever made to the maker of the note, except through Robinson's office.

"Robinson has presently left Boston, having appropriated to himself funds which did not belong to him. Lawton has written to Robinson asking him to be in Boston to be examined, and offered to pay his expenses.

"Robinson answered, among other things, that an attorney should get a writ of protection for him while in the city.

"Clarence F. Eldridge, a Barrister from Boston, testified that he knew Robinson and had been unable to make arrangements to get him at Boston at the time of this examination. "He could not get the people to withhold their judgment."

"This claim is then based on this note of $1,200 of the 22nd October, 1906. No mention is therein made of interest, therefore, if interest were to be paid, it must be

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the rate of interest mentioned in the bonds. However as interest is allowable herein, only up to the date of sale of the railway, viz., the 8th November, 1905, no interest is allowed, and as this case is clearly a case of pledge, the claimant is entitled to recover the sum of $1,200, the amount for which the bonds were pledged, without interest, for the reasons above mentioned. The sum of $6.00 paid at the time the loan was made representing interest thereon for one month should be deducted, leaving the net sum of $1,194, which the claimant is entitled to recover."

JOHN HASSELTINE.

"The claimant is the same John Hasseltine already spoken of in dealing with the claim of Pilling, and as most of the representations made to Pilling with respect to his loan were made by Hasseltine, we must necessarily conclude that Hasseltine stands in the same position as Pilling, and for the same reasons must share the same fate.

"At about the same time of the Pilling deal, Hasseltine procured a loan for Robinson on four bonds. One of these was placed with Pilling, and some of them were placed with Amy W. Holden. Three of these bonds came to him, as, at maturity, he had to pay the note he had endorsed for the loan, and in September or October, 1906, he returned to Robinson some of his obligations and took an absolute title to the bonds which had come to his possession in the latter part of March or April, 1905, as collateral. He claims he knew of the Receivership only at the end of 1905; but that was before he took the bonds in full settlement with Robinson in 1906. The amount of these obligations would hardly amount to $3,000. He himself having placed the bonds with persons and made himself liable on the paper, met the notes and took the bonds.

These three bonds are respectively numbered 0048, 0094 and 0095. The two latter are part of the stolen bonds. No overdue coupons are attached to the three bonds.

Now from the above it will be seen that Hasseltine is entitled to recover the sum of $3,000, with interest thereon at 4 per cent. from the 1st April, 1905, to the 8th November, 1905, amounting to $72.66, making the total sum of $3,072.66."

WILLIAM BLOOM.

"This claimant carrying on a wholesale woollen business at Boston, is also engaged in the "business of buying papers, mercantile paper, and of loaning money on securities" (p. 58), and knows Robinson since about 1903 or 1904, and made acquaintance with him in 1903 when he (Robinson) sent his secretary up to the claimant with some papers and kept dealing with him quite extensively, as his reputation was then very good.

"In May, 1905, claimant lent Robinson $2,500 on eight Quebec Southern Railway bonds, and got also Robinson's note as collateral, but the loan was paid. Absolutely no representations were made to him at the time those bonds were handed to him (p. 60) and he made no inquiry at that time, and when the note was paid Robinson took back the bonds.

"On the 2nd March, 1906, Robinson borrowed again from the claimant the sum of $800 on his (Robinson's) note and three bonds, and that loan was again taken up on the 2nd April, and the bonds were handed back to Robinson who came back on the same day, 2nd April, 1906, with one bond and borrowed $250, which again was paid and the bond was given back to Robinson. Finally the claimant on reference to his books, stated that on April 2nd the loan was $275. On May 2nd it was $265, and on June 4th it was $250. On July 6th, $250, and renewed August 6th for $250.

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"The note of 6th August, 1905, for $250, remains unpaid, and a copy thereof is filed as Exhibit I.C.–8, with the bond No. 088, which was given as collateral. This is one of the stolen bonds, and it had been received by claimants on the 2nd April, 1906. On reference to the bond it will appear that on the 2nd April, 1906, when he received the bond, there was one overdue coupon of the 15th October, 1905, still attached to it, although the claimant in his evidence, undoubtedly through inadvertence, stated that all matured coupons had been detached when he got the bond. However, perhaps this is one of the bonds he had previously received during May, 1905, and had returned to Robinson. After the note became due claimant made inquiry of Kidder, Peabody & Company about the Quebec Southern Railway, and was told for the first time the road was in the hands of a Receiver.

"Claimant received $2.50 at the time he discounted the note. There was never any sale of the bond, so he holds it as a pledge; therefore he is entitled to recover the sum of $247.50 without any interest, as interest could only run to the date of sale on the 8th November, 1905.

"Now, dealing in a general manner with these claims, whatever may be said should be prefaced by the statement that the undersigned finds that these five claimants are *bonâ fide* holders of the bonds, having acquired them in good faith. Doubtless the maxim *Omnia praesumuntur rite esse acta* would have thrown the burden of proof upon the other side in this proceeding, but the onus of establishing good faith was voluntary assumed by the claimants, and they adduced evidence of the facts above related, with that object in view.

"They are entitled, under the circumstances, to recover respectively the amounts hereinafter set forth, unless

some important reason or fact is found to put them upon their inquiry.

"The National Trust Company were appointed Trustees for the bond issue of 3,500,000 under Deed of Trust of the 10th June, 1902, and resigned, before signing any of the bonds, on the 27th February, 1904, when J. M. M. Duff was appointed Trustee in their place and stead, and he afterwards signed whatever bonds of that issue the company had at that time in its possession. Duff's appointment appears under Notarial Deed of the 27th February, 1904, filed herein as Exhibit No. 28. He was first appointed by the Executive Committee, and that appointment was subsequently confirmed at a meeting of the shareholders of the company.

"It is contended by the plaintiffs that the resignation of the National Trust Company does not comply with the requirements of the provisions of the Trust Deed, in so far as the notices provided by the Deed of Trust of such resignation were not given. But there was no occasion to give notice. To whom could it be given? There were no bondholders at the time the National Trust Company resigned. The bonds had not been signed, and were neither issued nor delivered.

"It is contended by the plaintiff that as the bond contained on its face the stipulation that "it shall not be obligatory until certified by the National Trust Company, Limited, the Trustee herein named," that it cannot be valid without such signature, and that the purchaser of a bond is put upon his inquiry by the fact that the bond is signed in the following manner: "National Trust Company, Limited, Trustee, succeeded by J. M. M. Duff, Trustee." It was clearly the duty of the company to see that the bonds were issued in correct form, and it is now estopped from setting up a breach of that duty as against a third party, a *bonâ fide* holder of such negotiable instru-

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ment. See *Bigelow's Estoppel* (1); *Oakland Paving Co.* v. *Rier* (2); *Weyanwega* v. *Ayling* (3); *Bentick* v. *London Joint Stock Bank* (4); *Harrison et al.* v. *Annapolis & Elk R. R. Co.* (5); *Willoughby* v. *Chicago &c. Stock Yards Co.* (6); *Fournier* v. *Cyr* (7); 5 *Cyc.* 796, vo. *Bonds;* 16 *Cyc.* 752, vo. *Validity of Bills, &c.*; 7 *Am. & Eng. Ency of Law*, 2nd Ed. pp. 783-4 23 pp. 835, 837; *Reed* v. *Vancleve* (8); *Adams* v. *Irving National Bank* (9). The statute creating the company does not place any restriction on the manner in which the bonds are to be made or signed. The authentication of the bonds is a voluntary or arbitrary provision of the company and one that could be waived *ad nutum*.

"The Trust Deed itself says that "The Trustee" means The National Trust Company, or any other party or Trustee who for the time being shall be Trustee under these presents. It further provides that in the event of the resignation of the Trustee, a new Trustee may be appointed. It cannot be contended that the National Trust Company had not a perfect right to resign, and that the company had not a perfect right to appoint a successor. The bond on its face appears complete, good and valid. It is signed by the President and the Secretary of the company and by a Trustee. Is that not sufficient for a *bonâ fide* third person? The company, or the creditors acting in its place, are obviously estopped under the circumstances from setting up the alleged irregularities or any of these formalities for which they are responsible. These bonds were certified by Duff, the duly appointed Trustee of the company, and after certifying them they are handed by the Trustees to the President of the Company.

(1) 4th ed. 528-536.
(2) 52 Cal. 270.
(3) 99 U. S., 112.
(4) (1893,) 2 Ch. 120.
(5) 50 Md. 490.
(6) 50 N. J. Eq. 656.
(7) 64 Maine, 32.
(8) 27 N. J. Law, 352.
(9) 116 N. Y. 606.

"The broad proposition laid down by Abbott C.J., (1) that whoever is the holder of a negotiable instrument 'has the power to give title to any person honestly acquiring it" is accepted and confirmed by Lord Halsbury in the case of *London Joint Stock Bank* v. *Simmons* (2) and is also accepted as a sound guidance in this case. In the same case the learned Chancellor observed that it cannot be accepted as law that in every case one at his peril must inquire whether an agent with whom he is dealing has the authority of his principal.

"Then the leading case of *Murray* v. *Lardner* (3) in which the English law upon this subject is reviewed, is authority for the proposition that a bond payable to bearer stolen before maturity is valid in the hands of a *bonâ fide* purchaser for value. See also upon the same subject *Young* v. *McNider* (4), *Abbott's Railway Law of Canada*, 111; *Doty* v. *Oriental Print Works Co.* (5); *Miles* v. *Robert* (6); *Goodman* v. *Harvey* (7); *Goodwin* v. *Robarts* (8); *Gorgier* v. *Melville* (9); *Swift* v. *Tyson* (10); *Goodman* v. *Simonds* (11); *Brown* v. *Spofford* (12); *Swift* v. *Smith* (13); *Pana* v. *Bowler* (14); *Purdy's Beach on Private Corporations* (15).

"The line of demarcation between the fraud which does not affect the *bonâ fide* holder for value and without notice and that which makes null and void the negotiable instrument in all hands whatsoever is somewhat narrow and difficult to distinguish, as the distinctions are often very fine.

(1) *Gorgier* v. *Mieville*, 3 B. & C. at p, 47.
(2) (1892), A. C. 201, at p. 212.
(3) 2 Wall. 110.
(4) 25 Can. S.C.R., 272.
(5) 67 Atlantic Reporter, 586.
(6) 76 Fed. Rep. 919.
(7) 4 Ad. & El. 870.
(8) 1 App. Cas. 476-497, 5 Eng. Rul. Cas 199.
(9) 3 B. & C. 45-47, 5 Eng. Rul. Cas. 198.
(10) 16 Pet. I. at p. 22.
(11) 20 How., 343.
(12) 95 U.S., 474.
(13) 102 U.S., 442. 107.
(14) 107 U.S., 529.
(15) Vol. 3, p. 1153.

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"The company was guilty of negligence in respect of these bonds, by means of which an opportunity for fraud has been created. This lies in the facts above set forth, by which it appears that Hodge, the President, was given unrestricted possession of the bonds, and enabled to convert them to his own personal use. That Hodge was himself deceived by Robinson does not alter the responsibility of the company towards *bonâ fide* purchasers for value without notice. *Weimer* v. *Gill* (1); *Bentick* v. *London Joint Stock Bank* (2); *Long Island Loan and Trust Co.* v. *Columbus C. & I. Ry. Co.* (3); *Provident Life Trust Co.* v. *Mercer County.* (4).

"To sum up, the undersigned is of opinion (1) that with respect to the more general question of the form and apparent validity of the bonds in the hands of *bonâ fide* purchasers for value, there is nothing upon the face of these negotiable instruments to put the purchasers upon inquiry, and so lay the foundation of constructive notice of any invalidity therein; (2) the undersigned finds as a fact that to *bonâ fide* third parties the said bonds were duly certified by the proper trustee of the company, and were in all other respects good and valid; (3) that the company was negligent in allowing Hodge unrestricted possession of the bonds, and that whether such bonds reached the hands of *bonâ fide* purchasers for value by reason of Hodge's deliberate breach of trust towards the company by using them as collateral security for a personal loan, or by reason of their being stolen from him, does not alter in any way the liability of the company towards the said purchasers of such negotiable instruments.

"The stronger equity is obviously in favour of the *bonâ fide* holder for value, and when one of two innocent persons must suffer, and in the present case it is as between

(1) [1905] 2 K.B. 181.
(2) [1893], 2 Ch. 120.
(3) 65 Fed. Rep. 455.
(4) 170 U.S., 593, 604.

the company or the creditors representing it, on the one hand, and the *bonâ fide* holders of the negotiable instrument on the other,—the one who does the act from which the loss results, must bear it.

"Therefore the claimant, John B. Pilling,

is entitled to recover the said sum of.....			$12,072	99
The claimant Edward H. Lowell, the sum of..			4,884	18
do	Charles K. Lawton,	do ..	1,194	00
do	John Hasseltine,	do ..	3,072	66
do	William Bloom,	do ..	247	50
Making the total sum of.....			$21,471	33

"These amounts will be allowed with privilege against the amalgamation after giving effect to and working out the operation sec. 4 of ch. 168 4-5, Ed. VII.

"The claimants have already been allowed costs on the issue as between themselves and Hodge and White, when the latter's contestation was dismissed with costs, for want of giving additional security.

"The undersigned is of opinion that no costs should be allowed upon the present contestation as between the plaintiff, the Bank of St. Hyacinthe, and the said five claimants. Indeed, these claimants must stand in the same position as all other creditors. They were duly called in due course of law to file their claims at a given time, and failed to do so, but came at the last moment asking the indulgence of the Court to file their claims and intervene in the contestation of Hodge and White. Had they filed their claims at the same time as all the other creditors did, they would, in all probability, have been allowed, without contestation, and in every case without costs. The creditors or the mass cannot, under the circumstances, be made pay and charged with these costs.

"There will be no costs to any of the parties on the present intervention and contestation, excepting, however, upon the contestation between Hodge and White and the intervening claimants, as above mentioned.

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PILLING'S CLAIM.

Argument of Counsel.

September 30th and October 1st, 1908.

The appeal now came on for argument at Montreal.

E. F. Surveyer, for Pilling, and the other intervening claimants;

A. Geoffrion, K.C., for the plaintiff, the Attorney-General of Canada and the Crown;

F. L. Beique, K.C., for the Bank of St. Hyacinthe;

E. F. Surveyer, for the intervening clients on the main appeal, argued that Pilling was a *bonâ fide* holder without notice, as the bonds were sold to him by the pledgees. As to Lowell he bought in the ordinary way so was entitled to rank for the full amount of the bonds he held. (Cites Arts. 1969 and 1973 C. C. P. Q.) Lawton and Bloom took the bonds as pledgees for money advanced. They were entitled to principal moneys and interest against the railway, and their transferrors stood in their place. The finding of the Referee should be increased to the amount claimed by the intervening claimants.

A. Geoffrion, K.C., for the plaintiff on the main appeal, contended that the claims of Pilling, *et al.*, should not be allowed, as the facts in evidence showed they were not *bonâ fide* holders of the bonds for value. The bonds were defective on their face, Duff not having had authority to sign for the National Trust Company. Upon the face of the bonds Duff's signature was an irregularity sufficient to put the purchaser upon inquiry. Inquiry would have shewn that Duff had no authority to sign. It would have shewn that the resolution purporting to appoint Duff as a successor in the trust was a nullity. There was no sufficient resolution of the shareholders appointing him. In the Province of Quebec a minute of the executive committee of a company or corporation which is essentially null is not validated by the presence of the corporate seal. Validity of form will not cure defect of substance. Furthermore, as to the validity of the bonds

for lack of notice, the appointment of a Receiver was a public matter, with notice of which the transferees of the bonds were charged.

F. L. Beique, K.C., followed for the Bank of St. Hyacinthe on the main appeal. He contended that the minutes of the company shew that on the day that Duff was appointed trustee there was a motion made for a scheme of arrangement. This was notice that the company was insolvent.

Mr. *Geoffrion*, on the cross-appeal by the Attorney-General of Canada, submitted that under the Civil Code (Arts. 1031 and 1484) Pilling had no right to buy the bonds. To allow the pledgee to buy is against public policy. It is the law of Quebec, and not the law of Massachusetts that applies to the purchase of these bonds by Pilling. When the pledgee buys the pledged property the relation he originally stood in touching the pledged property is not changed. He gets no new rights as against other creditors.

It is impossible for a pledgee to sell at private sale to himself. On the other hand notice is necessary to a valid public sale. A pledgee might buy at a judicial sale, but not otherwise. Besides this, Pilling, upon the facts, is a trustee, and *a fortiori* cannot buy for himself.

Mr. *Surveyer*, for the respondents on the cross-appeal, replied, relying on Art. 1971, C. C. P.Q., as empowering Pilling to buy as pledgee.

CASSELS, J., now (October 31st 1908) delivered judgment.

APPEALS BY BANK OF ST. HYACINTHE and the Attorney-General of Canada from finding upon the claims of Pilling, *et al.*, and appeal by Pilling, *et al.*, from finding upon their own claims.

On page 105*m* of the Referee's report this claim is fully dealt with (1).

(1) For the facts here referred to, see *ante* pp. 153 et seq.

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The validity of the claim must depend upon the validity of the amalgamation between the Quebec Southern Railway Co. and the South Shore Railway Co. and the validity of the issue of the bonds by the amalgamated company.

The Referee has found that the amalgamation was valid so far as this intervening claim is concerned.

Pilling recovers the full amount of his claim and interest, but claims to rank for the full amount of the face value of the bonds, his claim being based on the fact that he is in the same position as an outside purchaser would have been had he purchased the bonds at auction sale.

Had Pilling, representing his estate, not been a purchaser for value without notice he would have had no claim as he would have had no higher right than the pledgor. He occupies a higher position and so is allowed in full the amount of his claim.

I think the Referee was correct in holding that he cannot claim for the surplus. The surplus was to be paid over. The Referee's reasoning is in my view correct in respect of the claim of Pilling as well as that of Lowell, Lawton, Hasseltine and Bloom.

I would not have thought it necessary to consider the question of the validity of the amalgamation were it not that the title depends on it.

I have given my views as to the effect of the statute of 195, cap. 158, 4 & 5 Edw. VII, in dealing with the appeals of the Standard Trust Co.

The agreement of the 16th October, 1901, contemplated an amalgamation to be carried out on different lines than that eventually carried out by the agreement of 24th January, 1902. However, the agreement of 24th January, 1902, was intended to create an amalgamation of the two companies. It is a crude document and evidently further conveyances were contemplated which

were not executed. This was an amalgamation entered into pursuant to the provisions of section 11 of cap. 76, 63-64 Vict. It was assented to by the shareholders of both companies. To make the amalgamation effective the sanction of the Governor in Council was required. This sanction was given by Order in Council bearing date the 15th day of April, 1902.

It is argued that by sub-sec. 3 of sec. 11 of chap. 76 of the Acts of 1900 notice in the *Canada Gazette* was required to be given, and this notice not having been given, the amalgamation never became effective. *Chappelle v. The King* (1), was referred to in support of this contention. I do not think that case affects this one. At page 632 of the judgment of Sir Louis Davies sec. 91 of R.S.C. 1886, c. 54, is set out. The order or regulation only came in force after publication. The provision of sub-section 3 of section 11 to my mind is directory only.

After the amalgamation bonds were duly issued, the two railways were operated as one railway. The minutes of the Quebec Southern show continuous dealings with the railways as one railway.

The National Trust Company were made trustees for the bondholders, subsequently succeeded by one Duff. The bonds in question were issued and in the hands of their holders cannot now be questioned for the reasons given by the Referee.

The appeals and cross-appeals are dismissed with costs.

Judgment accordingly.

Solicitor for plaintiff: *A. Geoffrion.*

Solicitors for defendants: *Greenshields, Greenshields & Heneker.*

Solicitors for Hodge and White: *Hickson & Campbell.*

Solicitors for Pilling, *et al.*: *McGibbon, Casgrain, Mitchell & Surveyer.*

Solicitor for Attorney-General of Canada: *A. Geoffrion.*

(1) 32 S. C. R. 586; affirmed, [1904] A. C. 127.

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March 19.

QUEBEC ADMIRALTY DISTRICT.

BETWEEN

THE HARBOUR COMMISSIONERS OF MONTREAL..... PLAINTIFFS;

AND

THE SHIP *ALBERT M. MARSHALL*..... DEFENDANT.

Collision—Liability—Breach of regulations—Presumption—Negligence—Proof—Collision with a vessel at anchor.

Held:—Under the Canadian navigation rules, a breach thereof creates no presumption that a collision following the same was due to it, and the party alleging negligence must establish it in the ordinary way.

2. Where a steamer collided with a dredge at anchor, it was held to be no defence that the dredge was lying in an improper place and did not exhibit proper lights, if it be shown that the collision could have been avoided by the exercise of reasonable skill and care on the part of the moving vessel.

ACTION for damages for collision.

The facts are stated in the reasons for judgment.

DUNLOP, L. J. now (March 19th, 1908) delivered judgment.

The plaintiffs, by their statement of claim, in effect, allege: That on the 8th October, 1906, at about 9.50 p.m. a dredge known as dredge No. 1 belonging to the plaintiffs, and used by them in their work for the improvement of the harbour of Montreal, which is under their control, was at anchor in the harbour, south of the ship channel, about opposite section 22; that there was a watchman on board the dredge at the time; and she was carrying the regulation anchor lights, that it was dark at the time but there was no rain, the wind was about south and was

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strong, the current flowed about towards the north, at a speed at from four to six statute miles an hour; that, at that time, the steamer *Albert M. Marshall*, John A. Duncanson, master, proceeding down-stream from out of the basin formed by the wharves and Mackay pier, ran into the dredge, the port bow of the ship striking the starboard quarter of the dredge; that the dredge was sunk and almost completely lost as a consequence of the collision; that the collision and damage and loss to the plaintiffs resulting therefrom were caused by the negligent and improper navigation of those on board the *Albert M. Marshall*, against which steamer is the presumption of fa lt, the dredge being at anchor; that the plaintiffs, without prejudice to this presumption and without admitting that the burden of proof is on them or that they are bound to give any details of the fault of the steamer, and without limiting their case to the faults hereinafter mentioned, mention among other faults of said *Albert M. Marshall*, which have caused the collision, the following; that the *Albert M. Marshall* ran into the dredge which was at anchor, plainly visible and lighted, when she could easily have avoided it; followed an improper course and should have steered so as to avoid the dredge; should have kept in the channel and on the west or city side of the dredge, particularly in view of the existing current and wind; that there was but an improper lookout; that there was no competent officer in charge, or on duty, or on deck, at the time; the pilot was incompetent and the equipment defective, both the engines, machinery and steerage gear; that, if unable to be controlled to avoid running into the dredge, which is not admitted but denied, the ship should have been kept above Victoria pier in still water, till conditions allowed of her proceeding down in safety; that the ship should have stopped and reversed, or altered her course when danger of col-

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lision began to exist; and that the ship did not stand by after the collision.

The plaintiffs claim a declaration that they are entitled to the damage proceeded for; the condemnation of the defendant (and the bail) in such damage and in costs; to have an account taken of such damage with the assistance of merchants; and such further or other relief as the nature of the case may require.

The defendant by defence and counter-claim in effect alleges: That the defendant is the owner of the American steamer *Albert M. Marshall* of 987 net tons register, and worked by engines of about 650 horse power nominal, with a crew of about 20 hands, which, on the 8th October, 1906, was bound on a voyage from Lake Ontario ports to Ha! Ha! Bay, without cargo; that about 9.40 p.m. of that day, the ship in the course of her voyage left lock No. 1 of the Lachine canal, port of Montreal; the weather was clear, but dark, with a heavy wind blowing from a south-westerly direction; that she was proceeding out from the lock under her own steam in the usual and proper way, slowing gathering way, at between three and five miles an hour; with regulation lights duly exhibited and burning brightly, and a good outlook was being kept on board of her; that those on board of the steamer saw two white lights ahead and some on the *Marshall's* port bow; that the lights, on account of their dimness, had the appearance of being a long distance away; that the white lights had been in view of the *Marshall's* watch a very short time, the *Marshall* meanwhile holding her course to starboard to overcome the drift of the wind and current, when suddenly, and while the dim lights appeared to be a long distance away, a house on what proved to be dredge No. 1 loomed up in the darkness close at hand, and on the port bow of the *Marshall*, and thereupon the *Marshall's* engine was rung up to full speed and her helm put hard-a-port in an effort

to throw her clear of the dredge, but directly it was seen that because of the strong wind and current the *Marshall* could not pass clear of the dredge, her engines were reversed in an effort to ease the blow of the collision as much as possible; that the *Marshall* was carried down almost broadside against the dredge, her port side coming in contact with the up-river end or spud-casing of the dredge, doing apparently but slight damage to the dredge but some damage on the port side of the *Marshall*; that after she had been carried against the dredge, her wheel was immediately put hard-a-starboard, and with great difficulty she was straightened down channel in the narrow water, without stranding or further disaster; that it was impossible for her to round at that place, and she therefore immediately sounded a signal for assistance to come to the dredge, and, while the *Marshall* was being carried down-stream by the current, one of the tugs laying near the scene of the collision came out to the dredge; that except as hereinbefore appears, the several statements in the statement of claim are denied.

The defendant charges among other faults of the plaintiff or their agents or servants, that may develop at the hearing—which faults the defendant reserves the right to urge, that they were at fault in the following particulars: in violating the law as to place of anchoring or fastening to the ground; in disregarding the perils of navigation in anchoring or being fastened and remaining where and as she was; in having an insufficient lookout; in not having the dredge provided with proper lights, and in not having proper lights so placed as to indicate that she was anchored or attached to the ground where she lay, and further, in that the lights she did display were dim and insufficient in size and quality, besides being misleading in that in that they did not indicate a vessel, either at anchor or aground; in failing to give any signals or alarm, as the *Marshall*, with her lights show-

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ing brightly, approached the dredge; in failure to give the pilot or officers of the *Marshall* notice that the dredge had been placed in the channel, which, until that date, had been in customary use by vessels bound down from the Lachine canal; in failure to move the dredge into shoal water after the collision, and in unnecessarily permitting her to sink in deep water near where she was struck; that no blame in respect of the collision, and resulting damage, is attributable to the steamer *Albert M. Marshall*, or to any of those on board of her.

By the way of counter-claim, the defendant says that the collision caused great damage to the *Albert M. Marshall*, and the defendant claims a declaration that the defendant is entitled to the damage asked under its counter-claim; the condemnation of the plaintiffs (and their bail) in the damage caused to the *Albert M. Marshall*, and in the costs of this action; to have an account taken of such damage with the assistance of merchants, and with such further or other relief as the nature of the case may require.

The contentions of the parties are disclosed in the pleadings of which I have given a synopsis.

As is usual in cases of this nature, each of the parties accuses the other of being in fault, for a multitude of reasons.

The evidence discloses that on the 8th October 1906, at about 9.50 p.m., the dredge known as No. 1, the property of the plaintiffs and used by them in works for the improvement of the harbour of Montreal, under the control of the plaintiffs, was placed in the harbour, south of what is called the south ship channel, about opposite section 22 of the harbour, at about the place indicated on the plan produced; that there was a watchman on board the dredge at the time of the accident; that she was carrying a light on the A-frame, about twenty feet above her deck and one light at the up-stream end, and one

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light on the down-stream end of a scow which was fastened to the dredge at her lower or down-stream end. That at the time of the accident in question, it was dark, but a clear night, as admitted by the defendant. There was no rain. The wind was about south-west, blowing at an estimated rate of from seventeen to twenty miles an hour. That the current flowed north-westerly at a speed of from five to six statute miles per hour; that at that time, about 9.50 p.m., the American steamer *Albert M. Marshall* of a burthen of 987 tons register and 650 horse power, manned by a crew of about twenty hands and drawing four feet forward and eleven and a half feet aft, was proceeding down stream, bound on a voyage from Lake Ontario ports to Ha! Ha! Bay, without cargo; that the steamer at the time in question was proceeding down-stream from the basin formed by the wharves and Mackay pier in the harbour of Montreal, and ran into and collided with the dredge, striking its starboard quarter; that the dredge was sunk and almost completely lost as a consequence of the collision, and the steamer *Albert M. Marshall* was also much damaged by it.

As a great number of English and American authorities have been cited by counsel, it might be well to state at the outset that in considering these questions it must be remembered that there is radical difference between our law and the law of England.

Under the English law a breach of the regulations creates presumption that a collision was due to that breach; while under the statute concerning shipping in Canada, R. S. C., c. 113, secs. 914 to 918, a mere breach of a regulation creates no presumption, and the common law applies, and the other side or party must prove the cause of the collision.

It is strongly contended in this case that even under the law of England, if the anchoring of the dredge in question in an improper place had been proved affirmati-

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vely, and that technically improper lights were shown and that there was no anchor watch (which facts of course are not admitted in the present case), and further, if shown that these defects or deficiencies had nothing to do with the collision, the dredge would have sufficiently rebutted the presumption of fault.

In a recent Admiralty case of *The Etna* (1), Mr. Justice Bucknill, referring to the management of the Torpedo Boat *Wear*, which had been in collision with the steamer *Etna*, said (in substance):

"He failed to act (referring to the officer in charge of "the Torpedo Boat), until too late, and just failed to clear "the *Etna* by 40 feet. It was agreed that on the autho- "rity of *H. M.* S. *Sanspareil* (2), the rules of common "law as to the negligence applied, and that if the *Etna* "was initially negligent, yet she might escape, if, by "reasonable care and skill the *Wear* could have avoided "her; this, however, had not been made out to his satis- "faction, as the *Etna* was not only negligent in getting "in between the two lines of the flotilla, but there had "evidently been a bad lookout on board, for she did not "see the starboard division of the flotilla at all".

And the learned judge, having regard to the negligent navigation of the *Wear*, also held both vessels to blame. This case is cited in order to show that if there had been antecedent negligence on the part of the dredge, yet if the *Albert M. Marshall* could have avoided her by the exercise of reasonable care, the dredge could not be held responsible for the collision.

On this point, *Marsden on Collision* (3) says:

"The general rule that a vessel under way is *primâ* "*facie* in fault for a collision with a ship at anchor, applies, "although the latter is brought up in an improper place, "or has no riding-light, provided the former could with "ordinary care have avoided her.

(1) [1908] Prob. 269, at p. 281. (2) [1900] P. D. 267.
(3) Page 30, 5th ed.

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"It is the bounden duty of a vessel under way, whether "the vessel at anchor be properly or improperly anchored, "to avoid if it be possible with safety to herself, any col- "lision whatever. Even if a ship is brought up in the "fair way of a river, if the other could with ordinary "care have avoided her, the latter will be held solely to "blame".

The decision in the Torpedo Boat case above cited shows that the *Sanspareil* case is a binding authority on the Admiralty Court in England, and there, notwithstanding that the Nautical Assessors in the first Court held that there was no negligence in the *East Lothian* in passing across the bows of the *Sanspareil*, the Court held as the *Sanspareil* might, with ordinary care, have avoided the collision, she was alone to blame for the collision. This case was taken to appeal on the ground that there was improper navigation on the part of the *East Lothian*, and the damages sustained should have been in any event divided. Different assessors assisted the Court of Appeal which confirmed the judgment of the Court below, and which asked the following question as mentioned at page 282 of the Probate Reports, 1900:

"Q. Was the *East Lothian*, under the circumstances "of this case, guilty of negligence in passing across the "bows of the *Sanspareil?*" And they answered: "It "was improper navigation," which the Court of Appeal took to mean that the assessors did not advise them in the same way as the Elder Brethren in the Court below, and accepted their advice so given. Lord Justice Smith, in giving judgment, at page 283 of the report, said:

"The well-known law of contributory negligence laid "down by Lord Penzance, in the House of Lords, in "*Radley* v. *The London and North Western Railway Co.* "(1), is 'that the plaintiff in an action for damages can- "not succeed, if it is found by the jury that he has him-

(1) 1 App. Cas. 754.

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" self been guilty of any negligence or want of ordinary " care, which contributed to cause the accident'; but there " is this qualification equally well established, namely, " that, though the plaintiff may have been guilty of negli- " gence and although that negligence may in fact, have " contributed to the accident, yet, if the defendant could, " in the result, by the exercise of ordinary care and dili- " gence have avoided the mischief which happened, the " plaintiff's negligence will not excuse him. The case " of the *Margaret* (*Cayzer* vs. *Carron Co.* (1) shows that " the common law doctrine is applicable to such a case " as that now before us."

Lord Justice Williams, at page 287, said :

" The only remaining question is whether, applying " the common law rules to this matter, there is evidence " of such a state of circumstances that the plaintiff is " disentitled to recover. That there was negligence by " the plaintiff there can be to my mind no doubt. If the " advice of our assessors is right, there obviously was, " and, speaking for myself, I entirely agree with the " view they take. But according to the rule laid down " in *Radley* v. *London & North Western Railway Co.*, " that is not sufficient; you must show that the negli- " gence was of such a character that the defendant could " not, with ordinary skill and care, have avoided the " accident. That rule applies equally in the Court of " Admiralty, where the practice is that, if both ships are " to blame, the damage is to be divided."

Lord Blackburn and Lord Watson made it clear in the *Margaret* (*Supra*) that the common law principle governs the Admiralty Rules, and that if the consequences of the neglect of the plaintiff could have been avoided by ordinary care and prudence on the part of the defendants, the negligence of the plaintiffs would be no answer to the action.

(1) 9 A. C., 873.

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In the case of *The Hamburg Packet Co.*, v. *Desrochers* (1) the judge, in rendering judgment said :

" The effect of the statue (referring to the English " statute), is to impose on a vessel that has infringed " a regulation which is *primâ facie* applicable to a case " the burden of proving, not only that such infringement " did not, but that it could not by possibility, have con- " tributed to the accident. That is the rule for which " the appellants contend, and it is no doubt the rule to be " followed in Canadian Courts, in cases of collision on " the high seas, but it is not applicable where the colli- " sion occurs in Canadian waters ".

This must always be borne in mind when considering the English authorities, and such authorities, prior to 1873, are only applicable, the English law having been then changed. Previous to that time the law was the same as the present Canadian law.

The case of *The Khedive* is referred to at page 303 of 8 Exchequer Court Reports as follows :

" The alteration of the law in 1873 was an important " one. The occasion of it, and its effect will be seen by " reference to the following cases : In *Tuff* vs. *Warman*, " the defendant was charged with having so negligently " navigated a steam vessel in the River Thames, as to run " against and damage the plaintiff's barge. The case " came before the Exchequer Chamber in 1858. The " effect of the decision cannot, I think, be better stated " than it was by Lord Blackburn in the case of *The Khe-* " *dive* decided by the House of Lords in 1880 : 'On the " construction of this and similarly worded enactments, " it has been held in *Tuff* vs. *Warman* that, though the " plaintiff had infringed the rules, and by his neglect of " duty put the vessel into danger, yet if the defendant " could, by reasonable care, have avoided the consequence " of the plaintiff's neglect, but did not, and so caused the

(1) 8 Ex. C. R., 304.

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"injury, the plaintiff could recover, as, under such cir-"cumstances, the collision was not occasioned by the "non-observance of the rule.'"

"This (he adds) prevented the statute from producing "the effect that those who framed it wished; but nothing "was done until attention being apparently called to the "subject by the case of *The Fenham*, section 17 of the "Merchant Shipping Act 1873 was enacted".

This is evidently one of the earlier cases referred to in the judgment of the Exchequer Court, where the presiding judge said:

"Where that happens" (referring to the collisions in Canadians waters), "the rule to be followed is that "established by the earlier cases. It is necessary then, in "considering the English authorities, to distinguish bet-"ween cases decided before and those decided after 1873, "when the Act was passed".

Virtually, the the same thing was held in the case of The Ship *Cuba* (1), in which Mr. Justice King, in rendering the judgment of the Court, is reported to have said:

"Our Act uses the language of the earlier English Act "17-18 Vict. cap. 104, and enacts: 'If in any case of "collision, it appears to the Court, that such collison was "occasioned by the non-observance of the rules prescribed "by this Act, the vessel shall be deemed to be in fault, "unless it can be shown to the satisfaction of the Court, "that the circumstances of the case rendered a departure "from the rules necessary.' Accordingly it would seem "to be necessary, under our Act, to consider whether the "non-observance of the rule complained of did, or did not, "in fact contribute to the collision. Apart from the sta-"tutory definitions of blame and negligence, there seems "no difference between the rules of law and of Admiralty "as to what amounts to negligence in causing collision.

(1) 26 S. C. R. 661.

"(Per Lord Blackburn in *Cayzer* v. *Carron Co.* and in *The* "*Khedive.*) As applied to the case before us, the princi- "ple is that a non-observance of a statutory rule by the "*Elliott* is not to be considered as in fact occasioning the "collision, provided that the *Cuba* could, with reasonable "care, exerted up to the time of the collision, have avoid- "ed it. (The *Bernina* (1).

The rule is well known that a ship under way running into a vessel at anchor, whether anchored in a proper or improper place, is to blame, and can only relieve herself by saying that the accident was practically inevitable.

In the case of *The Batavier* (2) Dr. Lushington says as follows :—

"The presumption of law, where a vessel at anchor is "run down by another, I take to be this: That the "vessel running down the other must show that the "accident did not arise from any fault or negligence on "her own part, and for this reason, that the vessel at "anchor has no means of shifting her position, or avoid- "ing the collision; and it is the duty of every vessel "seeing another at anchor, whether in a proper or impro- "per place, properly or improperly anchored, to avoid, if "it is practicable and consistent with her own safety, any "collision. This is the doctrine not merely of maritime "law, but of common sense; it is the doctrine which pre- "vails on roads, where supposing a carriage to be stand- "ing still on the wrong side, it is no justification for "another running against it, though the latter be on the "right side. It is always incumbent on the person doing "the damage, to show that he could not avoid it, without "risk to himself".

This has always been the rule, and reference might be made to the remarks of Lord Watson in the *City of Peking* (3) :—

(1) 12 P. D. 36. (2) 10 Jur. 19.
(3) 14 App. Cas. 43.

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"When a vessel under steam runs down a ship at her "moorings in broad day light, that fact is by itself *primâ* "*facie* evidence of fault; and she cannot escape liability "for the consequences of her act, except by proving that "a competent seaman could not have averted or mitigated "the disaster by the exercise of ordinary care and skill".

These cases were referred to in the case of *Hatfield v. The Ship Wandrian* (1), where amongst other things it was held:

"That where a collision occurs between a ship in mo- "tion and one at anchor, the burden of proof is upon the "moving ship to show that the cause of such collision so "far as she was concerned was an inevitable accident, not "arising from negligent navigation. This burden is not "discharged by mere proof that the moving ship was "navigated with ordinary care and skill". (*The Schwan & Albano* referred to).

The case of *Hatfield* v. *Ship Wandrian* was confirmed in appeal by the Supreme Court of Canada (1)

Lord Esher in the case of *The Schwan & Albano* (2) said:

"The case of the *Annot Lyle* (3) raised a question as "to a great many of these definitions which were thought "to have been somewhat loosely expressed in the Admi- "ralty Court. It was a judgment given by Lord Hers- "chell, in the presence of myself and Fry J. who agreed "therefore, according to the report, that the definition of "the law with regard to this matter was as laid down by "Lord Herschell, and agreed with him in the deliberate "terms which he used, and these terms were:—'Under "these circumstances the burden is on the defendants to "discharge themselves from the liability which arises "from the fact that the *Annot Lyle* came into collision "with and damaged a ship at anchor. The cause of colli-

(1) 11 Ex. C. R. 1; 38 S. C. R., 431. (2) (1892) P. D., at pp. 427-8.
(3) 11 P. D., 114.

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"sion in such a case may be an inevitable accident not "arising from negligent navigation ; but unless the defen- "dants can prove this, the law is clear, and they are liable "for the damage caused by their ship.' All I can say is "that in a very long experience in the Admiralty Court "and dealing since that time with Admiralty Court judg- "ments there has always been a marked distinction bet- "ween the phrase "inevitable accident", and the phrase "mere negligence" and that "inevitable accident" is "a far larger term and meant to be a much larger term "than a mere case of negligence".

In the case of the *Indus* (1) where this matter was considered, the law is stated thus:

"It is the duty of a vessel in motion to keep clear of one "at anchor, if the latter can be seen, and if she does not "keep clear, then she must shew good cause for doing so. "In what way then could the defendants justify them- "selves? They could say that everything was done "that could be done by careful seamen, but that some "overwhelming storm occurred which prevented the "ship from being navigated as she ought to have been. "They could say that an entirely unforeseen accident "which could not have been prevented by proper manage- "ment occurred to the machinery with the same result. "There are yet other things which may be classed "under the head of law, known as inevitable accident, "which is a well known expression, and though it may "not be philosophically correct, answers its purpose; "but the defendants must clearly prove the occurrence "of such inevitable accident."

Now, these words were deliberately used with refer- ence to what is taken to be a well known phrase inevi- table accident, and which is a head of law well known and distinguished from the case of mere negligence. The ship in motion is not allowed in such a case to say merely

(1) 12 P. D. 46.

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'I was not guilty of an ordinary want of care and skill.' It must be shewn that it was an inevitable accident.

Availing myself of the power which this court has to invoke the assistance of a nautical assessor I have obtained the assistance of Captain James J. Riley, a mariner of experience, holding a certificate of competency as master from the British Board of Trade, No. 82599, now engaged in important public service as superintendent of pilots, and examiner of masters and mates, and a director of the nautical college, upon whose judgment and opinion I shall find it my duty to rely, and to whom I have submitted the following question, and whose answer is appended thereto :

"Q. Could the steamer *Albert M. Marshall*, under "the circumstances of this case, by the exercise of rea- "sonable care, on the part of the officers navigating her "have avoided the collision in question in this cause?

"A. I am of opinion that the steamer *Albert M.* "*Marshall* could have avoided the collision with the "Montreal Harbour Commissioner dredge No. 1 on the "night of October 8th, 1906 by the exercise of reasonable "care and skill."

This steamer, the *Albert M. Marshall*, seems to have been well equipped with all the requisites for safe navigation, and with a sufficient crew; but in passing I must remark that the master and the mate were navigating in waters that were outside of the limits mentioned on their licenses and that Onesime Hamelin, whom the master had engaged as a pilot had no license, nor branch. It is admitted by the master who was on the bridge, and by Hamelin who says that he took charge of the steamer *Albert M. Marshall* when she left the lower lock of the Lachine canal, that the lights (on the dredge) were seen when the steamer came to the end of the Mackay pier; and it is in evidence that the dredge No. 1 was placed at least 1,600 feet below the Mackay pier.

It is stated by the master, that the two lights when seen were a little, or about half a point, on the port bow, and that they did not alter their bearing even when the *Albert M. Marshall* kept porting, or to use his own words: "He had ported his helm a little to allow for the current, "porting a little at different times as we always do, and "it did not seem to make any difference in the lights, "although we were watching them, thinking we were "going to catch up to some tow or something, and he "was keeping probably his own side of the channel, that "is the starboard side; and when we appeared to be about "100 feet, the dredge loomed up, and then the order was "given by the pilot to hard-a-port."

Onesime Hamelin also says that the lights (on the dredge) did not alter their bearing from the first, or, to use his own words, "they did not appear to be moving, "but I did not pay attention to that; I had shaped my "course to clear them," which testimony is borne out by the fact that when the dredge loomed up, it must have been at about the same bearing, because the master threw his helm hard-a-port to save him from "cutting into the dredge."

Both the master and Hamelin say they thought that the lights were on a tow, or on the stern of some small vessel going down-stream, and keeping on his own proper, that is the starboard, side of the channel. The presence of the lights should have been a sufficient indication to the navigating officer of the *Albert M. Marshall* that there was some sort of craft in the channel; and if he had been in doubt as to the nature or character of the lights, he should have followed the usual custom of mariners, and approached the lights at slow speed until he was sure of what they were (1.) The fact that the lights did not alter their bearing, although the *Albert M. Marshall* kept porting and porting, should have been a

(1) R. S. c. 79. Art. 23.

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warning of danger. I think I am right in saying that this rule would apply also to vessels that are being approached. If the lights were judged to be those of a tow, keeping on her own side of the channel, and if the *Albert M. Marshall* meant to take the tow's water, she should have followed the custom of the pilots on this river, and complied with rule 80 of the harbour commissioners regulations for the port of Montreal, and given one blast of her whistle signifying that she was directing her course to starboard. The absence of a responding signal on the part of the dredge would have warned the *Albert M. Marshall* not to pass to starboard. And if under the impression that it was a tow, why did not the *Albe t M. Marshall* comply with article 24 of chap. 79 R. S. C. ?

In view of the fact that the collision took place even though the *Albert M. Marshall's* engines were rung up full speed ahead, and the helm put hard-a-port, when the dredge loomed up a little on the port bow, I am of opinion that if, even at that time, say 100 feet away as is stated, the speed of the *Marshall* had been stopped, and her helm put hard-a-starboard the collision could have been avoided, as it is proved that she could be turned at a right angle very quickly on her helm. Hamelin says in a second or less, and, as the current runs in a north-westerly direction at that place, at the rate of at lea st five miles an hour, it would have helped her in the execution of that manœuvre, she would have gone on the Montreal or western side of the dredge ; by attempting to go to the eastward, or St. Helen's Island side, the whole force of the current was pressing her down on to the dredge.

The direction and force of the wind would not have been a serious bar to the *Albert M. Marshall's* passing to the Montreal side of the dredge, as it would at most only have been on her port quarter.

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I am of opinion that the navigating officer of the *Albert M. Marshall* misjudged both his distance from the lights, and the strength of the current, and thus failed in proper skill; and that by not approaching the dredge more prudently, he lacked in proper care, There was about 600 feet of navigable water between the dredge and the nearest point, i.e., Victoria pier, on the Montreal side of the harbour, and the *Albert M. Marshall* could have gone to that side of the dredge with all safety. There was about 300 feet of navigable water between the dredge and the St. Helen's Island shore for the *Albert M. Marshall's* draught of water; and if the *Albert M. Marshall* had determined to pass on that side, she should have shaped a proper course to that end, when she first saw the lights, and have taken care to widen the bearing between her and the lights as she approached them. The look-out man on the *Albert M. Marshall* was not giving his sole attention to looking out, but was engaged in other duties that were stated by him as having to be performed before he took his station as a lookout man.

If, as is admitted, the master of the *Albert M. Marshall* saw the lights 1600 feet off, it is evident that he should have seen them more clearly, say 300 feet off, in ample time to avoid them. The night was dark, but clear and without rain. The wind was blowing from the south-west at a rate of from fifteen to twenty miles an hour, and these weather conditions did not change from the time the *Albert M. Marshall* left the Mackey pier until she reached the dredge.

The rules above referred to were continued in force by section 193 of cap. 113 R. S. C., 1906.

Section 916, cap. 113 Revised Statutes of Canada still uses the language of the earlier English Act 17-18 Vict., cap. 104. As applied to the case now before me, the non-observance of a statutory rule or any regulation by the dredge in question is not to be considered as a fact

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contributing to the collision, provided the *Albert M. Marshall* could, with reasonable care exerted up to the time of the collision, have avoided it; and I am advised by the assessor, and I accept his advice, that if such reasonable care had been exerted by the *Albert M. Marshall* up to the time of the collision, the collision could have been avoided.

As to the question of antecedent negligence, in a case where the collision could have been avoided by the exercise of care and skill on the part of those navigating the vessel not originally in fault, it must be remembered that there is a material difference between the English and the American authorities, and the rule contended for by the plaintiff and on which he relies, and which the Court adopts is universally recognized in England and in Canada, but is not generally admitted in the United States. It follows that the American decisions on the consequences of mooring in an improper place, or on the antecedent fault of one ship, when the other ship, by ordinary care, could have avoided the collision, can have no material bearing on the present case.

I concur fully, for the reasons above stated, in the advice given me by the assessor, that the steamer *Albert M. Marshall* could have avoided the collision with the dredge No. 1, the property of plaintiffs on the night of the 8th November if reasonable skill and care had been exercised by the master, officers and crew navigating her.

As to the faults attributed to the dredge No. 1 by the defendant, I find that the lights were technically incorrect though burning brightly at the time of the collision; and that she was brought up in the channel south of what is called the south ship channel about opposite section 22 of the harbour and that the watchman on board was not on deck, when the collision took place. The non-observance by the dredge of any rules on these points is not to be considered as a fact contributing to the colli-

sion, as the collision could have been avoided by the exercise of reasonable skill and care on the part of those navigating the *Albert M. Marshall*. Further reference might be made to the case of *The Ship Cuba* v. *McMillan* (1). where it was amongst other things held: "That the non-observance of the statutory rule "(Art. 18) that steamships shall slacken speed or stop "and reverse, when approaching another ship, so as to "involve the risk of a collision, is not to be considered "as a fact contributing to a collision, provided the same "could have been avoided by the impinging vessel by "reasonable care exerted up to the time of the accident."

I am advised by the assessor and find that if such reasonable care had been exerted up to the time of the accident in the present case, the collision in question could have been avoided.

Having carefully considered all the authorities cited on both sides, the evidence of record, and the advice given me by the assessor, I am of opinion that the collision in question could have been avoided, if reasonable care and skill had been exercised by the master, officers and crew of the *Albert M. Marshall*, and I am consequently of opinion that the *Albert M. Marshall* and her owners, The Great Lakes & St. Lawrence Tranportation Company, are solely responsible for all the damages caused by the said collision; and I consequently find in favour of the plaintiffs and maintain their action with costs and dismiss the defendant's counter-claim with costs; and do further order and adjudge that an account be taken; referring the same to the deputy registrar assisted by merchants, to report the amount due, and order that all accounts and vouchers with the report in support thereof, be filed within six months from the date of the present judgment.

Judgment accordingly.

Solicitors for plaintiffs: *Geoffrion, Geoffrion & Cusson.*

Solicitors for defendants: *Atwater & Duclos.*

(1) 26 S. C. R. 651.

IN THE MATTER of the Petition of Right of

1908
March 25.

JEAN BAPTISTE BOULAY AND ADELARD LUCIER..... ..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... .....RESPONDENT.

Contract—Breach—Supply of hay for war purposes—Inspection—R. S. C. 1906, c. 85—Applicability where provisions for inspection are made in the contract—Negligence—Crown officers—Liability.

During the progress of the South African war, the Minister of Agriculture for the Dominion of Canada entered into certain contracts with the suppliants for the supply of pressed hay for the use of the British forces engaged in the war. Express provision was made in the contracts for the inspection of the hay at the Canadian port of shipment for South Africa. Some of the hay was rejected by the Government Inspector at such port as being defective in quality under the contracts. The rejected hay was sold by the Crown for the benefit of the suppliants at a lower price than that payable under the contracts. In an action for damages for breach of contract it was contended by the suppliants that the provisions of the *Inspection Act* (R.S. 1886, c. 19; R. S. 1906, c. 85) were not complied with by the Government inspectors, and their inspection was therefore improperly made.

Held, that the statute in question did not apply and that as the manner in which the inspection was made satisfied the requirements of the contracts, there was no breach.

Semble, that even if the conduct of the inspectors was illegal or negligent, the Crown would not be bound thereby.

PETITION OF RIGHT for damages for an alleged breach of contract of sale.

By their petition the suppliants alleged, *inter alia*, that during the year 1901 the Government of Canada, through the Honourable Sidney A. Fisher, Minister of Agriculture, requested the suppliants to procure plant and equipment for compressing hay and to purchase large quantities of hay and to hold the same on hand in order to be prepared to fill the orders to be given by the Government

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of Canada for shipment to South Africa. They further alleged that such plant and equipment were procured by them at great expense, and that subsequently thereto they entered into several written contracts with the Department of Agriculture for the supply of pressed hay for the purpose aforesaid. By one of the clauses of the said contracts it was provided that "a number of bales in each car was to be weighed at St. John by an Inspector for the Department, the weight of the car load to be determined on this basis, and any short-weight that may be found to be charged against the shipper," and the suppliants alleged that purporting to act under this clause the inspectors of the said Department improperly reported a shortage in weight in the hay supplied by the suppliants of some 331,084 pounds which was wrongfully charged against the suppliants. The suppliants further charged that the inspectors of the Department improperly rejected hay by reason of alleged defect in quality, and that the Department refused to accept the same. By reason of these alleged facts the suppliants claimed damages, amounting to a sum of $20,766.97, for breach of contract by the Crown.

By its statement in defence the Crown denied the alleged breach of contract and consequent liability therefor, setting up that the suppliants had not purchased plant and equipment for compressing hay at the request of the Minister of Agriculture; that what the inspectors did was done in pursuance of the memorandums of agreement between the Department of Agriculture and the suppliants; that the deductions for shrinkage and short deliveries were properly made as was also the rejection of certain quantities for defect in quality; and that if the suppliants suffered any loss it was by reason of their own conduct in the selection and shipment of the hay during the period in controversy.

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Argument of Counsel.

On the argument the suppliants contended that there had been no proper inspection of the hay, as the provisions of the Dominion Inspection Act (1) had not been complied with.

March 24th, 1908.

The case was heard at Montreal.

C. S. Gogo and *J. A. MacInness*, for the suppliants;

M. G. Larochelle, for the respondent.

Mr. *Gogo*, for the suppliants, contended that there was no proper inspection of the hay upon which the Crown might rest its right to reject the alleged defective portion of it in respect of quality. The requirements of the Dominion Inspection Act, R. S. c. 85, s. 32, were not complied with, and the Government inspectors were themselves responsible for the shrinkage and deterioration of the hay because they did not make their inspection promptly or see that the hay was properly stored in the meanwhile, *Bull* v. *Robison* (2). There is no evidence to show that the hay was of such poor quality as not to answer the requirements in that behalf; and in no event was the Crown justified in re-selling.

[By the Court: Is not the inspection of the hay provided for in the contracts?]

There was no proper inspection, because the provisions of the Act regulating such inspections were not complied with.

Secondly, there was no proper rejection of the hay. The intention to reject was not communicated to the suppliants. The goods shipped f.o b., threw all risks on the purchaser, and the Crown did nothing to assert its right to reject. It assumed the possession of the hay, and did not put itself in a position to reject, much less re-sell the hay. The moment the hay came into the Crown's possession it was necessary for proper inspection

(1) R. S. c. 85. (2) 10 Ex. 342.

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and rejection to be made. The Crown re-sold without notifying the suppliants. (Cites *Benjamin on Sales* (1).

Thirdly, there was acquiescence on the part of the Crown's servants upon which an estoppel arises. They accepted possession of the hay, and exercised the right of re-sale instead of asserting their right to rescind the contract *pro tanto*. Fourthly, there is no shrinkage to be accounted for by the suppliants because there was no proper ascertainment of the fact of short weight as provided for by the Inspection Act.

Mr. *MacInnes*, followed for the suppliant, citing sec. 31 of the Dominion Inspection Act, R. S. c. 85.

The respondent's counsel was not called upon.

CASSELS, J. now (March 25th, 1908) delivered judgment.

I do not think I will call upon the defence for any argument in this matter; I had thought of reserving the case for judgment, but, this is a case which seems to me to depend to a very great extent upon the facts, and, taking everything into consideration, I think it would be better for me to give judgment immediately.

While considering the case, it is well to look at the statement of claim, and to ascertain, in the first instance, what the suppliants are suing for.

The allegation in the 10th paragraph of the petition of right is, that upon the arrival of the hay at St. John, the same was not inspected and weighed properly by the Department, and that said inspection and weighing were delayed from time to time, and no adequate provision was made by the Government of the Dominion of Canada for the care and protection of the hay so delivered between the time of its arrival, and the time of its being inspected and weighed as aforesaid.

As a result of this the suppliants ask for some twenty thousand odd dollars damages.

(1) 15th ed. p. 752,

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At the opening of the case, the claims were all abandoned with the exception of two items, one for the sum of $554.50 claimed in the twenty third paragraph of the petition of right. This is what the suppliants urged as representing the amount of their loss on the hay rejected by the Department as set out in paragraph twelve. This is the paragraph referring to the disposition of the hay by the Department.

The only other item persisted in is the one referred to in the twenty fourth paragraph of the statement of claim, that is in connection with shortage in weight, which refers back to the fifteenth clause.

Now, it is necessary that I should discuss some of the aspects of the case as proved. It is quite clear, to my mind, that this contract was entered into on behalf of the Imperial Government, with the object and purpose that the hay should be received at St. John for transmission to South Africa.

I mention this in connection with the point that has been placed forcibly before the Court by Mr. Gogo in his argument in connection with the obligation to accept the rejected hay. I will deal with this later on.

As I have stated, the contract was entered into for the Imperial Government. It is quite true that the Dominion Government are the ostensible contractors, and it is quite true that they are the parties liable to these suppliants, if any liability exists. Nevertheless, the contract was undoubtedly entered into for the Imperial Government.

The contract itself, according to my judgment is not governed by the Inspection Act (1) at all. The fifth paragraph of the contract (assuming all the contracts to be the same in that respect, as I believe they are) provides that the hay shall be subject to inspection and acceptance by the Department, alongside the steamship at St. John, N.B.

(1) (R. S. 1886 c. 19; R. S. 1906, c. 85)

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The seventh clause of the same contract provides that a number of bales in each car shall be weighed at St. John by an inspector for the Department.

As I view it, the clause of the Revised Statutes has no application whatever to this particular contract. I think the statute relates to inspections, under the terms of the Act, made for the general protection of the public of Canada. The statute itself provides means for fixing the standards, and inspectors are appointed. They have to pass an examination in order that they may be capable of seeing that the goods passed, or purporting to be passed under the authority of the Dominion Inspection Act, are up to those particular standards.

Under this particular contract, the standard is fixed by the contract itself. It is of no concern to the public that this hay might be inspected. This was not hay which was being inspected for the purpose of being put on the market with the hall-mark of inspection under the Revised Statutes of Canada. This hay was to be shipped to South Africa.

It is provided in the first clause of the contract that this hay was to be good timothy, specially selected and with not more than twenty per cent. of clover. The contract is complete in itself.

The suppliants come forward with evidence of as loose a character as could possibly be presented in support of their claim; and, but for the production of information and evidence by the Crown, it would have been almost impossible to arrive at a conclusion as to what they were claiming. The Crown has brought forward certain statements which show the amount of hay rejected, and the reason given for the rejection.

In the first place I may say, there is not the slightest impeachment of the inspectors appointed by the Government. We have the evidence of Mr. Macfarlane, Mr. Robertson, Mr. Moore and others, to the effect that

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these inspectors were all gentlemen in the employ of the Department of Agriculture. They are all gentlemen of high standing, and there has not been any suggestion of anything wrong on their part. If any suggestion at all has been made, it is more a suggestion of error in law, or in the legal way in which the inspection was done, than any personal imputation. There has not been any personal imputation of any kind cast upon these gentlemen, either by counsel for the suppliants, nor in the evidence itself.

As a result of this, I must assume that they intended to accept the hay, if it was up to the standard. There was no object whatever in their rejecting hay which was up to the standard, when they were trying as a matter of fact to get it. That being so, I think that the action taken by these gentlemen is final, so far as the evidence before me is concerned.

More than that, there was a great deal of evidence offered to the effect that the rejected hay was not up to the standard. If we consider the evidence of Mr. Robertson (of course nobody can speak as to every particle of hay that was in each of these bales) but speaking in a general way Mr. Robertson stated that he had seen the rejected hay, and that the hay was properly rejected, because it was not up to the standard called for by the specifications.

Mr. Macfarlane, who was examined as a witness here, gave evidence to the same effect; as also did Mr. Bell. There is no evidence whatever, and no proof has been made showing that the hay was other than what those Inspectors stated it to be. Apparently the only proof is that the hay was placed upon cars at the points of shipment, and, as far as the suppliants know, it was in good order.

No one has come forward to give evidence as to whom the hay was purchased from; no one who sold the hay has

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given evidence to show that the statements made by Professor Robertson, Mr. Macfarlane, Mr. Bell and Mr. Moore were unfounded. We have not a tittle of evidence as against their statements.

All the evidence amounts to is practically this, that the suppliants no doubt honestly intended to supply hay in accordance with the contract, and they took it for granted that the parties from whom they bought the hay were supplying them with hay of quality and weight which would fulfil the requirements of the contract.

The salient feature of the case is that there was a rejection of some of this hay in St. John, and the hay that was rejected was not up to the standard called for by the contract.

The learned counsel for the suppliants, Mr. Gogo has said everything that could be said in favor of the contention of the suppliants.

As to the question of the standard, I have given my views with regard to the statute.

With regard to the expression f. o. b. on the cars, it seems to me that this practically means that the cost of the freight or transportation would be upon the Government. While the hay was put f. o. b. on the cars, nevertheless the Government could reject it at St. John alongside the steamship.

Now, with regard to the excess quantities, raised by Mr. Gogo, I do not think there is a great deal in that.

Mr. Gogo also cited certain cases in support of his contention in regard to the expression f. o. b. For instance, take the case of *Chapman* v. *Morton* (1). That case amounts to nothing more than this, having regard to all the facts and circumstances of the case, the Court came to the conclusion that the vendee had accepted. That is all that case amounts to.

(1) 11 M. & W. 534.

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In this matter it is a difficult thing to argue, or to contend that the department, by its officers, ever intended to accept this rejected hay. One fact alone goes a long way towards the demonstration of that point. The hay was acquired, or purchased, for the purpose of being shipped to South Africa. Now, if they had any contemplation, or intention of accepting the hay, it would not have been sold in St. John after it was rejected. That is obvious, it is also obvious from the evidence, that what the Department, or Departmental officers, did under the terms of this contract (whether they were right, or whether they were wrong) was to reject that hay, and to decline to receive it under the terms of the contract. This is quite apparent from every circumstance connected with the case. It is also quite apparent from the fact that when the hay was sold for $6.80 per ton, that this amount was refunded to the suppliants.

Now, there is a good deal of force in the contention raised by Mr. Gogo, that the Government, or the Government officers, had no right to sell the rejected hay. The hay, having been rejected, never became the property of the Government. However, the place was filled with this hay, and it had to be got rid of, and the officers of the Crown, as a matter of fact, did sell the rejected hay, and did remit the proceeds to the suppliants.

There is no allegation in the petition of right of any loss or damage by that sale. There is no evidence made before me to show that the hay did not realize the highest price that could be got. The action, or claim, is against the Crown, and if the Crown is liable for what might be a wrongful act of the officers of the Department, there is no evidence before me of any loss whatever. It is purely a question of the loss sustained by the suppliants by reason of their property having been sold in the manner in which it was sold. I should doubt very much if the Crown would be liable in any event, for the

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acts of their officers in selling the suppliant's hay. I think it is open to very great question whether such liability exists, but suppose it did exist, what of it? It is only a question of damage, and there is no evidence at all that the hay was not sold upon the best terms that could be got. There is no evidence at all that the hay did not bring the best price on the market, and no evidence whatever of damage of any kind, and no allegation in the petition to any such effect.

I think, therefore, that the case of the suppliants absolutely fails, and the petition is dismissed, with costs.

Judgment accordingly.

Solicitor for the suppliant: *J. A. MacInnes.*

Solicitor for the respondent: *M. G. Larochelle.*

IN THE MATTER of the Petition of Right of

1908
April 10.

SIMEON VIGER.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT

Government railway—Injury to the person — Trespasser — Obligation to fence between railway track and adjoining property in city—R. S. 1906, c. 36, secs. 22 & 23.

The suppliant was injured by a train on the Intercolonial Railway in the city of Lévis, P.Q., he having inadvertently trespassed upon the right of way while engaged in work for the owner of property immediately adjoining such right of way. He alleged that the accident was due to the want of a fence between the railway and such adjoining property, and that it was negligence on the part of the Crown's servants in not having erected a fence there.

Held, that under the provisions of sec. 22, R. S. 1906, c. 36, there was no obligation to fence at the place in question as between the Crown and the suppliant, and that being so, the suppliant had no right of action under the provisions of section 23.

PETITION OF RIGHT for damages for an injury to the person on a public work alleged to be due to negligence of the Crown's servants.

By his petition the suppliant charged that on the 26th day of April, 1906, he was working as a stonemason in the construction of a house belonging to one Després, whose property adjoined the tracks of the Intercolonial Railway in the city of Lévis, P.Q. Certain stones that were being used in the construction of the house, were piled at the back of the house and close to the railway property. Owing to the absence of a fence the suppliant alleged that it was difficult to ascertain the boundary between the properties, and in going to the pile to fetch a piece of stone required for the house he was struck by the engine of a train which came suddenly around a curve

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just at that place, and he was seriously injured. He claimed $2,000 damages.

By its statement in defence the Crown denied that it had any obligation to fence its railway at the place in question. The Crown alleged that the suppliant was a trespasser on the property of the Crown when he was struck as alleged in his petition. If there was any obligation to fence it was upon the owner of the property where the suppliant was working.

April 9th, 1908.

The case was now argued on the points of law raised by the defence.

E. L. Newcombe, K.C., for the Crown, argued that the theory of liability put forward by the suppliant depended wholly upon the obligation to fence the railway so that he might be kept off the track. If there is any obligation upon the Crown to fence it must be found in the twenty-second section of *The Government Railways Act*. The provisions of that section relate to fences against straying cattle, and by no implication can be applied to persons trespassing on the railway. Even in the case of animals there is no absolute obligation to fence, but the obligation arises only on the application of adjoining proprietors, who wish to protect their cattle. (He cited *Brown and Theobald's Railway Law* (1); *Buxton* v. *North Eastern Railway Company* (2).

A. Lemieux, K.C., for the suppliant, contended that it was clearly the duty of the Crown to fence the railway for the prevention of just such accidents as this. The suppliant had a perfect right to do what he was doing, namely, prosecuting his work on adjoining property. Owing to the absence of a fence between the railway and the property where he was working, he had no knowledge that he was near enough to be struck by the train, and

(1) 3rd ed. p. 306. (2) L. R. 3 Q. B. 549.

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he could not see the train approaching as there was a curve at the place where he sustained the injuries complained of. The railway should not be operated to the detriment of the public, and it was negligence on the part of the Crown to allow the chance of an accident such as that which happened to the suppliant.

CASSELS, J. now (April 10th, 1908) delivered judgment.

The points of law raised by the defence were argued before me yesterday. I reserved judgment to consider the argument of Mr. Lemieux, but I am of opinion the points of law raised by respondent must be given effect to.

Section 22 of *The Government Railways Act* (Cap. 36, R. S. 1906) provides as follows:—

"22. Within six months after any lands have been taken for the use of the railway, the Minister, if thereunto required by the proprietors of the adjoining lands, shall erect and thereafter maintain, on each side of the railway, fences at least four feet high and of the strength of an ordinary division fence, with swing gates or sliding gates, commonly called hurdle gates, with proper fastenings, at farm crossings of the railway, for the use of the proprietors of the lands adjoining the railway.

"2. The Minister shall also, within the time aforesaid, construct and thereafter maintain cattle-guards at all public road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway.

"3. In the case of a hurdle gate fifteen inches longer than the opening, two upright posts supporting the gate at each end shall be deemed to be proper fastenings within the meaning of this section.

"4. Every railway gate at a farm crossing shall be of sufficient width for the purposes for which it is intended." R. S. c. 38, s. 16; 50-51 V. c. 18, s. 2.

Section 23 reads as follows:—

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"23. Until such fences and cattle-guards are duly made, and at any time thereafter during which such fences and cattle-guards are not duly maintained, His Majesty shall, subject to the provisions of this Act relating to injuries to cattle, be liable for all damages done by the trains or engines on the railway, to cattle, horses or other animals on the railway, which have gained access thereto for want of such fences and cattle-guards." R. S. c. 38, s. 17.

The suppliant can hardly be classed as an "animal" within the meaning of this section. It provides for the damage in case of non-compliance with the provisions of section 22.

There is no allegation that even for the benefit of the proprietor of the adjoining land the duty of erecting a fence, as provided by section 22, was placed upon the Minister.

As against the respondent no such statutory duty is created, and I think the petition should be dismissed with costs, to be paid by the suppliant to the respondent.

Judgment accordingly.

Solicitor for the suppliant: *A. Bernier.*

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

BETWEEN

1908
April 15

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

AND

THE ROYAL TRUST COMPANY OF CANADA, EXECUTORS AND TRUSTEES OF FRANK BULLER..... DEFENDANTS.

Expropriation—Government railway—Taking possession of land—Vesting of title in Crown—Compensation.

Under the provisions of sec. 18 of *The Government Railways Act*, 1881, [See now R. S. c. 143, sec. 22] lands taken for the purposes of a Government railway became absolutely vested in the Crown at and from the time of possession being taken on its behalf, and compensation must be assessed in respect of the value of the lands at that period. *The Queen* v. *Clarke* (5 Ex. C. R. 64) explained; *The Queen* v. *Murray* (5 Ex. C. R. 69); and *Paint* v. *The Queen* (2 Ex. C. R. 149; 18 S. C. R. 718) referred to.

THIS was an information by the Attorney-General of Canada seeking to obtain possession of land for the purposes of a railway.

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

February 14, 1908.

The evidence was now taken before an examiner, and the case subsequently submitted on written arguments.

A. Whealler, for the plaintiff;

G. E. Corbould, K.C., and *J. R. Grant* for the defendants.

CASSELS, J. now (April 15th, 1908) delivered judgment.

This information is filed on behalf of His Majesty to have the compensation ascertained for certain lands form-

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Reasons for Judgment.

ing part of the west half of Lot No. 190, Group 1, New Westminster District.

The lands were expropriated for the Canadian Pacific Railway.

There is no dispute as to the quantity of land taken, both the plaintiff and defendant admitting the area to comprise one and twenty one-hundreths of an acre.

By the information the Crown offers in full satisfaction the sum of $10.26 for the land taken and the damage for severance, &c.

The defendant places the value of the lands expropriated at $75 a lot or $375 per acre.

A good deal of evidence has been taken by consent before Mr. Beck, and also by consent written arguments have been put in, and I am asked to adjudicate on the evidence and these arguments.

As it seems to me, there is a good deal of useless evidence adduced to show the value of the lots as subdivided, the value of the portion of the lots expropriated and the loss occasioned by the severance of the lots. The defendant even goes so far in its evidence as to contend that assuming the case should be determined on the basis of the existing plan it is entitled to damage by reason of lots 67 an 65 being cut off from access to Fifth Street, ignoring the fact that had the railway never gone near its lands its plan laying out a series of lots 38 to 46, fronting on Fifth Street, necessarily cut off access to Fifth Street over any of the southern lots.

I am of opinion that in arriving at the amount of compensation to be paid the plan subdividing that part of lot No. 190 owned by the defendant, representing the estate of the late Dr. Buller, should be ignored and the case treated as it no sub-division into lots had been effected, but as if the railway had expropriated when that portion of Lot No. 190 had not been subdivided.

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So far as the amount to be allowed is considered it is not of much consequence, as the value of the land prior to sub-division into lots is neither augmented in value nor diminished in value by the sub-division.

It may however affect the question of damages occasioned by the severance of the lands, and the intricate questions discussed in the evidence as to whether lot 46 was rendered wholly valueless, 45 and 44 nearly wholly valueless. Whether the three together are capable of use, and so forth.

It is undisputed that pursuant to *The Government Railways Act* of 1881, the plan of lands required for the right of way for the Canadian Pacific Railway through the portion of lot 190 in question was deposited on the 6th September, 1882, in the Land Registry Office at Victoria. This plan had been approved by the engineer in charge, Mr. Marcus Smith, also by the Dominion Government Agent, Mr. Trutch.

It is proved that in the winter or spring of 1883 the railway took possession of the lands in question, constructed their line of railway, and have ever since occupied the same.

The sub-division into lots was by plan deposited in the Land Registry Office on the 17th June, 1884.

On the 14th July 1885 what may be called a Book of Reference was deposited in the Land Registry Office.

It seems to be assumed by counsel that the case of *The Queen* v. *Clarke* (1) determines the question, and that the 14th July, 1885, must be the date on which the lands were vested in the railway. The case of *The Queen* v. *Clarke* does not so determine. The learned judge in that case was dealing with a case where possession had not been taken. As to the right of way in that case he expressly states :—" and with the exception possibly of " the right of way there was no such taking of possession

(1) 5 Ex. C. R. 64.

" of the lands expropriated as would give the Crown title " under the 18th section of the Act ".

He was of opinion that it was of no consequence whether the period for ascertaining the compensation for the lands taken as right of way was taken as of 1882 or 1885, as there was no difference in value between these dates. When however it came to a question of allowing for buildings erected between 1882 and 1885 then it became material, and the fact in that case was that the railway was not in possession.

By *The Government Railways Act*, 1881, section 17, it is provided that the arbitrators in estimating and awarding the amount to be paid any claimant for injury done to any land or property and in estimating the amount to be paid for lands taken by the Minister under this Act shall estimate or assess the value thereof at the time when the injury complained of was occasioned.

The railway in this case was, as stated, in possession of the claimant's land in 1883.

Section 18 of *The Government Railway Act*, 1881, provides that the lands shall by the fact of the taking possession become absolutely vested in the Crown.

I am of opinion, therefore, that the valuation should be arrived at as of the earlier period, and not 1885. *The Queen* v. *Clarke*, (*supra*); and *The Queen* v. *Murray* (1) as well as *Paint* v. *The Queen* (2) fully deal with the principles that should govern in dealing with a case of this nature.

The difficulty is, from the evidence given in this case, to form any reasonable idea of the sum to be allowed. Too much is left to conjecture. It is noticeable that the defendant in this case notwithstanding the evidence of various sales at high prices (some or most of which were eventually abandoned) places the value of his lots at $75 a lot.

(1) 5 Ex. C. R. 69.

(2) 2 Ex. C. R. 149; 18 S. C. R. 718.

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For the Crown, Shannon places the value of the land at $100.00 an acre.

Major in his evidence supports this view.

There is no evidence on the part of the plaintiff of any benefit as an offset.

The Crown has offered $10.26 for the lands taken.

This acreage taken is one $\frac{20}{100}$ acres, and if I am correct in my view this should be increased by the lands taken on the part which, subsequent to the possession, was dedicated as streets.

The case is one in which it is impossible to arrive at any exact conclusion.

I think justice will be met by allowing the defendant $300.00 for the lands taken and injury caused by severance. There seems to be no doubt on the part of the witnesses that damage has been occasioned by the severance.

The plaintiff should pay the costs of defendant, and interest should be allowed on the amount awarded in the usual manner.

Judgment accordingly.

Solicitor for plaintiff : *F. W. Howay.*

Solicitors for defendant : *Corbould & Grant.*

IN THE MATTER of the Petition of Right of

THE BOARD OF WATER, LIGHT AND POWER COMMISSIONERS OF THE VILLAGE OF FENELON FALLS ..... SUPPLIANTS; 1908 June 14.

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Landlord and tenant—Lease by Crown—Surplus water passing through canal—Covenant—Navigation—Right of Crown to use dam—Maintenance of same.

A lease by the Crown of certain lands together with surplus water passing through a canal at a certain place in excess of the quantity required at any time for the purposes of navigation, provided that navigation should not be at any time obstructed or impaired by the employment of such surplus water by the lessees, contained the following clause:—

"If the existing dam can reasonably be made use of, and a new dam "between it and Cameron's Lake, can be dispensed with, the lessor "may rebuild, maintain and control the old dam or may build a new "one in substitution therefor, and may raise and alter the same to a "higher level or otherwise, paying damages consequent thereon "above as well as below it, but if it is found necessary to build a "dam higher up in the river, and if it becomes necessary to expro-"priate land in the bed of the river for that purpose the Smith "estate [the original lessees] are not to be entitled to any additional "compensation for the land expropriated nor for the old dam; and "if the old dam or a substitute therefor be used by the Government "as above, the same shall be maintained in perpetuity by the Gov-"ernment, and in so far only may be required for the purposes of the "navigation of said river and canal."

Held, that so long as the Crown considered that the dam could be used for the purpose of improving the navigation and desired to use it it had the right to do so; and so long as the dam was used and in the occupation of the Crown, it was bound to maintain the same, but only to the extent to which, in the opinion of the Crown, it was necessary for the purposes of the navigation in question.

2. That the Crown was under no contractual obligation to the lessors to keep the dam in repair.

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Argument of Counsel.

PETITION OF RIGHT to obtain a declaration, *inter alia*, that the Dominion Government was obliged to maintain, repair and renew a certain dam on the Trent Valley Canal, in virtue of a covenant in a lease between the Crown and the suppliants' predecessor in title.

The covenant is set out in the reasons for judgment, and the principal facts are there stated.

May 7th, 1908.

The case came on for hearing at Toronto.

F. A. McDiarmid, for the suppliants: Grants for valuable consideration are construed most strictly against the Crown. *Bulmer* v. *The Queen* (1). The employment of the word "sub-lessees" shews an intention to make the covenant enure to the benefit of parties later in interest. *Shaber* v. *St. Paul Water Co.* (2). *Spencer* v. *Parry* (3). The Crown by its grant is under an obligation to maintain the whole dam in perpetuity. *Stodhart* v. *Hilliard*, (4) *People* v. *Gaige* (5) *Burnham* v. *Kempton* (6) *Colwell* v. *May's Landing Water Power Co.* (7) *Natoma W. & M. Co.* v. *Hancock* (8) *Hutchison* v. *Chicago* (9).

R. J. McLaughlin, for the respondent: There is no privity of contract or estate between the suppliants and the Crown; the suppliants are strangers to the land. The covenant does not run with the land unless there is mutuality or succession of interest. Privity of estate is essential to carry the benefit of the covenant to subsequent owners of the land in question. This is the law of the older States in the American Union and it is the law of England. See *Spencer's Case* (10) *Mygatt* v. *Coe* (11) *Norcross* v. *James* (12) *Webb* v. *Russell* (13).

(1) 3 Ex. C.R. at p. 214.
(2) 30 Minn. 179.
(3) 3 A. & E. 331.
(4) 19 Ont. R. 542.
(5) 23 Mich. 93.
(6) 44 N. H. 78.
(7) 19 N. J. Eq. 245.
(8) 101 Cal. 54.
(9) 37 Wis. at p. 603.
(10) Ruling Cases, Vol. 15 at p. 233.
(11) 142 N.Y. 78.
(12) 140 Mass. 188.
(13) Ruling Cases, Vol. 15 at pp. 244, 245 and 246.

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Reasons for Judgment.

CASSELS, J., now (June 14th 1908), delivered judgment.

This petition came on for trial at Toronto on the 7th May, 1908. I have been unable to consider it until my return from the Maritime Provinces.

I have gone carefully over the evidence and documents, and remain of the same view as I entertained at the trial.

I think it unnecessary to consider the questions of law argued at the trial by counsel for the Crown as to whether assuming the covenant to mean what the suppliants contend for there is any privity entitling the suppliants to enforce it.

The case made on behalf of the suppliants is that by contract the Crown is liable to keep in repair the dam the subject matter of the controversy.

I am indebted to counsel for the suppliants and the Crown for a careful presentation of both law and facts.

The right of the suppliants and of the Crown (assuming the suppliants have the right to enforce the covenant) depend on the meaning of the covenant contained in clause 9 of what is called the lease dated 12th April, 1890. It reads as follows:—

"9. If the existing Dam can reasonably be made use of, and a new Dam between it and Cameron's Lake can be dispensed with, the Lessor may rebuild, maintain and control the old Dam or may build a new one in substitution therefor, and may raise and alter the same to a higher level or otherwise, paying damages consequent thereon above as well as below it; but if it is found necessary to built a Dam higher up in the river, and if it becomes necessary to expropriate land in the bed of the river for that purpose the Smith Estate are not to be entitled to any additional conpensation for the land expropriated nor for the old Dam; and if the old Dam or a substitute therefor be used by the Goverment as above, the same shall be maintained in perpetuity by

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the Government, in so far only as may be required for the purposes of the navigation of said River and Canal".

I agree with the contention of Mr. McDiarmid that the dam referred to includes that portion of the dam marked Wing Dam.

The suppliants were notified pursuant to the provisions of clause 8 of the lease to prevent waste of water. This clause reads as follows:—

"8. The whole water power at and above the Falls and so far as the Smith property extends below the said Falls (subject to the rights of the Government as above set out) is to remain under the control of the Lessees, it being understood that the Lessees shall maintain all their works, on both sides of the river, in sufficient repair at all times, so that no waste of water or damage to the canal, or to the navigation thereof or to the river, shall arise from leakage or otherwise—and that the canal officers shall at all times have access to the works and mills of the said Lessees to ascertain the state of repair and condition thereof."

They therefore expended the sum of about $4,000 in rebuilding a portion of the dam.

The work was essential if they desired to operate their work. To get the proper head a dam is a *sine quâ non*.

From the standpoint of the Crown the only object of the dam was to back up the water of the river and so improve the navigation.

So long as the Crown considered the dam could be used for the purpose of improving the navigation and desired to use it, the Crown had the right to use it. So long as they used it and were in occupation the Crown was bound to maintain it, but only to the extent to which in the opinion of the Crown it was necessary for the purposes of the navigation of the river and canal.

I cannot find any contractual liability as claimed by the suppliants.

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Counsel for the suppliants asked that having regard to the peculiar circumstances of the case and that it was proper to have a construction of the lease, no costs should be given against the suppliants in the event of the decision being adverse.

I think except under peculiar circumstances costs should follow the event. In this case, however, counsel for the Crown assented to my suggestion that if the suppliants would agree that this decision should be final and no appeal taken, then no costs should be given.

I dismiss the petition without costs.

Judgment accordingly.

Solicitors for suppliants: *McDiarmid & Weeks.*

Solicitor for respondent: *R. J. McLaughlin.*

IN THE MATTER of the Petition of Right of

1908
Sept. 16.

J. C. MILLER.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Obstruction to navigation—Submerged portion of breakwater constructed by the Public Works Department—Liability of Crown.

The suppliant, a resident of the State of Michigan, U.S.A., sought to recover damages against the Crown for injury to two barges of American registry, which ran upon a submerged portion of a breakwater erected by the Department of Public Works at the entrance to a public harbour in Canada. The top of the breakwater had been washed away some time previously, and had not been re-built. The suppliant charged negligence against the Crown in allowing the breakwater to fall into disrepair, and in not sufficiently indicating the obstruction to navigation by means of buoys or otherwise. Information concerning the obstruction had been given to mariners prior to the accident by means of notices issued by the Department of Marine and Fisheries, and such information was also printed in official notices issued to American mariners by the Government of the United States.

Held, that upon the facts there was no negligence of any officer or servant of the Crown within the meaning of R. S. c. 140, sec. 20 (*c*).

The Queen v. *Williams* (9 App. Cas. 418 distinguished.

2. The fact that after the occurrence of the accident an officer of the Department of Public Works ordered buoys to be placed on the obstruction had no bearing upon the issue of negligence raised in the action.

PETITION OF RIGHT for damages arising out of an accident to foreign vessels navigating Canadian waters.

The facts are stated in the reasons for judgment.

May 8th, 1908.

The case came on for hearing at Toronto.

L. E. Dancey, for the suppliant, relied on *The Queen* v. *Williams* (1). He also cited *Filion* v. *The Queen* (2);

(1) 9 App. Cas. 418. (2) 4 Ex. C. R. 134.

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Letourneux v. *The King* (1); *Brady* v. *The King* (2); *Gilchrist* v. *The King* (3); *Martin* v. *The Queen* (4); *Gagnon* v. *The Queen* (5); *McKays' Sons* v. *The Queen* (6).

C. J. R. Bethune, for the respondent, cited *Hart* v. *L. & N. W. Ry. Co.* (7); *Cole* v. *Canadian Pacific Ry. Co.* (8); *Columbia Ry. Co.* v. *Hawthorne* (9).

CASSELS, J., now (September 16th, 1908) delivered judgment.

The petition in this matter was filed on behalf of one J. C. Miller, a resident of Marine City, in the State of Michigan.

The petitioner is the owner of the steam barge *Rand* and the barge *Annie P. Grover*, both being ships of American register.

The allegations of the petition are that in the month of May, 1907, the two barges were chartered to carry cargoes of coal from the City of Cleveland to the Town of Goderich in the Province of Ontario.

The allegation is that on Monday, the 6th May, 1907, the two barges were about to enter the harbour of Goderich when they ran upon a sunken breakwater placed there by the Public Works Department of the Government of the Dominion of Canada and sustained damages to the extent of $1,500.

I quote verbatim the 4th and 5th paragraphs of the petition:—

"That said breakwater was in the course of construction by the said Department of Public Works during the year 1906 and is situated in Lake Huron about three quarters of a mile from the entrance to the piers of the

(1) 33 S. C. R. 335.
(2) 2 Ex. C. R. 273.
(3) 2 Ex. C. R. 300.
(4) 2 Ex. C. R. 328.
(5) 9 Ex. C. R. 189.
(6) 6 Ex. C. R. 1.
(7) 21 L. T. N. S. 261.
(8) 19 Ont. P. R. 104.
(9) 144 U. S. 202.

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said port of Goderich, and during the fall of said year 1906, the top of said breakwater through improper construction was washed off and there remained the submerged portion referred to in paragraph 3 hereof.

"That said portion of submerged breakwater was left by the said Department of Public Works in a very dangerous condition and a menace to the safe navigation of vessels entering the said port of Goderich, and no buoys or other marks were stationed by the said Department of Public Works at or near the submerged breakwater to indicate the danger to vessels about to enter the said port of Goderich, and by reason of the negligence of said Department of Public Works in not placing buoys or other marks to indicate said danger, your petitioner's said barges ran upon said breakwater and sustained the damages hereinbefore mentioned."

The Attorney-General of the Dominion of Canada acting for His Majesty the King, pleads want of care and caution upon the part of the captain and men in charge of the barges in attempting to enter the harbour of Goderich otherwise than by the proper channel, and that but for such want of care the accident would not have happened.

The defence also raises the question that even admitting the allegations contained in the said petition to be true, that no right in law exists against the Crown in favour of the petitioner.

The petition was tried before me at Toronto and subsequently written arguments were put in.

A considerable portion of the evidence was taken by commission.

There is no dispute as to the fact that the barges ran on the sunken breakwater.

At the trial it was agreed by both counsel for the petitioner and the Crown that in the event of the petitioner

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being entitled to damages, the amount of such damages should be assessed at the sum of $1,000.

This agreement obviates the necessity of considering a considerable portion of the evidence relating solely to the amount of damages.

There is but little dispute as to the facts of the case.

It appears that in the year 1904 the Department of Public Works undertook the construction of a breakwater to protect the harbour of Goderich.

A contract was entered into by the Department with Messrs. Battle & Conlon, of Thorold, for the construction of this breakwater, being about 500 feet in length and 35 feet wide. The construction of this breakwater was proceeded with when in the fall of 1905, a large portion of the superstructure was washed away. No further work was done towards the completion of the breakwater, and during the year 1905, the balance of the superstructure was washed away leaving no portion of the breakwater above the surface of the water.

The claim to relief is founded upon sub-sec (*c*) of section 20 of the Exchequer Court Act, cap. 140 R. S. C. It is contended that injury has resulted to the petitioner on a public work arising from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment.

The ground for the claim is as stated in the 5th paragraph of the petition hereinbefore quoted, namely, that the Department of Public Works should have placed buoys or other marks to indicate the danger to vessels entering the harbour.

The breakwater in question is a lawful structure. In the early spring of 1909 the contract with Battle and Conlon was terminated and a new contract for the completion of this breakwater entered into.

At the time of the accident the day was fine and clear and the water smooth. William Shackett was the cap-

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tain of the steam barge *Rand* and was responsible for the navigation of the vessels. The captain had been to Goderich at least four times previous to the trip in question, his last trip previous being at least three years previous to the one in question. On entering the harbour on the morning in question, the captain, apparently ignorant of any change in the ranges, proceeded to enter on the course pointed out by the ranges previously in use instead of by the channel indicated by the new ranges. Had the captain been aware of the change of the channel and of the new ranges, it is obvious from his own evidence that the accident would not have occurred.

The notice to mariners and the warnings given as to obstructions in entering any of the harbours are issued by the Department of Marine and Fisheries. These notices are widely circulated and every facility is afforded for obtaining such notices. The following notices were issued by the Department of Marine and Fisheries :—

"DOMINION OF CANADA."

Notice to Mariners.

No. 46 of 1905.

(Inland Notice No. 7.)

All bearings, unless otherwise noted, are magnetic, and are given from seaward, miles are nautical miles, heights are above high water mark and all depths are at mean low water."

"ONTARIO.

(115) LAKE HURON—GODERICH—CONSTRUCTION OF BREAKWATER—TEMPORARY LIGHTS.

A breakwater is being built about 1,400 feet outside the pier forming the sides of the channel into Goderich Harbour, Lake Huron, to shelter the entrance, and mariners are now warned of this fact in order that the cribs already sunk in place may not prove dangerous to navigation.

The cribs as sunk are below the surface of the lake but are marked in daytime by timbers standing up out of the water. At night the contractors keep them marked by lights. The number, description and position of these lights is not stated.

N to M No. 46 (115) 13—6—05.

Source of information, report from Harbour Master, 6th June, 1905. Admiralty Charts affected—Nos. 407, 519 and 678. Publication affected—Sailing Directions for Lake Huron 1905, page 61. Department of Marine and Fisheries of Canada, File No. 5686.

F. GOURDEAU, *Deputy Minister.*

Department of Marine and Fisheries,
Ottawa, Canada, 13th June, 1905.

Pilots, masters or others interested are earnestly requested to send information of dangers, changes in aids to navigation, notice of new shoals or channels, errors in publications, or any other facts affecting the navigation of Canadian waters to the Chief Engineer, Department of Marine and Fisheries, Ottawa, Canada. Such communications can be mailed free of Canadian postage."

"ONTARIO.

(250) LAKE HURON—GODERICH—NEW BREAKWATER—DAMAGED—CAUTION.

Messrs. Battle and Conlon, contractors, report that a portion of the new breakwater in process of construction across the entrance to Goderich harbour, Lake Huron, has been carried away by a gale, leaving it partially submerged and a possible danger to vessels entering. At this season of the year it is difficult if not impossible to maintain lights on the submerged portion of the breakwater and mariners are notified that they must invari-

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ably enter on the new range of red lights described in Notice to Mariners No. 82 (198) of 1905.

N to M No. (250) 20—11—05.

Source of Information—Departmental Records.

Admiralty Charts affected—Nos. 3,319, 3,390, 519 and 678.

Publication affected—Sailing directions for the Canadian shore of Lake Huron, 1905, page 61.

Department of Marine and Fisheries of Canada, File No. 17, 380.

F. GOURDEAU, *Deputy Minister.*

Department of Marine and Fisheries,
Ottawa, Canada, 20th November, 1905.

Pilots, masters or others interested are earnestly requested to send information of dangers, changes in aids to navigation, notice of new shoals, or channels, errors in publication, or any other facts affecting the navigation of Canadian waters, to the Chief Engineer, Department of Marine and Fisheries, Ottawa, Canada. Such communication can be mailed free of Canadian postage."

Mr. O'Hanly in his evidence shews the care taken to have these notices brought to the attention of the mariners. Bulletin No. 16 of the War Department of the United States, issued in 1906, at page 22, shows the full information given to mariners. It also appears that in the Coast Pilot Book which Captain Shackett had, the information was contained. It would appear the captain made no inquiries from any one as to changes in the ranges, but took his chances.

No officer of the Public Works Department had any duty cast on him of placing buoys.

The protection of navigation was under the supervision of the Marine and Fisheries Department. They adopted all the precautions they considered necessary. These precautions were sufficient if the captain had exercised

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reasonable care. I think no legal cause of action lies in favour of the petitioner.

I cannot see how the Crown can be made liable even if the Marine Department might in my opinion have taken extra precautions. The case of the petitioner is not brought within the statute Even if it were the taking for granted on the part of Captain Shackett is the real cause of the accident.

I have read over and considered the numerous authorities quoted by counsel. *The Queen* v. *Williams* (1) was greatly relied on by the petitioner; I do not think this case entitles the petitioner to relief. This case depends on a statute differing from the one governing this case.

Great stress is placed in the case upon the fact that no steps had been taken to indicate to mariners the hidden danger. On the day of the accident and after learning of it, Lamb ordered buoys to be placed to indicate the sunken breakwater. It was a wise precaution and taken of his own motion. This fact cannot create a liability if it did not exist.

Mr. *Bethune* cited several cases holding that such subsequent precautions cannot create liability.

Having regard to the facts of this case, if a legal liability did not exist, such subsequent acts would not creat it.

I think the petition should be dismissed with costs.

Judgment accordingly.

Solicitor for suppliant: *L. E. Dancey.*

Solicitors for respondent: *Chrysler, Bethune & Larmonth.*

(1) 9 App. Cas. 418.

BETWEEN

1908
Nov. 6.

THE RED WING SEWER PIPE COMPANY..... } CLAIMANTS;

AND

HIS MAJESTY THE KING.....DEFENDANT.

Revenue—Customs—Reference of claim—R. S. 1906, c. 48, sec. 179—Evidence before court which claimants neglected to produce before Minister of Customs—Reversal of Minister's decision—Costs.

Where, in the case of a Customs claim referred to the court under the provisions of sec. 179 of the Customs Act (R. S. 1906, c. 48), the judgment was mainly based on evidence which, though it was in their possession at the time, the claimants had neglected to produce to the Minister of Customs when the claim came before him, the claimants were not allowed the costs of the reference.

THIS was a reference to the court of a claim for goods alleged to have been wrongfully seized by the officers of the Customs Department.

The reference was made under the provisions of sec. 179 of the *Customs Act* (1) and the facts of the case are set out in the reasons for judgment.

September 15th and 16th, 1908.

The case came on for argument at Winnipeg before Sir Thomas W. Taylor, Acting Judge.

Fullerton and *Graham* for the claimants;

Affleck for the defendant.

Sir THOMAS W. TAYLOR, Acting Judge, now (November 6th, 1908) delivered judgment.

This case arises out of a seizure of a quantity of sewer pipe, made by a Customs official at Winnipeg, in October, 1906, and confirmed by a decision of the Minister of

(1) R. S. 1906, c. 48.

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Customs, in February, 1907. The parties interested being dissatisfied, the Minister by virtue of the powers vested in him by the Customs Act, has referred to this Court for adjudication, the claim against his decision.

Lee, the purchaser from the Red Wing Sewer Pipe Co., now alleging that he has no interest in, and makes no claim to, the pipe, the company prosecutes the claim as claimants.

At the trial, all the correspondence, affidavits, statutory declarations, invoices, shipping bills and other documents, contained in the file from the Customs Department, were produced and read or referred to, except one. That was an affidavit made by Charles E. Sheldon, and it was objected to on the part of the respondent as having been sent in too late, and not before the Minister of Customs when he disposed of the matter. It was ruled out, following a decision of the late Mr. Justice Burbidge in *Dominion Bag Co.* v. *The Queen* (1).

There being on the file a letter stating that an official of the company called at the Custom House, admitted that a mistake had been made, and said a cheque for the penalty would be sent, but none had been received, a witness was called to give evidence as to these facts. To the admission of his evidence objection was taken, until the person alleged to have made the admission was proved to be an agent of, or connected with, the company. Counsel for the respondent undertaking to prove the agency, the evidence was permitted to be given. As, however, no such proof was offered, the evidence was rejected and treated as struck out.

Other correspondence was also produced, and oral evidence given.

There was no objection taken to the sum of $601.82 named in the recommendation of the Commissioner of Customs, dated the 30th January, 1907, as a proper

(1) See Audette's Exchequer Court Practice, p. 183.

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amount, in the event of the seizure being upheld. The only issue raised was:—Is the pipe in question standard pipe, properly valued and entered as such at 86¼ cents, or is it double strength pipe of a higher value?

It appears that in March, 1906, the purchasing agent of the Canadian Pacific Railway wrote to Lee, asking how soon the company could procure a quantity of double strength vitrified culvert pipe, 24 inch, according to C. P.R. specifications, and at what price. A copy of the specifications was sent with that letter. In these, dealing with 24-inch pipe, the minimum thickness of shell is given as 2 inches, length as laid, 30 inches, and weight per lineal foot 190 pounds. To this Lee replied, giving a quotation on "24-inch pipe" in car loads f. o. b., Winnipeg, $1.90 per foot, or $1.80 for cash within 30 days.

Lee seems then to have written to the claimants about pipe, for on 30th April they wrote him: "We have an option on 100 cars of pipe at St. Louis, assorted sizes." The latter then proceeded to make him an offer of any portion of this pipe he desired, at the cost price f. o. b. at factory, St. Louis, and prices are given, among them 24-inch double strength at $1.05 $\frac{3}{10}$ per foot, and the weight is given 178 lbs. to the foot. On 7th May Lee telegraphed to claimants:—"Rush all the 24-inch standard and double strength that you have." Next day he wrote:—"If you have double strength send them, but it is standard that I want." A few days later he wrote:—"You can ship 10 cars 24-inch pipe, but I must say the price is rather high. I will take the 10 cars and I want to keep the Western trade." No doubt this must have referred to the 10 cars double strength. On the 17th May Lee again wrote:—"I want you to ship me, say 10 or 12 cars 24-inch standard, as I want to try to push it off with the other 24-inch double strength that you are sending."

When this correspondence was before the Customs authorities, they seem to have assumed that the option

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mentioned in the claimants' letter of 30th April was one from the Evans & Howard Fire Brick Co. of St. Louis, and so connected the pipe seized with it. But it was not so, as that option was from the Laclede Co., another company manufacturing sewer pipe at St. Louis. And from that company double strength pipe was imported by Lee during 1906.

Lee's letter of 17th May has been unfavourably commented on. In an opinion given the Customs Department, it is said: "that this pipe was purchased by Lee to fill his orders from the Canadian Pacific Railway, and that it was being furnished to said company as double strength pipe, is, I think beyond doubt". And again, it is said of the letter that it "shews the kind of man we are dealing with. Any man who would deliberately push off standard on customers as double strength could scarcely be expected to be scrupulous in his dealings with the Customs".

Now this letter does not necessarily indicate an intention to defraud customers by pushing off on them an inferior class of goods for a higher class. He was a very large dealer, handled during that year great quantities of pipe, and would naturally desire to have always on hand an assorted stock, in order as he says, in another letter "to keep the Western trade". That he could expect to pass off on the Railway Company, with its intelligent and experienced engineers and officials, sewer pipe inferior to that he had tendered to supply, is highly improbable.

Besides in the letters to the Company's agent he always speaks of 24-inch pipe, and never mentions double strength. His doing so can be understood, for when examined as a witness, he swore that his tender to the company was to supply Canadian double strength or American standard. Although one of the Company's engineers was afterwards called as a witness by the res-

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pondent, no attempt was made to impeach Lee's evidence as to his tender, and it stands wholly uncontradicted.

The evidence as to the weight of pipe being a material element in determining its classification, is not very satisfactory. The Evans & Howard Co. issue a catalogue or price list as to the pipe manufactured by them, and in that the weight of the different kinds of pipe is given. But that is said to be an old catalogue issued about 30 years ago, reprinted since then carelessly and without revision. It is said weight is not now considered important, the quality of the pipe depends on the thickness only. Engineers who were examined gave similar evidence. One of them said that weight is no test, that in determining whether light or heavy, the thickness only is looked at. "We gave the elements in determining the the quality of the pipe to be, its strength, that the spigot end fits well, and that it will not be disintegrated by what passes through it." Another said, the weight has nothing to do with the classification. It may be difficult fully to accept such evidence, but it was given by intelligent experts who have handled large quantities of sewer pipe.

No doubt the material used in the manufacture of the pipe has a great deal to do with the weight. The use of fire clay in making the pipe, and the amount of that entering into its composition, must naturally affect the weight.

A letter to the Customs appraiser at Winnipeg from the Monmouth Mining and Manufacturing Company, of Illinois, was produced and read. That company speaking of 24 inch pipe, says:—"So far as we know this pipe is made in only two weights, namely, standard and double strength. This distinction applies to the thickness of the pipe only. Standard 24 inch pipe is 1½ inches in thickness, and should weigh 125 lbs. per foot. Double strength 24-inch pipe is two inches in thickness and should weigh 150 lbs. per foot. These weights are for pipe in 2

foot lengths. If the pipe was 2½ foot lengths the weight per foot would be slightly less, owing to the increased length of barrel to each socket". But the Monmouth pipe is made of shale only, for fire clay is not found in that neighbourhood. Shale is a much lighter material than fire clay.

The pipe manufactured by the Evans & Howard Co. is made of fire clay, shale, loam or top soil, gravel, and to that is added what is known as graul, or broken up and crushed sewer pipe. Fire clay, a heavy material, enters largely into the composition of their pipe, and consequently it is heavier than that of other manufacturers.

A good deal of stress was laid by the Customs Department upon the weight, 30,550 lbs. entered on each shipping bill. From the declaration made by one of those, a dealer in sewer pipe, who examined the pipe in question at the instance of the Customs appraiser, it appears that he was asked: "From your experience would you think it at all probable that 187½ feet Evans & Howard standard 24-inch sewer pipe, would be billed as weighing 30,550", and he replied:—"No, I do not think this either probable or possible, in straight business. If a dealer was entitled to 210 feet in a car load of 14 tons, he neither could nor would accept 187½ feet as weighing 30,550". Another dealer who examined the pipe made a similar statement.

The evidence now given shows that the 30,550 had nothing whatever to do with the actual weight of the pipe contained in the car. The pipe was not weighed before loading, nor was the car weighed after being loaded. The 30,550 was arrived at, and placed on each shipping bill, in this way: There is a Western Weighing Association for all the western and some of the eastern American railroads, and that association has settled a tariff of freight rates, giving the weight and rate of freight at which different articles shall be carried by these roads.

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The provision as to sewer, 24 inches in diameter and 2½ feet in length, is that it shall be carried, and freight charged on it, as weighing 404 lbs. each piece, and to that is to be added from 200 to 300 lbs. for the weight of the lumber used in packing and staying the pieces of pipe in the car. In each car in question here there were 75 pieces of such pipe. Now taking 75 pieces of pipe at a weight of 404 lbs. each, it will make 30,300 lbs., and adding 250 lbs. for the lumber the 30,550 is arrived at. That amount was put on each shipping bill, not because it was the actual weight of the pipe, but because it was the weight fixed by the Western Weighing Association as that at which the number of pieces of each pipe in each car would be carried, and on which freight would be charged.

The pipe certainly came from, and was manufactured by, the Evans & Howard Co. It was not made specially to fill Lee's order, but taken from the ordinary run of pipe being made at the time. All pipe made by that company is classed as heavy or light, the former is stamped "H", the latter is stamped "L". All the pipe here has the tetter "L" on it, with the manufacturer's name.

During the year 1906 the Evans & Howard Co. turned out an immense quantity of pipe of different grades; but they did not, in that year, make any double strength pipe 24-inch in diameter and 2½ feet in length. The only double strength pipe they made that year was in 2 feet lengths.

The pipe when seized was examined at the instance of the Customs officials by five persons, a civil engineer and four rival dealers in sewer pipe. Two of the latter described the pipe as 25-inch double strength 2 inches thick and 170 lbs. in weight. The other two gave the same description of it, although they say, it ran from a little under to a little over, 2 inches in thickness. Rin-

dall, the engineer says, he found the pipe from 1¾ to 2 inches in thickness, and it could not possibly be standard pipe. All these persons refer to the Evans & Howard catalogue or price list, and evidently formed the conclusions to which they came on the description and weight of pipes given there. None of them supply any information as to how, or at what part of the barrel, they took their measurements. If they took the thickness at the spigot end, as that of the pipe, or if they measured close to that end, undoubtedly they would find the thickness to be two inches, or in some cases perhaps even a little more. The greater thickness at the spigot end is caused by the pipe when manufactured, and while still in a soft and pliable condition, being set up on that end to dry, the weight crushing in and thus thickening the pipe for a few inches up the barrel. But that affords no criterion for judging the thickness throughout the barrel, or beyond those few inches.

Rindall was examined as a witness, and then said he measured about 8 inches from the spigot end and also some inches from the bell, finding the thickness to be from 1¾ to 2 inches. He was somewhat confused and indefinite in his evidence; his recollection of measuring the pipe seemed vague, and he was by no means a satisfactory witness.

In the interest of the importers, the pipe when seized, was examined by two civil engineers, an architect, and the inspector of sewer pipe for the city of Winnipeg. According to their declarations then made they found, measuring some inches from the spigot end, the thickness to be 1¾ inches and in a few places 1⅞ inches. They all, without reserve, declare it to be a standard pipe.

At the trial, two civil engineers who had also examined the pipe, but had made no statutory declarations, were produced as witnesses for the claimants. One of them, the engineer of the City of Winnipeg, has handled sewer

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pipe for many years, having laid nearly fifty miles of it. He found the greatest thickness to be $1\frac{3}{4}$, and in a few places $1\frac{5}{8}$ inches. He says it is standard or light pipe. The other witness was an engineer who has also had extensive experience, and he was perhaps the most satisfactory witness of all. He had examined no less than 123 pieces of the pipe, and produced his notes made at the time of the measurement. He found the thickness to be generally $1\frac{3}{4}$ inches, a few ran $1\frac{11}{16}$; a few others, in some places, $1\frac{7}{8}$. None were in any place 2 inches. He declares the pipe to be 24-inch standard vitrified sewer pipe.

At the request of counsel, I visited the Customs Examining Warehouse, where samples of the pipe have been kept. There were present with me, counsel for both parties, one or two Customs officials, the President of the Evans & Howard Co., and the engineer of the City of Winnipeg. The samples, three in all, are stamped "L.24" with the name Evans & Howard. They are no doubt about two inches thick at the spigot end, but it could easily be felt that this thickness extended into the barrel only a few inches. Measurements made in my presence, with proper calipers, at the distance of 10 inches or so from the spigot end, shewed the thickness to be $1\frac{3}{4}$ inches, in a few spots slightly in excess of that, nowhere 2 inches.

From the evidence adduced in this case, I have no hesitation in coming to the conclusion that the pipe in question is, as it was represented to be, standard pipe. The evidence also shows that the price at which it was sold to Lee was $86\frac{1}{4}$ cents, and there was no agreement or understanding that a higher price should be paid.

The entry therefore of the pipe as standard pipe, at $86\frac{1}{4}$ cents, was the correct entry, and the seizure of it should not have been made.

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My judgment is that the goods should be restored to the claimants.

The case has been decided mainly on the evidence given at the trial. The evidence was, when the question of the seizure was before the Minister of Customs, in the possession, or at the command, of the claimants, and they neglected to produce it. Had they laid it before the Minister there can be little doubt a different decision would have been given. I therefore award no costs to the claimants.

Judgment accordingly.

Solicitors for claimants : *Graham & Young.*

1908
Dec. 24.

THE BERLINER GRAM-O-PHONE COMPANY, LIMITED..... } PLAINTIFFS;

AND

THE COLUMBIA PHONOGRAPH COMPANY..... } DEFENDANTS.

Patent action—Infringement—Points of law—Argument before trial—Refusal—Practice.

The defendants, in an action for infringement of a patent of invention, set up by their statement in defence an adjudication by the Circuit Court of the United States upon the said patent. The plaintiffs replied that such adjudication disclosed no answer in law to their claim, and made an application that the questions of law so raised be argued before the trial of the action upon the grounds of convenience, the saving of time and expense.

Held, that as the defendants might fail to establish the facts as alleged, the court would then be determining the law upon what might turn out to be a merely hypothetical state of facts, and further that the finding of this court upon the question of law might be reviewed by an appellate court while another part of the case was being dealt with elsewhere, a costly and inconvenient practice, the application should, therefore, be refused with costs to the plaintiffs in any event, unless otherwise ordered by the trial judge.

THIS was an application for the hearing of certain questions of law arising on the pleadings before trial.

November 7th, 1908.

The motion now came on for hearing before the Honourable Mr. Justice Riddell, judge *pro hac vice*.

R. C. H. Cassels for the plaintiffs;

N. W. Rowell, K.C., for the defendants.

RIDDELL J., now (December 24th, 1908), delivered judgment.

This is an application by the plaintiffs for an order for the trial of certain questions of law arising on the pleadings under the provisions of Rule 66 of Oct. 8th, 1906.

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Reasons for Judgment.

The rule reads—"No demurrer, as a separate pleading, shall be allowed, but any party shall be entitled to raise by his pleadings any point of law; and any point so raised, shall be disposed of by the Court or a Judge at or after the trial; provided that by the consent of the parties, or by order of the Court or a Judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

This rule is taken from the English Ord., xxv. r. I (1883).

The action in the present case is to restrain the defendants from infringing certain letters-patent of the plaintiffs, and for similar relief. The statement of defence disputes the patent, and sets up an adjudication by the Circuit Court of the United States in favour of the defendants; the reply denies this, and "submits that said paragraph discloses no answer in law to the plaintiff's claim and craves the same benefit on this ground as if it had demurred to said statement of defence."

The application is by the plaintiff that the question of law thus raised may be disposed of separately, and not at the trial of the other parts of the case. The ground alleged is the saving of time and of expense as well as convenience.

It appears that both parties are of substance, and it is not suggested that the defendant, if he should fail in the matter is not quite good for any extra costs that may be incurred by any method of proceeding.

Again, it is to be observed that the fact of the alleged adjudication is not admitted—it may well be that the defendant would fail to establish the fact, and thus the Court is in the position of being asked to determine the law in what may turn out to be a merely hypothetical state of facts—a course always to be deprecated.

Moreover, if the application were acceded to, it might and probably would be the case that an appellate Court would be called upon to deal with one branch of the case

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while another part would be in the course of being dealt with elsewhere, a uselessly costly and inconvenient practice.

The authorities in England upon the corresponding rule there are to be found in Snow's Annual Practice; a number of these are very different from the present case, and I do not find any very like the present. No authority has been cited, and I can find none, which indicates that the order sought should be granted.

The motion will be refused, and the costs will be paid by the plaintiff in any event, unless the trial Judge should otherwise order.

Motion refused.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

BETWEEN

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY (PLAINTIFFS)..... } APPELLANTS; 1909 Feb. 2

AND

THE STEAMSHIP *IMPERIAL* AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

Shipping—Collision—Action in rem against ship whose owners are in liquidation—Jurisdiction of Exchequer Court—Winding-Up Act—R. S. 1906, c. 144, secs. 22 and 23—Leave to bring action—Practice—"Sequestration."

Held, (reversing the judgment of the Deputy Local Judge) that the jurisdiction of the Exchequer Court in respect of proceedings *in rem* for collision against a ship (whose owners are at the time in liquidation) is not taken away by the provisions of secs. 22 and 23 of the Winding-Up Act (R. S. 1906, c. 144); and where leave is obtained from the proper forum to bring an action, as provided by sec. 22 of the Winding-Up Act, the Exchequer Court is competent to entertain the same.

Semble, that the word "sequestration" as used in sec. 23 of the Winding-Up Act means a sequestration to recover payment of a judgment already obtained.

In re Australian Direct Steam Navigation Co. (L. R. 20 Eq. 325) referred to.

THIS was an appeal from two judgments of the Deputy Local Judge in Admiralty for the District of Quebec.

The nature of the judgments appealed from, and the findings of the learned trial judge, are stated in the reasons for judgment on appeal.

January 9th, 1909.

The appeal was now argued.

A. R. Angers, K.C., for the appellants;

C. A. Pope for the respondent.

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THE RICHELIEU AND ONTARIO NAVIGATION CO. v. THE STEAMSHIP IMPERIAL.

Argument of Counsel.

Mr. *Angers* contended that inasmuch as the leave of the Superior Court, which was seized of the winding-up proceedings against the owners of the ship, was obtained to bring the action *in rem* in the Exchequer Court, there was no question as to the competency of the proceedings. (Cites *Marsden on Collisions* (1). By *The Admiralty Act*, 1891, sec. 4, the Exchequer Court is given jurisdiction in all cases of "contract and tort and proceedings *in rem* and *in personam* arising out of or connected with navigation, shipping, trade or commerce," &c., which may be had or enforced in any Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act* (Imp.). This jurisdiction is as wide as the Admiralty Court's in England with reference to actions *in rem* for collision. It could never have been the intention of Parliament to oust the jurisdiction of a federal court, with all its convenient procedure and process, in favour of a provincial court which was never contemplated to exercise admiralty jurisdiction in the ordinary way. The learned trial judge has erred.

Mr. *Pope* argued that the Winding-up Court had no power to grant the order for leave to proceed against the ship in the Exchequer Court. The Superior Court, under all the English authorities, is the proper court to entertain the suit, and it cannot divest itself of its jurisdiction. It cannot delegate what the statute has expressly given it for a special purpose. Moreover, sec. 23 of the Winding-up Act expressly prohibits sequestration of property within the control of the Winding-up Court. There is no technical meaning to be given to "sequestration" as used in the Act. It simply means the detention of property by a court of justice for the purpose of answering a demand that is made. That is exactly what the arrest of a ship is, and as I read sec. 163 of the Imperial Companies Act, it is void in the case of a creditor

(1) 5th ed. pp. 74, 78.

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Argument of Counsel.

who can prove under the Winding-up—that is when the sequestration takes place after the Winding-up order is made. (*In re Australian Direct Steam Navigation Company*, (1). An arrest by the process of another court cuts out the jurisdiction over the property of the Winding-up Court. The Superior Court has jurisdiction to grant the full remedy open to the plaintiffs in respect of the collision claim; and where the *res* and the parties are before the court the claim must be prosecuted there. *In re Rio Grande Steamship Company* (2).

I submit that the present proceedings are vexatious and unnecessary in that the plaintiffs could and should enforce their lien before the Superior Court.

Mr. *Angers*, in reply, contended that the Superior Court had not the necessary procedure and machinery to try out an admiralty claim for collision; for instance, the court has no power to call in the assistance of a nautical assessor. Again, there is no provision in the procedure of the Superior Court for filing a preliminary act, a matter so essential to obtaining the truth and the whole truth in respect to a collision claim. Nor is there any process for the arrest of the ship in the Superior Court. The *Rio Grande Steamship Company's Case*, cited by counsel for the ship, is not in point, because there the lien was liquidated, and here our damages are not liquidated.

CASSELS, J., now (February 2nd, 1909), delivered judgment.

These appeals are from judgments of Mr. Justice Dunlop, Deputy Local Judge for the Quebec Admiralty District at Montreal, bearing date respectively, the 14th December, 1908 and the 31st December, 1908.

The action is one for damages arising out of a collision in the River St. Lawrence, near Varennes, on the 5th

(1) L. R. 20 Eq. 325. (2) L. R. 5 Ch. D., 282.

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day of July, 1908. The learned trial Judge states the allegations of fact as follows :—

"On the 5th July, 1908, plaintiffs allege that the "steamer *Imperial*, being improperly navigated, came "into collision with the steamboat *Quebec* in the River "St. Lawrence, near Varennes, causing the *Quebec* con- "siderable damage and disabling her ; that the *Quebec* "came to anchor, and was subsequently towed up to "Montreal for repairs ; that the St. Lawrence Navigation "Co., the owners of the steamboat *Imperial* are in liquida- "tion under the *Winding-Up Act ;* that in compliance "with chapter 144, section 22, R. S. C. 1906, the Riche- "lieu and Ontario Navigation Co., the owners of the "*Quebec*, the vessel damaged, applied to the Winding-up "Court, the powers and jurisdiction of which are vested "in the Superior Court, for leave to take an action *in* "*rem* in admiralty against the steamer *Imperial*."

Leave was granted, and admiralty proceedings against the S. S. *Imperial* were instituted. The statement of claim was filed on the 19th October, 1908, and the statement in defence on the 7th November, 1908. By the 14th paragraph of the statement in defence the respondents alleged that the action was not within the jurisdiction of the Court in view of Cap. 144 R. S. 1906 (*The Winding-Up Act*). To this paragraph of the defence the plaintiffs demurred.

The plaintiffs moved to have the questions of law raised by paragraph 14 of the defence and by the plaintiffs' demurrer, determined, and they were fully argued before the learned trial Judge, who, after carefully considering the questions before him, came to the conclusion that the defence raised by paragraph 14 was well founded, and on the 14th December, 1908, pronounced judgment in favour of the defendants.

The finding of the learned Judge is that the Exchequer Court on its admiralty side has no jurisdiction in respect

of this claim by virtue of the provisions of the *Winding-Up Act* (R. S. 1906, ch. 144).

The logical conclusion from this finding that the Court is without jurisdiction followed, and the action was dismissed by judgment pronounced on the 31st December, 1908. The appeals heard before me are from these two judgments. They were fully and ably argued by Mr. Angers, K.C. for the appellants, and Mr. Pope for the respondents.

I have considered the case and I am unable to concur in the decision of the learned trial Judge. The sole question is whether or not the admiralty jurisdiction of the Exchequer Court in respect of such a matter has been taken away by virtue of sections 22 and 23 of the *Winding-Up Act*.

After hearing counsel for both parties, and considering the facts set out in the various affidavits filed, the Judge of the Superior Court of Montreal, being the Judge having jurisdiction in the Winding-up proceedings, made an order giving leave to the plaintiffs to institute proceedings in the Exchequer Court in Admiralty. No appeal was taken from the judgment, and had the order been appealed from it would not likely have been varied, as it was a question of discretion. (*Thames Plate Glass Co.* v. *Land and Sea Telegraph Co.* (1). I do not think this order would confer jurisdiction if such jurisdiction had been taken away by the statute; but it has a strong bearing on the question to be considered. The provisions of section 22 of the *Winding-Up Act* (R.S. 1906 ch. 144) read as follows:—

"After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes."

The provisions of section 23 are as follows:—

(1) L. R. 6 Ch. 643.

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"Every attachment, sequestration, distress or execution, put in force against the estate or effects of the company after the making of the winding-up order shall be void".

Practically similar provisions are to be found in sections 87 and 163 of the *Imperial Companies Act* 1862 (25-26 Vict. chap. 89).

Section 87 :—

"When an order has been made winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose."

Section 163 :—

"Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution, put in force against the estate, or effects of the company, after the commencement of the winding-up shall be void to all intents".

Buckley, in his work on the *Companies Act*, 8th ed. at page 274, states as follows :—

"By section 163, where a company is being wound up by or under the supervision of the court, any attachment, sequestration, distress or execution, put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents. But it was decided in 1864 (1) that section 163 is to be read with and is controlled by the 85th and 87th sections, and that the joint effect of these sections is to put the creditor who desires to proceed to execution after the winding-up order to the necessity of coming to the Court and asking for leave to so proceed, and whether he shall be allowed to proceed or not is a question for the discretion of the Court. It is difficult no doubt to see why the clear and precise provi-

(1) Exhall Mining Co. 4 De G. J. & S. 377.

sions of section 163 should be read as if a distress were a 'proceeding' within section 87, but the Court is now bound by the decision and the many subsequent cases which have followed it".

This statement of the law is amply supported by the authorities.

The first decision was that of *Exhall Mining Co.*, in 1864, reported in 4 De G. J. & S. 377. Then there is the case of *Railway Plant and Steel Co., In re Taylor* (1) in which the judgment was delivered by Hall, V.C. After this decision follows *Lancashire Cotton Spinning Co. Ex. p. Carnelly* (2). This was a judgment of Lord Justices Cotton, Lindley and Bowen, given in 1887. Then comes the case of *Higginshaw Mills* v. *Spinning Co.*(3), that being a decision of Lord Justices Lindley and Lopes in 1896. And see also *Lindley on the Law of Companies* (4). To the like effect will be found a series of decisions in the Ontario Courts: See *In re Lake Superior Native Copper Co.* (5). In *Parker and Clark's Company Law*, (1909) commencing at page 388, numerous authorities are cited. But it will be seen that the judgment of Osler, J. at page 435 of 23 Ont. A. R., in the case of *Shaver* v. *Cotton* is on a different question, namely, the right to proceed against contributories, the Canadian statute not being similar to the English Act in this respect.

The finding of the learned trial Judge and the argument of the respondents are mainly based on two authorities, namely, *In re Australian Direct Steam Navigation Co.* (6) and *The Rio Grande Steamship Co.* (7).

On the question of the jurisdiction of the Exchequer Court on its Admiralty side being ousted, the only matter for consideration, these authorities support the appellants'

(1) L. R. 8 Ch. D. 189.
(2) 35 Ch. D. 656.
(3) (1896) 2 Ch. 544.
(4) 6th ed. at page 907.
(5) 9 Ont. R. 277, at page 283.
(6) L. R. 20 Eq. 325.
(7) L. R. 5 Ch. D. 282.

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contention. The head-note to *In re Australian Direct Steam Navigation Co.*, is as follows:—

"The proper mode of enforcing a maritime lien on a vessel belonging to a company which has been ordered to be wound up is by a proceeding in the winding-up and not by a proceeding *in rem* in the Admiralty Court. The arrest of a vessel by the Admiralty Court is a 'sequestration' within the meaning of the *Companies Act*, 1862, section 163."

Were it not for this judgment of a very able Judge, which seems to have been accepted, I would have thought that "sequestration" as used in section 23 of the Dominion Winding-Up Act, meant a sequestration to recover payment in respect of a judgment already obtained. I have already quoted the provisions of this section. It would have occurred to me that what is contemplated by this section is to prevent judgment creditors who have not already obtained liens, from getting higher rights after the winding-up order had been made.

The result of the proceeding in the present action may be a dismissal of the action. However, in the case of *Re Australian Direct Steam Navigation Co.* (*supra*) no leave had been obtained by the plaintiff. Besides in that case the learned Master of the Rolls only stayed the proceedings upon a sum being carried to a separate account to answer the damages, an order which would not have been made had there been no jurisdiction. The Master of the Rolls evidently treated the case before him as an application for leave to proceed, and refused the leave on security being given.

In the *Rio Grande Steamship Company's Case* (*supra*) the jurisdiction is expressly upheld by the Court of Appeal. An order had been made on the 1st of October, 1875, giving leave to proceed in Admiralty. At page 285, James, L. J. says:—

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"An order was made accordingly on the 1st October 1875, and notwithstanding what is stated to have been said by the Vice-Chancellor as to that order, I am of opinion that it was the right order to be made unless the company was able and willing to give the applicant sufficient security for the amount of his debt, and costs, charges and expenses."

I think that the judgments of the 14th and 31st December, 1908 should be reversed, and that the application of the plaintiffs (appellants) to reject paragraph 14 of the defence, should be granted; and that the plaintiffs' action be declared to be within the jurisdiction of the Local Judge in Admiralty for the Admiralty District of Quebec.

I also think that the case should be sent back to the Deputy Local Judge at Montreal for trial before him. The costs of this appeal, and the costs before the Deputy Local Judge to be paid by the defendants (respondents).

Judgment accordingty.

Solicitors for appellants: *Angers, Delorimier & Godin.*

Solicitors for respondent: *Lafleur, Macdougall, MacFarlane & Pope.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1909
Feby. 18.

BARBER v. THE SHIP *NEDERLAND.*

Shipping—Action for damages for personal injuries sustained on foreign ship—Jurisdiction—Dismissal of action.

THIS was an action by the plaintiff for damages for personal injuries sustained whilst working on a foreign ship as a stevedore, such injuries being caused by the faulty construction of hatch coverings and beams supporting the same.

On 14th December, 1908, a motion was made on behalf of the ship to set aside a writ for want of jurisdiction, and alternately that the action is one *in personam* and not *in rem.*

F. Peters, K.C., for ship, cites the *Admiralty Act*, 1861, c. 7. Ship must be active cause of damage. The *Theta* (1); *Currie* v. *McKnight* (2); the *Sylph* (3); the *Beta* (4); *Franconia* (5); *Vera Cruz* (6); the *Zeta* (7); the *Normandy* (8); the *Malvina* (9); *Vera Cruz* (10). Distinguishes *Wyman* v. *Duart Castle* (11).

No action *in rem* unless maritime lien of some sort or allowed by statute. *Currie* v. *McKnight*, supra (12).

Where ship under charter, owners cannot be held liable for action of some one not under their control.

F. B. Gregory, for plaintiff. The case of *Wyman* v. *Duart Castle* (11) is in our favour.

By section 35 of *Admiralty Act of* 1861, the remedy under sec. 7 can be pursued either *in rem* or *in personam.*

(1) [1894] P. 280.
(2) [1897] A. C. 97.
(3) 2 L. R. Ad. & Ec. 24.
(4) L. R. 2 P. C. 447.
(5) 2 P. D. 163.
(6) 10 A. C. 59.
(7) [1893] A. C. 468.
(8) [1904] P. at 200.
(9) Lush. 493.
(10) 9 P. D. 88 & 96; Williams & Bruce Ad. Pr. (3rd ed.) 76.
(11) 6 Ex. C. R. 387.
(12) See also Williams & Bruce, p. 73, Note (*a*).

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Being a foreign ship judgment against owners is of little value if obtained.

On 18th February, 1909, Mr. Justice MARTIN, Local Judge, allowed the motion to set aside proceedings.

Solicitors for plaintiff: *Fell & Gregory.*

Solicitors for ship: *Bodwell & Lawson.*

BETWEEN

1909
April 20.

WILLIAM GREENSPAN..... .....CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Revenue — Customs Act—Breach — Importation of jewellery in Canada—Smuggling—Evidence—Costs.

Where unsatisfactory statements with respect to certain articles of jewellery imported into Canada were made by the owner to the Customs authorities who had seized the goods, but the court, on a reference of the claim, found that upon the evidence before it there was no intention on the part of the claimant to evade the law, the goods were ordered to be restored to the claimant; but he was not allowed his costs. *Smith* v. *The Queen* (2 Ex. C. R. 417); and *Red Wing Sewer Pipe Co.* v. *The King* (12 Ex. C. R. 230) followed.

THIS was a reference of claim by the Minister of Customs under the provisions of sec. 179 of chap. 48, R. S., 1906.

The claimant Greenspan came to Canada from Buffalo, N. Y., for the purpose of settling in this country. After having been in the City of Toronto for some five days he was arrested and imprisoned by the police department on suspicion of his being a man who was wanted in Montreal for having committed a theft there. After having been detained in custody for some three or four days with no charge against him, he was deprived of certain jewellery he had on his person by the police and handed over to the Customs officers as having been guilty of an evasion of the Customs laws by not having entered and declared such jewellery for duty on coming into Canada. He was compelled to pay 70 % on a valuation of $600 before he was allowed to take the jewellery into his possession again. Certain statements were made by him to the Customs authorities which were regarded by them as unsatisfac-

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Argument of Counsel.

tory. He was however, ignorant of the English language, which might have accounted for certain discrepancies in his statements. He subsequently made a claim against the Department of Customs for restitution of the money so paid, on the ground that a man coming into this country with a view to settling here has a right to carry jewellery to a reasonable extent on his person without entering it for duty. The Department of Customs decided against the claim, and sustained the action of its officials in Toronto.

March 22nd, 1909.

The case was now heard at Toronto.

R. H. Greer for the claimant.

J. H. Patterson for the respondent.

Mr. *Greer* contended that as Greenspan was entering Canada as a settler he had a clear right to bring in his jewellery as part of his personal belongings or wearing apparel. The articles were not brought in for sale, there is no evidence to support the contention of the Customs officials as to that. Any of Greenspan's statements which seem to indicate an intention to avoid the payment of duty are due to an imperfect knowledge of English, his whole course of conduct with respect to the jewellery negatives any fraudulent intent. He was ignorant of Customs laws, and if he had declared these articles they would have been entitled to free entry. As there is no evidence of intention to smuggle, the Court should give the claimant the full benefit of the settler's privileges. *United States* v. *One Oil Painting* (1); *The Queen* v. *Tolson* (2); *United States* v. *One Pearl Chain* (3).

Mr. *Patterson* argued that the facts all tended to show an intention to evade the duty payable on the jewellery brought into Canada by the claimant. He had no baggage,

(1) 31 Fed. Rep. 881. (2) 23 Q. B. D. 168 at p. 185.
(3) 139 Fed. Rep. 513.

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which was a most suspicious fact in the case of an alleged settler. He made statements to the Customs Inspector inconsistent with honesty of intention. He had no right of free entry for jewellery carried in his pocket. The Crown is entitled to exact a reasonable sum in lieu of forfeiture. (Cites secs. 23, 28, 187, 193, 198 and 219 of the *Customs Act*, R. S. 1906 c. 48).

Mr. *Greer*, replied.

CASSELS, J., (now April 20th, 1909), delivered judgment.

This case arises out of a seizure of one pair of solitaire diamond earings, two only solitaire diamond rings, and one only ring, turquoise set with twelve diamonds, made by Customs officials at Toronto, confirmed by a decision of the Minister of Customs in 1907.

It is not necessary to set out the facts in detail. It would have been more satisfactory had Greenspan and his wife procured evidence from Buffalo corroborating their own evidence as to this purchase and the re-setting of the articles in Buffalo.

As it is, I have to deal with the case as presented before me. I have no reason to disbelieve the story told to me by Greenspan and his wife. They gave their evidence in a manner that carried conviction of the truth of their statement. They are Roumanian Jews. Their language is Yiddish. They both had a very poor appreciation of the meaning of the English language, and I think that neither Greenspan nor his wife should be too harshly judged in respect of statements said to have been made by them on two different occasions varying from their evidence given before me.

Besides, there is not much discrepancy between the sworn evidence before me and their statements as sworn to by the officers of the Customs Department.

Greenspan is a man of considerable means. This is

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proved by undisputed evidence. He has purchased property to a considerable amount in Toronto. The value of the jewelry in question is trifling compared with his means. The wife appeared in court with the earrings in her ears and one ring on her finger, the other being on her husband's finger.

The Customs authorities seemed to have had evidence that Greenspan had offered one of the diamonds for sale. Counsel for the crown stated that one Branstein was in court who would swear to the fact. He was not called. This alleged fact had considerable influence on the action of the officials. I do not refer to the details of the alleged admissions said to have been made by Greenspan, or the manner in which they were obtained. It may be necessary in the interests of justice to resort to the means adopted in this case by the police. Personally it does not appeal to my sense of justice.

There will be a declaration that the claimant is entitled to the possession of the goods; and that the money paid in to obtain the release of the same from the Customs be refunded and restored to him. Judgment that the claimant is entitled to recover from the Crown the sum of $420.00 without interest. Under the facts of the case, there ought to be no costs to either party, and it is so ordered. *Smith et al* v. *The Queen*, (1) *Red Wing Sewer Pipe Co* v. *The King* (2.)

Judgment accordingly.

Solicitors for the claimant: *Smith, Rae & Green.*

(1) 2 Ex. C. R. 417. (2) 12 Ex. C. R. 230.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

BETWEEN

1909
Mar. 9.

R. DUNSMUIR & SONS. .....PLAINTIFF;

AND

THE STEAMSHIP *OTTER*.

Shipping—Salvage—Meritorious service—Award—Value of res—Rule as to percentage of depreciation in British Columbia—Practice.

The *O.*, a freight steamer, fully laden with coal, had gone ashore on Danger Reefs at the northerly end of Thetis Island, and about 7½ miles, by ships' course, from Ladysmith, B.C. She had sprung a leak and the water had put out her fires. About ten feet of her forefoot were on the rock, while her stern was in deep water. The *P.* sighted the stranded vessel in the night time and went to her relief, taking in a hawser passed to her by the *O.* and waiting for the tide and daylight. Just before 6 o'clock in the morning the *P.* started to pull straight ahead at half speed, and shortly succeeded in getting the *O.* off the reef. The *P.* then cut the *O.'s* hawser, so as loose no time, backed up to the *O.* and made fast to her with the *P.'s* hawser, and succeeded in towing her under forced draught into Ladysmith, where the *O.* was tied up to a wharf in a position of acknowledged safety.

Held, that the services performed by the *P.*,, while without the specially meritorious features of saving human life, or danger to herself and crew, were as skilfully conducted as the nature of the case permitted, and valuable, and as such were entitled to corresponding recognition, even though they were of short duration.

Salvage awarded in an amount of $2,200.

2. In finding the value of the ship and cargo the District Registrar allowed a yearly depreciation in the value of the ship of 7 per cent., following a practice with reference to wooden vessels said to prevail in British Columbia.

Held, that whatever may be said of the allowance of such a depreciation in the case of wooden vessels as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed, and the care she had subsequently received; but, in any event, it could not be applied to the ship in respect of which salvage services were rendered in this case.

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Reasons for Judgment.

THIS was an action for salvage services rendered near Ladysmith, B.C., by the tug *Pilot*, of which the plaintiffs are the owners.

The trial took place in Victoria, B.C., before Mr. Justice Martin, the Local Judge for the British Columbia Admiralty District, on the 10th, 12th and 14th days of February, 1908, and was adjourned until report made by the District Registrar as to the value of steamer.

On 7th April, 1908, the District Registrar filed his report, and both sides having filed objections to said report, argument to vary report and on the whole case took place on 29th April, 1908.

E. V. Bodwell, K.C., for plaintiff cites the *Antelope* (1) the *Abbey Palmer*, (2).

J. E. McMullen for the Ship, cites, as to value, the *Hermonides*, (3) the *Hohenzollern*, (4) *Sedgwick on Damages*, (5).

As to salvage, the *Werra*, (6) the *Amérique*, (7) the *Chetah*, (8) the *Lancaster*, (9).

MARTIN, L. J., now (March 9th, 1909,) delivered judgment.

This is a claim for salvage services rendered by the tug *Pilot* (136 feet long) to the steam freighter *Otter* (232 tons, net) on the morning of the 27th of September, 1907, at which time, about half past one or two, the *Pilot*, on her way from Nanaimo to Victoria, sighted the *Otter*, aground on Danger Reefs, at the northerly end of Thetis Island, and about seven and a half miles, by ships' course, from Ladysmith. The *Otter* was laden with a full cargo of 292 tons of coal, and about ten feet of her forefoot were on the rock, with her stern in deep water; and

(1) 4 Ad. & Ecc., 33.
(2) 8 Ex. Ch., 446.
(3) (1903) P., 1.
(4) (1906) P., 339.
(5) Vol. 2, s. 595.
(6) 12 P. D., 52.
(7) L. R. 6 P. C., 468.
(8) L. R. 2 P. C., 205.
(9) 8 P. D., 65 and 9 P. D., 14.

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the water from the leaks rose so high in her engine room that it put out the fires. The night was calm but dark and misty, and the sea smooth. The tide had begun to flow shortly before the *Pilot* arrived, but it was too dark to do anything except to take in a six inch line which the *Otter* passed to her, and anchor, after putting the stern of the *Pilot* as near the stern of the *Otter* as possible. The vessels were kept in that position till daylight, just before six o'clock, when, after the tide had risen considerably, the *Pilot* began to pull straight ahead on the hawser at half speed, and after doing so for about a quarter of an hour, more or less, the *Otter* came off, and the master of the *Pilot* immediately cut the *Otter's* hawser, so as to lose no time, backed up to the *Otter*, and made fast to her with the *Pilot's* hawser and started to tow her to Ladysmith under forced draught, and did succeed in bringing her up alongside the City wharf at that place at a quarter to eight, where after being tied to the wharf, she was in a position of acknowedged safety because the water was so shallow that she could not sink much lower, even if she filled (as her master admits), there being only 18 to 19 feet of water at that wharf at high tide. During this run, the Chief Engineer of the *Otter* admits that she sunk lower in the water by four or five inches, and when she reached Ladysmith there were between 7 and 8 feet of water in the engine-room.

After thus accomplishing her object, the *Pilot* left the *Otter*, and the master of the latter put a sail over her bows to stop the leak as well as possible, and about half an hour later the steamer *Trader* came alongside and began to siphon out the *Otter* and unload her cargo, and though the *Otter* was rising in the water as the result of the *Trader's* operations, yet about an hour later a small steamboat, the *Stetson* (17 tons) also was engaged to assist in and expedite the work, by means of her siphon. Still

later, about 6.30 the same evening, a third steamer, the *Salvor* (561 tons) which is always kept ready for salvage purposes and equipped with a salvage plant, arrived from Esquimalt, and put a large pump to work with the result that the *Otter* was pumped dry next morning at eleven o'clock.

Since the trial I have carefully re-read and re-considered all the evidence, and I am satisfied, without here entering into particulars, that the matter must be dealt with by me on the assumption that had not the *Pilot* given the *Otter* the assistance she did, the latter would have sunk in deep water. It is true that as the *Pilot* was towing the *Otter* to Ladysmith she met the *Stetson*, with a scow, about two miles from Danger Reefs, on the way to the *Otter's* assistance, in response to a request sent by a boat from the *Otter;* but I am clearly of opinion that the *Otter* was, in view of all the circumstances, in such a dangerous position that the master pursued the only proper course in trusting himself to the *Pilot* and making the attempt, successful as it turned out, to reach Ladysmith. It then remains to be decided, what is the proper amount to be awarded to the *Pilot* for her valuable services. So far as the other vessels are concerned, they have already been settled with by the *Otter's* owners before this action was begun as follows: *Trader*, $600; *Stetson*, $400; *Salvor*, $1,500. But I can derive practically no assistance from that settlement because, in the first place, this Court had nothing to do with it, and in the second place, I think it was wrong in principle, for the services rendered by the *Stetson* and *Salvor*, however valuable they may have been, clearly do not properly partake of the nature of salvage at all, whatever may be said of those of the *Trader*, into which it may be possible that some element of salvage may enter, though it is not necessary to decide the point. Therefore I shall proceed to make my award without regard to the said unsatisfactory settlement and apportionment, and deal

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with the *Pilot's* claim on its own merits without reference to others. Now, while the services she rendered were without those specially meritorious features of saving human life, or danger to herself or crew, yet they were as skilfully conducted as the nature of the case permitted of, and valuable, and are entitled to corresponding recognition, even though they were of short duration. I am informed that the *Otter's* owners tendered the sum of $1,500 in satisfaction of said services, but in my opinion that sum is not sufficient and should be increased by $700, making the award amount to $2,200, for which sum let judgment be entered, the costs following the event.

In arriving at this conclusion I have taken into consideration the value of the ship which was fixed by the Registrar, under order of reference, at $18,364.94, and the cargo, 292 tons of coal at $3 50 = $1,022, in all ship and cargo valued at $19,386.94. Objection is taken to the fact that in arriving at the value of the *Otter* the Registrar in his report allowed a yearly depreciation of seven per cent. Now, whatever may be said of the allowance of such a depreciation in the case of wooden vessels on this coast as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed and the care she has subsquently received. In the case of the *Otter*, I do not think such a rule could be fairly applied. She is, according to the evidence, a better built ship than the average and has been well cared for and maintained. She cost in 1900 $41,128, and at the time of the accident, I am satisfied by the evidence as a whole, that for the purposes of this award her value must be taken to be at least $30,000, even after giving due, but not unreasonable weight to the evidence on behalf of her owners, that she is a vessel of a type which is not so profitable, under existing conditions, to operate on this coast as others of more recent construction, which fact would of course affect her market value. The further fact that

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she is insured for six thousand pounds is a useful guide to her owners' opinion. Taking this view it is not necessary to consider the other objections to the Registrar's report.

Judgment accordingly.

Solicitors for plaintiff: *Bodwell & Lawson.*

Solicitor for ship: *J. E. McMullen.*

BETWEEN

1909
March 15.

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

AND

LORENZO ROBITAILLE AND THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED..... DEFENDANTS.

Revenue—Excise—Distillery—Method of assessing duty—Grain in mash-tubs—Liability of distiller—Construction of Statutes.

Revenue statutes are not to be construed strictly against the Crown and in favour of the subject, but are to be interpreted the same way as other statutes; and if on a proper construction of the statute the defendant in a proceeding by the Crown is liable, the court has nothing to do with the hardship of the case.

Sec. 155, sub-sec. (*a*) of the *Inland Revenue Act*, R. S. 1906, c. 51, enacts as follows, respecting the distilling of spirits :

" Upon the grain used for its production at the rate of one gallon of proof spirits for every twenty and four-tenths pounds, or, in a distillery where malt only is used, upon the malt used for its production at the rate of one gallon of proof spirits for every twenty-four pounds."

Section 156, sub-sec. (*a*) provides that the quantity of grain for the purpose of computing the duty shall be the quantity actually weighed into the mash-tubs and recorded in the proper books kept therefor, except when there appears to be cause to doubt the correctness of the quantity so entered, when the inspecting officer is empowered to determine the actual quantity of grain consumed in the distillery. The duty must be assessed and levied on the quantity of grain so determined, in the proportion of one gallon of proof spirits to every twenty and four-tenths pounds of grain.

Held, that defendant R., having accepted his license with a knowledge of these provisions, was not entitled to relief from the method of assessment fixed thereby.

INFORMATION for the recovery of excise duties on the manufacture of spirits.

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

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v.
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Argument of Counsel.

February 22nd and 25th, 1909.

The case was heard at Quebec.

F. X. Drouin, K.C., for the plaintiff.

A. Rivard, for the defendants.

Mr. *Drouin* contended that the defendants were clearly liable to pay the duty upon the malt used in the production of spirits at the rate of one gallon of proof spirits for every twenty-four pounds. This was the minimum rate. This duty was payable on the first day of each month for the quantities produced during the preceding month, (Sec. 57.) Returns have to be made monthly. (Sec. 49.) The Act makes the duty payable on the grain or malt used.

Mr. *Rivard* argued that the intention of the Act was to impose duty on spirits and not on malt or grain. (Sec. 154.) Section 154 shows that it is on the spirits distilled and not on the malt that the duty is primarily imposed. When the distiller can show how much he has distilled, the duty is payable on that amount. It is inequitable to charge the distiller duty upon spirits which may never be distilled. Suppose that no spirit at all is produced, through a break in the machinery, for instance, would it be reasonable for the distiller to be required to pay under such circumstances?—Cites *Attorney-General* v. *Halliday*. (1) If whiskey never comes out of the tail of the worm it is not distilled, and you cannot exact duty on it. Section 154 provides for the payment of duty on spirits *distilled*, and sec. 155 must be read in harmony with it. Section 156 emphasizes the intention of Parliament to impose the duty on the spirits distilled.

Mr. *Drouin* replied, contending that the Government officers had no discretion in respect of collecting the duty on the grain or malt under section 155. Section 156 also contemplates the imposition of the duty on the quantity of grain used.

(1) 26 U. C. Q. B., 397.

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CASSELS, J., now (March 15, 1909) delivered judgment.

This case was tried at Quebec, the defendant Robitaille being represented by Counsel. The defendant The Employers (Liability Assurance corporation, Ltd.) although duly served with notice of trial, was not represented by Counsel.

The information filed in this case alleges that the defendant Robitaille is the owner of and operates a distillery at Beauport in the Province of Quebec. On the 29th August, 1906, Robitaille was granted a distillery license. This license terminated on the 31stMarch, 1907, the end of the fiscal year.

It is further alleged in the information that during the months of October, November and December, 1906, there was a deficiency in the production of proof spirits in Robitaille's distillery as compared with the grain used therein, such deficiency amounting to 6,395·67 proof gallons calculated and computed on the grain used for its production at the rate of one gallon of proof spirits for every twenty and four-tenths pounds. The defendant Robitaille in his defence admits the deficiency, but states that it took place during the months of October and December, 1906, and January, 1907.

It is conceded that the months should be November, December and January, and the information should be amended accordingly.

During the months of February and March, 1907, there was an excess over and above the minimum quantity of spirits which the grain used should produce on the basis of one gallon of proof spirits for every 20·4 pounds of grain used, and the Crown has credited Robitaille with this excess as against the previous deficiency, thereby reducing the number of gallons upon which at the rate of $1.90 for each proof gallon would leave the defendant Robitaille indebted to the Crown in the sum of $5,116.15, if his defence fails.

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It was set up in the defence of Robitaille that the fiscal year should be treated as ending on the 30th June, 1907, in which event if credit were given for the excess during the months of April, May and June, 1907, the whole deficiency would be wiped out. This defence was not pressed before me, and could hardly be so in view of the fact that the license terminated on the 31st March, 1907, the end of the fiscal year.

On the 8th of May, 1907, the following report was approved by the Governor-General in Council:—

"INLAND REVENUE.

"That at the distillery of Mr. Lorenzo Robitaille at Beauport, Que., deficiencies in production have arisen during the months of October, November and December, 1906, aggregating 6,395·67 proof gallons which, under the provisions of the Inland Revenue Act, require that duty shall be collected thereon at the rate of $1.90 per proof gallon or on the quantity named $12,151.78; that the most thorough enquiries that could be made have established no evidence of irregularity but the deficiency is reported to be due to defective apparatus, and it is believed that the spirit if produced has been run off in the refuse from the stills; that under section 155 of chaper 51 of the Revised Statutes of 1906 it is provided that the duty upon spirits shall be charged and computed by certain methods, one of which is that the duty shall be charged upon the quantity of grain used for its production at the rate of one gallon of proof spirits for every twenty and four-tenths (20·4-10) pounds of grain. It further provides that the method of computation which yields the greatest amount of revenue shall in all cases be the one upon which distillers shall pay the duty; that in this distillery the quantity subject to duty has been determined upon the basis of one gallon of proof spirits for every twenty and four-tenths (20·4-10) pounds of

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grain as above quoted; that under section 56 it is provided that all duties of Excise imposed by this Act shall accrue and be levied on the quantities made or manufactured, ascertained in the manner by this Act provided, or otherwise proved, and section 57 provides that such duties shall be due and payable on the first day of each month; that in the past the Department has required distillers to pay the duty on any deficiency in production, each month, but as the law does not expressly state that this must be done, and as the Department has every reason to believe that the short production was due to defective apparatus and unforseen difficulties, the Minister of Inland Revenue recommends that under the circumstances stated the production in this distillery be computed on the whole quantity of grain used up to the end of the fiscal year in connection with the sprits produced therefrom, and that the duty be exacted upon the deficiency for the period above recommended.

"From the report submitted to the Treasury Board it appears that every distiller taking out a license does so under the conditions provided by the Act and in the case of spirits as well as malt, tobacco, cigars, &c., definite standards of production are fixed, and that it cannot be claimed that in the course suggested any deviation is being made, except favourably to the distiller, from the conditions under which his license was obtained.

"The Treasury Board concur in the above recommendation and submit the same for favourable consideration.

"(Sgd.) RODOLPHE BOUDREAU,
"*Clerk of the Privy Council.*"

The Crown has taken a liberal view of the *Inland Revenue Act*, cap. 51, Revised Statutes of Canada, 1906, in calculating the deficiency at the end of the fiscal year instead of monthly.

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The contention of counsel for the defendant Robitaille is that there being no fraud and the spirits in question, which should represent the grain used, not having been produced owing to defective apparatus and unforseen difficulties, or if produced run off in the refuse from the still, a proper construction of the statute would relieve him from liability.

It is apparent that the basis of production, one gallon of proof spirits for every twenty and four-tenths pounds, is a minimum basis. This appears from the excess during the months of February and March.

It was argued that the statute should be construed strictly against the Crown and in favour of the defendant.

I have to construe the statute as any other statute should be construed, and if on a proper construction of the statute the defendant is liable, I have nothing to do with any question of hardship. *The King* v. *Algoma Central Ry.* (1), affirmed on appeal (2); *Canada Sugar Refining Co.* v. *The King* (3), *Attorney-General* v. *Carlton Bank* (4), See also *Maxwell on Statutes* (5) :—

"The American revenue laws are not regarded as penal laws in the sense that requires them to be construed with strictness in favour of the defendant. They are regarded rather in their remedial character, as intended to prevent fraud, suppress public wrong and promote the public good; and are so construed as to most effectually accomplish those objects."

See section 15 of the *Interpretation Act*, R.S. C. 1906.

The *Inland Revenue Act* Cap. 51 R. S. C. (1906) contains various provisions designed to prevent fraud and insure the payment of the proper excise dues.

Section 48 provides for an accurate record of the grain.

Section 49 for monthly returns.

Section 57 provides that the several duties shall be due and payable on the first of each month.

(1) 32 S. C. R. 277.
(2) [1903] A. C. 478.
(3) [1898] A. C. 741.
(4) [1899] 2 Q. B. 164.
(5) [1905] 4th ed. p. 434.

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Sections 55, 155 and 156 are the sections upon which mainly the question of the liability of the defendant depends.

Section 55 : " The amount of duty shall be calculated on the measurements, weights, accounts, statements, and returns, taken, kept or made, as herein provided, subject to correction and approval by the collector or other officer thereunto duly authorized ; and when two or more methods for determining quantities or the amount of duty to be paid are provided for, that method which yields the largest quantities or the greatest amount of duty shall be the standard ".

* * * * *

3. " Such computation may be based on any reliable evidence respecting the quantity of material brought into the distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory or other premises subject to excise, or as to the quantity of the manufactured article therefrom, or as to the quantity or strength of any articles used in any of the processes of manufacture ".

Section 155 : The duty upon spirits shall be charged and computed as follows, &c. Then follow various methods of computation.

The method adopted by the Crown is that provided by sub-section (*a*) :

" Upon the grain used for its production at the rate of one gallon of proof spirits for every twenty and four-tenths pounds, or, in a distillery where malt only is used, upon the malt used for its production at the rate of one gallon of proof spirits for every twenty-four pounds ".

Section 156, sub-section (*a*) is important. It reads as follows :

" The quantity of grain shall be the quantity actually weighed into the mash-tubs and recorded in the books kept under the requirements of this Act ; except that

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whenever there appears to be cause to doubt the correctness of the quantity so entered on the said books, an inquiry may be made by an inspecting officer of Inland Revenue, who may swear and examine witnesses under oath, and inquire as to the quantity of grain taken to the distillery in which such books are kept, and as to the quantity of grain removed therefrom, and generally into the matters referred to, and shall determine, as nearly as may be, the actual quantity of grain consumed in the distillery; and the duty may be assessed and levied on the quantity of grain so determined, in the proportion of one gallon of proof spirits to every twenty and four-tenths pounds of grain."

The defendant accepted his license with a knowledge of these provisions. It has to be borne in mind also that this is not the case of no spirits having been distilled from the grain used. A large quantity has been distilled.

The only authority cited to me at the trial was the case of the *Atty.-Gen.* v. *Halliday* (1), cited by Mr. *Rivard*, but this case does not assist the defendant.

I have endeavored to find Canadian or English authority but have failed to find any in point.

Some American authorities by eminent judges are of great assistance.

In the United States there are provisions in their Internal Revenue Act somewhat of a similar nature to the Canadian statute.

There are provisions for ascertaining the capacity of a distillery.

By section 20 of the Act of July 29th, 1868 (15 Statutes at Large, 125), provision was made for a return of the quantity of spirits distilled, and the statute provided that the "quantity of spirits returned together with the defi-

(1) 26 U. C. Q. B. 397.

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"ciency assessed shall in no case be less than 80% of the "producing capacity of the distillery," etc.

In *United States* v. *Nissley* (1), it was determined that a distiller is bound to pay taxes on 80% of the producing capacity of his distillery although this be on more than the amount of spirits actually produced.

No reasoning is given in this case for the judgment.

In *United States* v. *Singer* (1872) (2), Mr. Justice Field deals with the question as follows:—

"Upon the construction which should be given to the twentieth section of the Act of July, 1868, there appears to have been some conflict of opinion among Circuit Judges. The real or supposed hardship in particular cases of imposing a tax upon an amount of spirits equal to eighty per cent. of the producing capacity of the distillery, where a less quantity has been in fact manufactured by the distiller, has undoubtedly had much to do in inducing a construction leading to a different result. But the hardship of the operation of particular provisions of a statute has properly no place for consideration where the language is unambiguous and the legislative intent is clear. And reading the section in question by itself there does not appear to us to be any ambiguity in its language, or any doubt as to its meaning. Its meaning is that in no case shall the distiller be assessed for a less amount of spirits than eighty per cent. of the producing capacity of his distillery, and if the spirits actually produced by him exceed this eighty per cent. he shall also be assessed upon the excess".

After dealing with the provision of the statute the learned judge states as follows, at p. 120:—

"The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the government tax. And it seems well suited to accomplish this purpose; it at least reduces the limits within

(1) 1 Dillon, Cir. Ct. Rep. 586 (1871). (2) 15 Wall. at p. 118.

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which fraud can be practised to twenty per cent. of the capacity of the distillery. In view of the enormous frauds previously practised upon the government in rendering accounts, this system cannot be justly charged with unnecessary harshness. Every one is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distil at all, he is not entitled to much consideration".

United States v. *Ferrary*, (1); *Stoll* v. *Pepper*, (2).

The American law was amended providing for a remission of assessments for deficient production under certain circumstances. The amendment is to be found in United States compiled Statutes, 1901, Vol. 2, p. 2158, sec. 3,309.

In "The Laws of Excise" by Bell and revised by. Dwelly (1873) p. 394, section 89 of 23 & 24 Vict. cap 114 is cited.

Section 89 reads as follows :—

"The distiller shall in respect of all wort, wash, and bub in his distillery be charged according to the highest gauge of quantity at any time taken thereof, and according to the highest amount of gravity thereof at any time declared by him, or ascertained by any officer, without any allowance for waste, bub, dregs, yeast, or other matter whatever; and when any decrease shall take place in the quantity of wort, wash, and bub in a distillery, the amount of such decrease shall be deemed to have been distilled, and the distiller shall be charged accordingly with a quantity of spirits in proportion to the decrease of such wort, wash, and bub".

I find on reference to the *Century Dictionary* that the meaning of the words 'wort", "wash" and "bub" as used here, is as follows :—

(1) 93 U.S. 625 (1876). (2) 97 U.S. 438.

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"Wash" means the fermented wort from which the spirit is extracted.

"Wort" means the infusion of malt which after fermentation becomes beer.

"Bub" means a substitute for yeast, made by mixing a little meal or flour in a quantity of warm wort or water. There is a provision in this statute 23 & 24 Vict. cap. 114 for remission of duties in certain cases (1).

In my opinion the defendant Robitaille is liable for the duties claimed. The defendants The Employers Liability Assurance Corporation, Ltd., by the third paragraph of their defence admit their liability in the event of the defendant Robitaille being liable.

There will be judgment against both defendants for the amount claimed by the plaintiff, and interest from the 1st April, 1907. The defendants must pay the plaintiff's costs of the action.

Solicitors for the plaintiff: *Turgeon, Roy & Langlois.*

Solicitors for the defendants: *Casgrain, Lavery, Rivard & Chauveau.*

(1) [1873] See Bell's *Laws of Excise*, p. 406.

BETWEEN

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA..... } PLAINTIFF;

1909
May 17.

AND

ROSINA CONDON AND HARRY CONDON..... } DEFENDANTS.

Expropriation—Compensation—Value of lands and premises taken—Market value—Goodwill—Private way used in connection with business.

In addition to full and fair compensation for the value of lands and premises expropriated the owner carrying on business thereon is entitled to compensation for the goodwill of such business.

2. The market price of the lands taken ought to be regarded as the *primâ facie* basis of valuation in awarding compensation for land. *Dodge* v. *The King*, (38 S. C. R. 149) followed.

3. In this case there was a passage from a street in the rear of the premises where one of the defendants carried on a licensed liquor business, by which customers who desired to visit the bar without attracting notice could do so.

Held, that such passage enhanced the value of the property for the purposes of a bar, and so constituted an element of compensation.

INFORMATION by the Crown for the expropriation of certain lands for the purposes of public buildings in the City of Ottawa.

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

April 19th, 20th, 21st and 22nd, 1909.

The case was now heard at Ottawa.

A. Lemieux, K.C., for the defendants, contended that since the building of the Interprovincial Bridge over the Ottawa River the business increase in Sussex Street had been remarkable. The property of the defendants is a most desirable one for a hotel business; and no other centrally situated premises could be obtained except on

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Rideau or Sparks street where the values are very much higher than on Sussex street. Condon keeps a bar that is liberally patronized, and the private entrance to it from McKenzie Avenue is an element of value that ought to be considered.

The defendants are entitled to a fair and liberal compensation, with ten per cent. added to the amount for compulsory taking. The goodwill of the business must also be considered, *The Queen* v. *City of Toronto*, (1) *In re Wilkes' Estate*, (2) *In re Cavanagh and Grand Trunk Railway Company*, (3) *McAuley* v. *City of Toronto*, (4) *The King* v. *Rogers*, (5) *Hodge on Railways*, (6).

A. W. Fraser, *K.C.*, for the plaintiff, contended that the sales of property in the neighborhood are the primary means of arriving at the market value of land expropriated for public purposes. *Dodge* v. *The King* (7). As to the goodwill, defendants are not entitled to it as it is not inherent in the land itself. *Lefebvre* v. *The Queen*, (8) *McPherson The Queen*, (9) *The King* v. *Rogers*, (10).

Mr. *Lemieux* replied, citing *McGoldrick* v. *The King*, (11) *Sutherland on Damages* (12).

CASSELS, J., now (May 17, 1909) delivered judgment.

This is an information filed by the Crown to have the value of certain property expropriated ascertained.

The property is situate on Sussex Street, in the City of Ottawa. It is situate on the west side of the street with a frontage of 33 feet and a depth of 155 feet and 9 inches running through to Mackenzie Avenue. On the property is a building erected about forty-five years ago. The main part of the building covers in the front on Sussex Street the 33 feet, with a depth of about forty feet with an

(1) Aud. Ex. Pr. 2nd ed. p. 191.
(2) 16 Ch. D. 597.
(3) 14 Ont. L. R. 523.
(4) 18 Ont. R. 416.
(5) 11 Ex. C. R. 132.
(6) 7th ed. p. 208.
(7) 38 S.C.R. 149.
(8) 1 Ex. C.R. 121.
(9) 1 Ex. C.R. 53.
(10) 11 Ex. C.R. 132.
(11) 8 Ex. C.R. 169.
(12) 3rd ed. Vol. IV. p. 3142.

extension in the rear extending over part of the lot for about 18 feet. The building in question has been utilized as a hotel run by Condon and his wife. Mrs. Condon purchased the property in question in the year 1900 from one Landreville for the sum of $7,000.00.

Condon and his wife had been running a hotel on the flats when the great fire of 1900 destroyed their premises. Condon, the husband had a license to sell liquor which he had transferred to the premises in question. Landreville, who was carrying on in the premises the business of a hotel under license at the time of the Condon purchase was paid nothing for his license, which he allowed to lapse, not claiming any renewal.

There is a way, one-half owned by the Condons and one-half by the adjoining property of about eight feet, which permits access from Sussex Street to the rear part of the lot. The building in question extends over part of this way.

The Crown offers the sum of $12,500 in full for all damages sustained, including the value of the property, loss of good-will, and all other allowances for compulsory taking, moving etc.

The Condons unite their interests—Mrs. Condon as owner, Mr. Condon as licensee running the bar, and claim the sum of $32,000 made up as follows:—

Value of land	$ 10,000.00
Value of buildings	12,000.00
Good-will and sundries	10,000.00
	$ 32,000.00

The Mackenzie Avenue property abuts on Major Hill Park. The lot is about twenty feet on the Mackenzie Avenue front below the level of the street. Besides this there is an enormous rock shelving to the east which would have to be removed to utilize this part of the lot for building purposes.

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From Mackenzie Avenue there is a passage which enables that class of customers who desire to visit the bar to do so without being noticed on the occasion of their visits thereto. While this may appear to be a trifling advantage, it nevertheless secured a number of customers for Condon's bar whose patronage might otherwise be lost to him. It is therefore, an element that enhances the value of the property for the purposes of a bar.

I considered during the trial, lasting about three days, the evidence of the witnesses produced. Since the trial I have carefully analyzed the evidence. There are a few salient points in the case which in my judgment have to be accepted as proven :—

1. I think having regard to the character of the lot, the Mackenzie Avenue frontage need not be taken into account, separately from the Sussex Street frontage. From the owner's standpoint the property should be treated as a single property valued by the Sussex Street frontage, with a frontage of 33 feet and a depth of 155 feet and 9 inches.

2. It is admitted that Condon and his wife are both respectable and estimable people and that the hotel in question is well conducted and cleanly kept.

3. It is conceded by counsel on both sides that all the witnesses are reliable and honest. They may err in their opinions but not from any intention to depart from the truth.

4. Since 1900 the value of property in Ottawa has increased greatly including the value of Sussex Street property. This is due to several causes—the increase in the population—the improvements in Ottawa itself, such as the driveway and the parks—improved electric car service, etc.

It would appear that while Sussex Street property benefits with the rest of property in Ottawa, it has not increased in value as much as property situate elsewhere.

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It has certainly been helped by the building of the Interprovincial bridge connecting Hull with Ottawa.

It may be that inasmuch as so far back as 1901 the fact became known of the intention of the Government to expropriate the Sussex Street lands, this had a tendency to prevent the values for mercantile purposes increasing in the same proportion as properties in other parts of the city.

As is usual in these cases there is a great diversity of opinion as to values. Fortunately I have a very lucid and concrete rule for my guidance furnished by the decision of the Supreme Court in *Dodge* v. *The King* (1) at page 155, where the learned Judge who delivered the judgment states the law as follows :

" The market price of lands taken ought to be the *primâ facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession."

" How can it be better ascertained than by means of the prices paid for it so recently, and up to the day before expropriation ?

There may be added, as usually is added, a percentage to cover contingencies of many kinds " (p. 156).

In *McCauley* v. *City of Toronto* (2), the Chancellor of Ontario deals with the question of good-will.

With these authorities to guide me, I proceed now to deal with the evidence of the witnesses.

I think it only fair to the Condons to point out that while the evidence of purchases by the Crown of adjoin-

(1) 38 S. C. R. 149. (2) 18 Ont. R. 416.

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Reasons for Judgment.

ing properties is entitled to great weight as proving values, it should be borne in mind that people often prefer to accept perhaps a less sum than the value to avoid litigation.

The evidence of purchases, as stated by Mr. Justice Idington, is *primâ facie* conclusive (1).

After their purchase in 1900 the Condons expended about the sum of $4,000 in improving the property. This was not all in permanent improvements to the building.

The defendants produced considerable evidence as to values. I put aside the evidence of Mrs. Condon and Mr. Condon, so far as the value of the land and buildings is concerned. I will have to deal later on with their evidence when dealing with the question of good-will.

Witness Cole for the defendants places the value of the land at about $303 per foot frontage..	$ 10,000 00
Buildings at.....	12,000 00
	$ 22,000 00
Witness Geo. F. Thompson :—	
Land at	$ 9,900 00
Buildings at.....	11,591 00
	$ 21,491 00

He throws in 52 cents, which I do not refer to.

Witness Boyden :—	
Land at.....	$ 10,000 00
Buildings at.....	12,591 00
	$ 22,591 00
Witness Bouthillier places the value of the buildings at.....	12,501 00

In dealing with these valuations it may be well to note that on the 30th June, 1905 Condon gave an option to one Taggart of the whole property, including good-will and everything for $13,000. Condon states he was to

(1) See Dodge v. The King, 38 S. C. R. 149.

have the premises rent free for four or five years. He estimates this as worth $1,500 per annum. Accepting his statement, and allowing $6,000, his value would be $19,000 at that time for everything. The sum claimed for good-will is $10,000, and if good-will be deduced from the values placed by these witnesses. there would seem to be a great difference between Condon's idea of value and the retrospective idea of values of his witnesses.

The valuation has to be ascertained as of the 24th December, 1907. Witness Cole points out in his evidence that there has been a large advance in values in Ottawa property between the 1st January, 1908 and the date of his giving evidence.

The witnesses for the Crown take a very different view of the values of the property from the opinions of the witnesses for the Condons.

Witness Riopel produces a list of properties purchased by him on behalf of the Crown. Exhibit No. 11 shows the various properties and prices paid. According to this evidence, and in regard to other properties sold in the neighborhood, the amount tendered by the Crown for the lands and buildings would be in excess of the proportionate prices for adjoining properties. His evidence is entitled to weight, and the prices paid would be *primâ facie* evidence of the values. He does not deal with the "good-will".

Witness Simard is a purchaser of property on the East side of Sussex Street. He has been fortunate enough to become the owner of property returning him about 10½ per cent on his investment.

Witness Stewart, the Assessment Commissioner for the City of Ottawa, values the land at.....	$ 4,000 00
And the buildings at.	8,650 00
	$ 12,650 00

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Reasons for Judgment.

Witness Brown values the land at.....	4,125	00
And places a total value on the whole property (including $500 for furnace) at.....	12,375	00
Witness Lebel values the land at.....	3,580	00
And the building at.....	8,670	00
	$ 12,250	00

He reduces this to $11,750, deducting some allowance for moving included in his first valuation.

Witness Edey values the buildings at.....	$ 7,066	00
And the land at.....	4,134	00
	$ 11,200	00

On this testimony I have to come to a conclusion as to what amount should be paid. The Condons are entitled to full and fair compensation for the loss to them. They are not entitled to any additional sum by reason of the fact that the Crown instead of a corporation is expropriating their property.

I think a fair sum to be allowed would be $200 per foot frontage on Sussex Street through to Mackenzie Avenue, which would amount to $6,600.

If one takes Stewart's valuation of the buildings, viz: $8,650.00, and the furnace at $500.00, it would not be out of the way to allow $9,000.00 for the buildings.

This would make for land and buildings $15,500.

Next comes the indefinable allowance for compulsory expropriation, in other days computed at about 50 per cent. on the value, now-a-days at about 10 per cent. I do not understand the theory of the allowance. If it is intended to cover expense of moving etc., I do not see why it should be added to the value of the land. There

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seems, however, to be an allowance of this character recognized.

The evidence of good-will is not satisfactory. The account produced of receipts is of no value. The offsets are not forthcoming. This much, however, is proved. The Condons have had a good living. They have been able, out of their earnings, to put by about $1,200 per year. It is true they have worked hard and built up a good business. One of the witnesses, Brown, states that the *clientèle* would follow Mrs. Condon wherever she moves. I understand from this evidence that it was intended to intimate that she has the capacity of making her guests confortable.

I would allow for contingencies, moving, good-will, etc., the sum of	$ 2,000.00
For land and buildings	15,500.00
In all	$ 17,500.00

There will be judgment in favour of the defendants for $17,500 with interest there on from the date of expropriation, in full compensation for the land and buildings taken and for all damages resulting from the said expropriation. The defendants will also have their costs.

Judgment accordingly.

Solicitor for plaintiff: *D. H. McLean.*

Solicitor for defendant: *A. Lemieux.*

1909
May 12.

ALPHONSE LAMONTAGNE.....SUPPLIANT;

AND

HIS MAJESTY THE KING..... ....RESPONDENT.

Dominion steamer—Negligence—Stoker undertaking to perform an engineer's duty at his request but contrary to Chief Engineer's instructions—Liability.

The suppliant was employed as a stoker on board the Dominion steamer *Montcalm*. Instructions had been given by the chief engineer of the ship, and communicated to the suppliant, that "no employee on board, including stoker or 'graisseur,' was to touch the machinery without a special order from the chief engineer." On the evening before the accident to the suppliant, one of the engineers, who was ill, asked him if he was competent to start the machinery. The suppliant replied that he was, and the said engineer asked him to start the machinery for him early the following morning. To oblige the latter, the suppliant undertook to do this. The machinery was in perfect order, but owing to the negligence or unskilfulness of the suppliant in handling a steam-pump an accident happened by which he lost three fingers of his left hand.

Held, upon the facts, that the Crown was not liable under sec. 20 (c) of of c. 140, R. S. 1906.

PETITION OF RIGHT for damages arising out of an accident on a public work.

The facts are stated in the reasons for judgment.

February 22nd, 23rd and 25th, 1908.

The case came on for trial at Quebec, and after a certain portion of the evidence was taken a reference was directed to the Registrar to complete the taking of the evidence.

C. DeGuise, K.C., and *L. P. Grenier* for the suppliant;

The *Solicitor-General of Canada* and *H. Boivin* for the respondent.

CASSELS, J. now (May 12, 1909), delivered judgment.

This is a Petition of Right filed on behalf of the suppliant, a stoker on the Dominion steamship "Montcalm."

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Reasons for Judgment.

The suppliant claims the sum of $5,000 as damages for the loss of three fingers owing to an accident occurring on the 25th September, 1906, when starting the circular pump feeding the condenser.

The petition was filed on the 12th of April, 1907. The case came before me for trial at Quebec on the 28th May, 1908, when an application was made on behalf of the suppliant to postpone the trial on account of the absence of necessary witnesses employed on the "Montcalm" then on duty.

It was suggested and agreed that the question of law, namely, whether the steamer "Montcalm" is a public work within the meaning of *The Exchequer Court Act* (R.S. ch. 140, sec 20, sub-sec. (c) should be argued in Ottawa.

This argument did not take place, counsel, I presume, preferring to have the case tried, and it came on for trial at Quebec on the 22nd February, 1909.

After considerable evidence was adduced it was considered that more accurate evidence as to the construction of the machinery should be adduced, and by consent it was referred to the Registrar of the court to hear this evidence. This evidence was taken before the Registrar on the 19th March, 1909.

The suppliant bases his claim on the following allegations of fact, set out in the Petition of Right:—

"4. On or before the 16th September last, your suppliant as well as the whole crew of the Dominion Government steamship 'Montcalm' received an order to obey implicitly and without question all orders emanating from the superior officers and this order was specially directed for the crew or men concerned to obey without question all orders from the engineer in charge.

"5. On the 25th of September past, Alphonse Lamontagne, the suppliant, acting under orders from the ship's engineers, went below in the engine room to start up the

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circular pump feeding the condensor and other pumps and valves.

"6. That said pumps and said machinery he was ordered to attend to, were in such bad order that the spoke your suppliant was compelled to use to start said machinery flew out of his hands and, coming down with much force, cut off three fingers of his left hand.

"7. That the accident aforesaid was due to the fact that the engineer in charge had packed the safety valve and all the tubes connecting with the boiler, in such a manner as to choke said valves and tubes, and the negligent packing of these steam tubes occasioned the up heave and expansion of the two valves connecting with the machinery attended to by suppliant under orders as above stated.

"8. That the accident was caused purely through the negligence and carelessness of the engineer in charge of the machinery aboard the Dominion Government steamer 'Montcalm'."

A careful consideration of the evidence convinces me that there is no foundation whatever for these allegations. The machinery was in perfect order.

One Joseph Fontaine was the chief engineer of the "Montcalm". At the time of the accident the "Montcalm" was moored to the King's wharf at Quebec, ready at any moment on running orders, to depart for Sorel.

Jean Royer was either third or fourth engineer; it is immaterial which. Lamontagne, the suppliant, was a stoker. He himself testifies he was a "graisseur." I think he is mistaken. It is immaterial which position he occupied

On the night previous to the accident, Royer, who was then ill, asked Lamontagne if he was competent to start the machinery. Lamontagne answered yes, and Royer asked him to start the machinery the following morning at an early hour. It is proved by a witness for the sup-

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pliant, Jobin, corroborated by Fontaine, that strict orders had been given by Fontaine delivered through one Sauvageau that "no employee on board including stoker or "'graisseur' was to touch the machinery without a special "order from Fontaine."

Langlois, another witness for the suppliant, states that Fontaine's order was as follows:—

"Les ordres étaient qu'aucun chauffeur, ni trimmeur, même graisseur, ne devait toucher aucune machinerie, ni faire partir aucune pompe sans un ordre de l'ingénieur lui-même."

Lamontagne was aware of this order, and apparently to oblige Royer, undertook the work. Lamontagne had been for many years on the steamship and had started the pump before:—

"Q. Mais cette pompe là, la pompe en question, vous l'aviez déjà vue? A. Celle-la.....du "Montcalm".....Oui."

"Q. L'aviez-vous fait partir avant? A. Bien, oui."

To oblige Royer, contrary to the express orders of Fontaine, Lamontagne undertook to do the work.

Owing to no fault in the machinery, but to want of care or skill on the part of Lamontagne the accident occurred.

The statement of Joseph Ouellet and Narcisse Ouellet in the evidence taken *de bene esse* of the admissions made by Royer are of little value. Assuming the evidence to be admissible, all it amounts to is that Royer having disbeyed Fontaine's express orders was apprehensive he would be discharged.

I think the suppliant has failed entirely in proving a case of negligence against the Crown.

Having arrived at this conclusion, it is not necessary to consider the question whether having regard to the views expressed by Mr. Justice Burbidge in *Leprohon* v. *The Queen* (1) the words in *The Exchequer Court Act* "on any public work" means on "any property of the Dominion."

(1) 4 Ex. C. R. 100.

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Reasons for Judgment.

The petition is dismissed with costs, to be paid by the suppliant to the respondent.

Judgment accordingly.

Solicitor for suppliant: *L. P. Grenier.*

Solicitor for respondent: *H. Boivin.*

IN THE MATTER of the Petition of Right of

THE WESTERN ASSURANCE COMPANY..... .... } SUPPLIANTS; 1909 May 28.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Accident to vessel using canal—Negligence—Affirmative proof —Primâ facie case.

Held, that in order to bring himself within the remedy provided by section 20 (c) of R. S. 1906, c. 140, a party must prove affirmatively that there was negligence on the part of some officer or servant of the Crown; to show merely that an accident had occurred is not sufficient to establish a *primâ facie* case of negligence. *Dubé* v. *The King* (3 Ex. C. R. 147) followed. *McKay's Sons et al.* v. *The Queen* (6 Ex. C. R. 1) referred to and explained.

PETITION OF RIGHT for damages arising out of an accident to a scow while using the Lachine Canal.

The facts are stated in the reasons for judgment.

March 11th, 1909.

The case came on for hearing at Montreal.

E. Lafleur, *K.C.* and *C. A. Pope* for suppliants.

J. L. Perron, *K.C.* and *R. Taschereau* for the respondents.

After the evidence was closed and the case partly argued, on motion of Mr. *Lafleur*, counsel for the respondent consenting, the case was reopened for the taking of further evidence at Montreal on the 6th May following.

May 6th, 1909.

C. A. Pope for the suppliants;

R. Taschereau for the respondent.

Mr. *Pope* contended that the evidence shewed a clear case of negligence actionable under *The Exchequer Court*

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Act. The evidence as to the cause of the accident is uncontroverted. The Crown invited the suppliants to use the canal, and the accident shows that there was negligence in not keeping the canal free of logs. (Cites secs. 19 and 20 of *The Exchequer Court Act*; *City of Quebec* v. *The Queen* (1); *Mackay's Sons et al.* v. *The Queen* (2).) The suppliants are entitled to all damages suffered, including the cost of surveying the bottom of the scow. (Cites *Cedar Shingle Company* v. *Rimouski Assurance Company* (3).)

Mr. *Taschereau* contended that affirmative evidence of negligence was necessary on the part of the suppliants; it could not be presumed from the fact of an accident having happened. The remedy was statutory, and the negligence must be brought home to some officer or servant of the Crown while in the discharge of his duty.

Mr. *Pope* replied, citing sec. 16 of the *Canal Regulations*, and *Maxwell on Statutes* (4).

CASSELS, J. now (May 28th 1909) delivered judgment.

The petition of right is filed by the suppliants claiming the sum of $1,035.04 against the Crown for injury occasioned to the scow *Dominion No.* 2, while in the Lachine Canal, by a submerged log which penetrated through the barge causing it to sink.

The barge was at the time of the sinking the property of the Dominion Bridge Company. The suppliants had insured the scow, and after investigation of the loss paid the claim, and have been subrogated to the rights of the Dominion Bridge Co.

The petition was based on two grounds. That portion of the petition (par. 5) claiming damages by reason of the *Turret Crown* having struck the scow was abandoned by counsel for the suppliants at the opening of the trial.

(1) 24 S.C.R. 420.
(2) 6 Ex. C.R. 1.
(3) Q.R. 2 Q.B. 379.
(4) 4th ed. p. 360.

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Reasons for Judgment.

The case came on for trial at Montreal on the 11th March, 1909 and the evidence was closed.

Mr. *Lafleur* relied on the case of the *Acadia*: *Mackay's Sons et. al.* v. *The Queen* (1). The judgment in that case was an oral judgment, and might lead to the impression that the suppliant might succeed in an action without proof of actual negligence. The facts in that case when the record is examined shew that there was actual negligence on the part of an officer of the Crown committed by such officer while acting within the scope of his duty.

On mentioning my doubt as to the correctness of this decision as reported, without the facts of the case being considered, Mr. *Lafleur* asked to have the case reopened, and counsel for the Crown not objecting, leave was given the suppliant to adduce further evidence, and by consent of counsel the trial was adjourned until the 6th May, 1909, when further evidence was adduced and argument concluded.

There is but little dispute as to the main facts, or as to the amount of damages. The only difference as to the amount of damages is as to the right of the suppliants to add to the claim for damages the expense the suppliants incurred in investigating the claim of the Dominion Bridge Co.

Zepherin Clement was captain of the scow *Dominion No.* 2 when the accident occurred. He was proceeding from Montreal to Lachine in tow of the tug *Le Fred*, the scow being lashed to the side of the tug. The scow was 100 feet in length and 26 feet in width. She was laden with coal, about 300 tons, and was drawing about six feet of water. The scow and tug left the lock at Cote St. Paul about six o'clock. From this point to the bridge at La Cote St. Paul is about six miles. Having arrived at the bridge, a sunken log pierced the side of the scow

(1) 6 Ex. C.R.I.

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causing her to sink. It is stated and not contradicted that this log was about 15 inches in diameter at the upper end. It is admitted that the log in question was so far below the level of the water at the time of the accident as to be invisible to the eye.

The case for the suppliants is based on the fact that about three days before the accident in question a scow called the *Champlain* was struck by a log similar in appearance to the log in question, about two acres further west than the place where the accident in question happened. The scow *Champlain* was also owned by the Dominion Bridge Co.

Sigouin was in charge of the scow *Champlain*, and reported the fact as to the *Champlain* being struck by the log to the officials of the Dominion Bridge Co. No one considered it of consequence to notify those in charge of the canal of a dangerous log being in the canal.

The argument for the suppliants is that the Crown is liable because the fact of a log dangerous to navigation should have been known to the officers in charge of the canal.

Clement, the captain of the scow *Dominion No.* 2, states in the course of his evidence that at the time of the accident he was having the following conversation with his brother-in-law, who was with him on the barge, viz :

" Tout d'un coup on rencontre le billot-là de la lock qui descendait la semaine dernière,' j'ai dit : 'Tout d'un coup on le rencontre et on frappe pareil '. Mon beau-frère dit : ' Cela ne serait pas rien' ; on le disait, mon beau-frère était assis sur ce qu'on appelle un cabestan qui tourne."

And again speaking of the log, he says :

" Il pouvait être à peu près deux, trois pieds d'eau par-dessus parce qu'on ne le voyait pas. Qui aurait vu le billot on aurait dit ' voilà un billot ', on aurait pas été

capable de s'en empêcher quand on peut voir une affaire de même, quand le billot a *ressout* à travers du chaland."

He did not report to the canal officials the fact of there being a log.

At the time the barge *Champlain* was struck the log was apparently visible bobbing up and down. At the time of the accident on the 23rd May, 1904, three days later, the log was invisible. When it sank, if the same log, is not shown.

It is sworn to by Mr. O'Brien, the superintendent or overseer of the Lachine Canal that he had no knowledge of the fact of the log being in the canal. That no one informed him of the fact. He also states that had he been informed it would have been his absolute duty to remove it. The written regulations produced have no bearing on the case.

In order to succeed the suppliants must bring their case within the provisions of Section 16, sub-sec. (*c*) of 50-51 Vict., Ch. 16.

They must prove :

(1) That the suppliants suffered injury in person or to property on a public work.

(2) That the injury resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

See *Ryder* v. *The King* (1); *The King* v. *Armstrong* (2).

In the case of *Dubé* v. *The Queen* (3), it is laid down that the suppliant must prove affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *primâ facie* case of negligence.

Mr. *Pope* relied strongly on the reasons of Sir Henry Strong, C. J., in the case of *The City of Quebec* v. *The Queen* (4), but this opinion was not concurred in by a majority of the Court.

(1) 36 S. C. R. 462.
(2) 40 S. C. R. 229.
(3) 3 Ex. C. R, 147.
(4) 24 S. C. R. 420.

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Reasons for Judgment.

I think the suppliants have failed to prove a case of negligence as required by the statute, and the petition is therefore dismissed with costs.

Judgment accordingly.

Solicitors for suppliant: *Lafleur, McDougall, Macfarlane and Pope.*

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

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.. ..... } PLAINTIFF;

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May. 10.

AND

THE BURRARD POWER COMPANY (LIMITED) AND THE ATTORNEY-GENERAL OF BRITISH COLUMBIA ..... } DEFENDANTS.

Constitutional law—Dominion lands—Railway belt in British Columbia—Provincial legislation respecting the same—Water record—Invalidity—Interference with navigation.

No rights adverse to the Dominion Government can be acquired under the British Columbia Water Clauses Consolidation Act (R. S. B. C., cap. 190) in any waters within the territory known as the Railway Belt, granted to the Dominion Government by the Act 43 Vict. (B. C.) c. 11, as amended by 47 Vic. (B. C.) c. 14.

2. In view of the exclusive legislative authority of the Parliament of Canada under sub-sec. 10 of sec. 91, *British North America Act*, 1867, it is not within the power of a Provincial legislature to authorize any diversion or other use of water in the upper reaches of a river which would have the effect of interfering with the navigation of a lower portion of such river.

THIS was an Information filed by the Attorney-General of Canada to have it declared *inter alia* that a certain grant of water rights to the defendant company made by the Government of British Columbia was invalid.

The facts are fully stated in the reasons for judgment.

April 13th, 1909.

The case now came on by way of a motion for judgment by the Crown on the report of the learned referee. On the application of counsel for the defendant company, the said defendant was allowed to appeal from the report on the grounds set out in the reasons for judgment. (See *post* p. 308).

E. L. Newcombe, K.C., appeared for the plaintiff.

E. Lafleur, K.C., appeared for the defendant company.

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Argument of Counsel

The Attorney-General of British Columbia, appeared for that province.

Mr. *Lafleur*, contended that the finding of the learned referee with respect to the diversion of the waters having a tendency to interfere with navigation was wrong. The Lillooet river is admittedly navigable up to what is called the town line bridge, and beyond that point a certain class of boats could, as the learned referee finds, be laboriously taken up for a short distance, i. e., to the point where the Burrard Power Company contemplate carrying on their operations. From a point about a mile above the town line bridge up to the Lillooet lake it is not navigable in law. The only reason the river here is used at all is that there is no road, and a good test of its practical navigability lies in the fact proved that it took two men twelve hours to get a small boat five miles up the stream, for which they were paid $18. Such feats are far from establishing the navigability of that part of the stream. But it is submitted that these proceedings are quite premature because we have no right to do one thing or the other until the Government of British Columbia has given its sanction to the scheme. All that we have done so far is to get a water record, so as to prevent any other person from acquiring that quantity of water at about the place where we propose to operate; but, as to the details of the scheme, they are at large. But in any event the water used will be returned to the Lillooet river. If there is to be any interference with the water it will take place in the part of the stream that is not navigable; there will be no detriment to existing navigation. As to any possible disturbance to the fisheries, that is settled by putting in an ordinary fish-ladder. A river in this country is not a royal river unless it is tidal to its source. It may be a royal river in part, where navigable, and a private river for the rest. (Cites *The*

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Argument of Counsel.

Queen v. *Robertson* (1); *Keewatin Power Company* v. *Town of Kenora* (2).

Mr. *Newcombe* argued that inasmuch as the river in question was clearly within the "Railway Belt" granted by British Columbia to the Dominion Government by 43 Vic. c. 15, there was no possible doubt that the Dominion's ownership of the water and bed of the stream could not be interfered with by the provincial legislature or the provincial government. It is a part of the public property of Canada under sec. 91 of *The British North America Act.* It is the property of the Crown. There is only one Crown. The right of administration of public property may be in the Dominion or it may be in the provinces, but the property is the property of the Crown. So when this transfer was made by British Columbia to the Dominion, the title remained where it had always been, in the Crown, but by way of convenient analogy, as between individuals, we speak of British Columbia transferring its property to the Dominion. What British Columbia did was to transfer all the rights of administration of the beneficial interest of the lands to the Dominion, and the Dominion became the administrator, became the authority to administer the lands to the same extent as British Columbia could have done before the transfer was made. The provisions of the British Columbia Water Clauses Act, therefore, do not apply to the *locus in quo*; and no rights could be created by that Act adverse to the interests of the Dominion. (Cites *Attorney-General* v. *Mercer* (3); *Attorney-General of British Columbia* v. *Attorney-General of Canada* (4). The Dominion Government does not stand in relation to these lands as a freeholder within the province, but the administrative interest was vested in the Dominion by the statute. When the Dominion disposes of any of such

(1) 6 S.C.R. 52.
(2) 16 O.L.R. 184.
(3) 8 App. Cas. 767.
(4) 14 App. Cas. 295.

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Argument of Counsel.

lands to settlers, then the province would have the same jurisdiction over the lands in the hands of the Dominion's grantees as if the province had never parted with the same. But no question of that sort arises here.

I submit that the findings of the learned referee are amply justified by the evidence; and that there is no jurisdiction in the provincial authorities to authorize the defendant company to assume any rights in the waters of the river in question.

Mr. *Lafleur*, in reply, contended that under the decision of their Lordships of the Privy Council in the case of *The Attorney-General of British Columbia* v. *Attorney-General of Canada* (1), the Dominion secured nothing more in respect to the lands in the "Railway Belt" than the territorial revenues. None of the prerogative rights of the Crown in the right of British Columbia were transferred to Canada, but at most it was a conveyance in trust to enable the Dominion government to sell the lands and recoup itself the subsidy it granted to the railway. He submitted that the conveyance of the "Railway Belt" was never intended to enable the Dominion Government to give to its grantees a higher title than would be given by the province itself to settlers; and as the law stood at the date of the statutory grant to the Dominion, under a grant from the Government of British Columbia the settler's title would be subject to the superior rights of the persons who might hold water records. British Columbia never parted with its right to legislate over these lands; and no presumption would be drawn by the courts to exclude the sovereign right of legislation. (Cites *McGregor* v. *Esquimalt and Nanaimo Railway* (2)

My argument, in short, on this point is that while the property referred to in sec. 91 of *The British North America Act* means property with which the Dominion Government can deal with absolutely, the lands in the

(1) 14 App. Cas. 295. (2) (1907) A. C. 462.

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Argument of Counsel.

"Railway Belt" are granted in trust, and when the Dominion grants it to settlers they take it subject to provincial legislation. The trustee cannot appropriate the lands to himself, he must appropriate to the purposes of the trust, which was to sell and recoup the Dominion Government for the subsidy granted to the railway. (Cites *Martley* v. *Carson* (1); *Klondyke Government Concession* v. *McDonald* (2); *Esquimalt Waterworks Company* v. *City of Victoria* (3).

The water privileges under the British Columbia Water Clauses Act are grants by way of expropriation in the exercise of the right of eminent domain by the province, and are paramount to any ordinary title in fee. They could not be excluded by a conveyance to a trustee, who is merely the conduit through which the titles to settlers are to be granted.

Upon the question of navigability, the test is laid down in *Bell* v. *Corporation of Quebec.* (4) . A river is navigable in law when it is navigable for commercial purposes, not merely when it might, by some feats of strength or ingenuity, be made navigable by overcoming all kinds of obstacles, as is the case with the river here.

[BY THE COURT: If the diversion of water in the upper reaches interfered with the navigability of the stream below, would its authorization be competent to the provincial legislature?]

That is not shown by the facts; and can the Dominion Government take action here to prevent something that might never happen?

As to the possible interference with the fisheries in the river, the fact is that with respect to this river there are no regulations made by the Dominion Government affecting the fisheries, and, consequently, there is no clashing of Dominion and provincial authority.

(1) 20 S. C. R. at p. 653.
(2) 38 S. C. R. 79.
(3) [1907] A. C. at p. 509.
(4) 5 App. Cas. 84.

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THE KING v. THE BURRARD POWER CO.

Reasons for Judgment

CASSELS, J. now (May 10th, 1909) delivered judgment.

The information was filed on behalf of His Majesty on the information of the Attorney-General for the Dominion of Canada against the defendant, the Burrard Power Company, Ltd. For convenience it is better to set out in full the words of the information :—

"1. That pursuant to the agreement of the Government of British Columbia contained in article 11 of the terms of union upon which the colony of British Columbia was admitted into the Dominion of Canada, the legislature of British Columbia by an 'An Act to grant public lands on the mainland to the Dominion in aid of the Canadian Pacific Railway, 1880,' 43 Vict. Chap. 11, as amended by 47 Vict. Chap. 14, granted to the Dominion Government for the purpose of constructing, and to aid in the construction of, the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust to be appropriated as the Dominion Government might deem advisable, the public lands along the line of the railway before mentioned, as therein particularly mentioned, and which lands are hereinafter called the Railway Belt.

"2. That both the Lillooet River, which is a tributary of the Pitt River, and the Lillooet Lakes, from which it rises, are wholly situate within the limits of the said Railway Belt. The Lillooet River is about twelve miles long, and is a public and navigable stream.

"3. That the defendant is an incorporated company, having its head office in the City of Vancouver, B.C.

"4. That on the 7th day of April, 1906, upon the application of the defendant company, the Water Commissioners for the District of New Westminster, assuming to act under the Water Clauses Consolidation Act, 1897, Chapter 190, of the Revised Statutes of British Columbia, 1897, purported to grant the said company, at the annual rent and for the consideration therein men-

tioned, a record for 25,000 inches of water (subject to certain reservations) out of the said Lillooet Lakes and tributaries, and Lillooet River and its tributaries, such water to be used for generating electricity for light, heat and power and for milling, manufacturing, industrial and mechanical purposes, at or near lot 404, New Westminster District, and to be diverted from its source at a point at or near the outlet of the Lower Lillooet Lake and to be returned at a point at or near Lot 404, Group 1, New Westminster District, and to be stored or diverted by means of dams, pipes, flumes and ditches.

" 5. That on the public lands forming part of the Railway Belt and adjoining the said Lillooet Lakes and Lillooet River, is a large quantity of valuable timber, which is entitled of right to be floated down the said river, and the said alleged grant and the diversion thereby authorized will materially interfere with the said right.

" 6. That the said alleged grant and the rights under the Water Clauses Consolidation Act thereto attached will materially interfere with the rights of the Dominion Government in the Railway Belt.

" 7. That the capacity of the Lillooet River is about 25,000 inches, and the alleged grant and the proposed diversion thereby authorized will greatly diminish the quantity of water in the said river and materially interfere with the rights of the Dominion Government.

" 8. That the alleged grant and the proposed diversion thereby authorized will materially interfere with the public right of navigation in the said river.

" 9. That section 91 of the *British North America Act*, 1867, provides that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the following (amongst other) classes of subjects :—

(1). The Public Debt and Property.

(10). Navigation and Shipping.

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Reasons for Judgment.

"10. That sub-section (2) of section 131 of the Water Clauses Consolidation Act, 1897, provides that the power conferred by the 1st sub-section, of entering and taking Crown Lands, shall not extend to lands which shall be expressly reserved by the Crown for any purpose whatever.

CLAIM.

The Attorney-General for the Dominion of Canada, on behalf of His Majesty the King, claims as follows:—

(*a*) A declaration that the alleged grant of the 7th April, 1906, is invalid and conveyed no interest to the defendant company and that the same be cancelled;

(*b*) A declaration that the said record is invalid as being an interference with property subject to the exclusive authority of the Dominion of Canada;

(*c*) A declaration that the said record is invalid as being an interference with the public right of navigation and the right of floating timber down the said river;

(*d*) A declaration that the said record is invalid and unauthorized by or under the provisions of the Statute of British Columbia, 'The Water Clauses Consolidation Act, 1897';

(*e*) An injunction to restrain the defendant company from applying under the provisions of the Water Clauses Consolidation Act, 1897, for approval of its undertaking and from taking any further steps in regard thereto;

(*f*) Such further and other relief as to this Honourable Court shall seem meet."

The defendant, The Burrard Power Company, in its defence, deny all the allegations of the information. Paragraph 11 of the defence is as follows:—

"(11). The defendant will object on the trial that the information herein discloses no cause of action, and that in any event the water record or grant in question cannot be declared invalid or cancelled except upon petition of

the Attorney-General or other proper representative of the Province of British Columbia."

Subsequently, by the consent of the plaintiff, the Attorney-General of British Columbia was added as a party defendant as representing the interests of British Columbia, and appeared before the Referee and took part in the proceedings.

On the 23rd day of December, 1907, an order was pronounced as follows :—

"IN THE EXCHEQUER COURT OF CANADA.

THE KING on the Information of the Attorney-General of Canada.

Plaintiff;

and

THE BURRARD POWER COMPANY, LIMITED,

Defendant.

Upon the application of the Attorney General of Canada on behalf of the plaintiff, and upon hearing the solicitors for the plaintiff and the defendant, I DO ORDER that the determination of the issues of fact in this cause be referred for inquiry and report to the Honourable Mr. Justice Archer Martin, Judge of the Supreme Court of British Columbia, pursuant to the Revised Statutes of Canada, 1906, chapter 140, section 42, and to the Rules of the Exchequer Court of Canada regulating the proceedings on a Reference.

Dated at Ottawa, this 23rd day of December, 1907.

(Sgd.) GEO. W. BURBIDGE,
J. E. C."

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Mr. Justice Martin proceeded with the reference. A large mass of evidence was adduced before him, and on the 16th day of December, 1908, he made his report as follows :—

" *To the Honourable Walter Cassels, Judge of the Exchequer Court of Canada :*

" Pursuant to the order of reference herein, dated the 23rd day of December, 1907, I have the honour to inform you that I have inquired into the issues of fact in this cause and beg to report as follows :—

" 1. The allegations, founded upon certain statutes, contained in the first, ninth and tenth paragraphs of the Information were not considered proper subjects of discussion before me under said order of reference.

" 2. The allegations of fact contained in the third paragraph of said Information were admitted.

" 3. The allegations of fact contained in paragraph four of said Information have been proved. It is to be explained that the given point of return of the water diverted from said lakes and river, *i. e.* ' at or near Lot 404, Group 1, New Westminster District,' is not on the Lillooet River, but on Kanaka Creek, which creek at its nearest point is distant from said river about two miles to the south, and said creek discharges into the Fraser River.

" 4. The allegations of fact contained in the fifth paragraph of said Information have been proved.

" 5. The allegations of fact contained in the sixth and seventh paragraphs of said Information have been proved, and the rights of the Dominion, which have been materially interfered with, include navigation, timber, and fisheries ; the result of defendant's proposed undertaking upon the salmon (Sockeye) spawning beds in the lake would be specifically detrimental, not to speak of the harmful effect upon that fish and other kinds of salmon and trout caused by the reduction of the ordinary volume

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of water in the river, thereby curtailing the spawning area and probably entirely preventing fish from ascending to the upper reaches of the river at the proper season of the year.

" 6. The allegations of fact contained in the eighth paragraph of said Information have been proved.

" 7. With respect to the second paragraph of said Information the allegations of fact therein contained that ' both the Lillooet River, which is a tributary of the Pitt River, and the Lillooet Lakes, from which it rises, are wholly situate within the limits of the said Railway Belt,' have been proved. Counsel for the defence, and for the Attorney-General of British Columbia, adduced a considerable body of evidence to show that the sources of supply of said lakes were to a large extent outside the said Railway Belt, but I have not entered upon the consideration of the matter because in my opinion it is an immaterial issue which it would not be profitable to pursue.

" With respect to the allegation in the same paragraph that ' the Lillooet River is about twelve miles long and is a public and navigable stream,' the evidence establishes the fact that the river is a tidal one for between five and six miles and a navigable one for a distance of upwards of nine miles from its mouth (at Pitt River). Of said nine miles, nearly six miles, up to what is called the town line bridge, are navigable for power craft of various sizes. Said bridge has prevented any evidence, based on actual experiment, being offered of the capacity of the stream above it for power craft, but the evidence points to the belief that a little and inexpensive work would enable such craft to go up another mile or so. Above the said bridge loggers' and other boats can go up for two or three miles, say about nine miles in all, nearly any time of the year. The balance of the river (which, as a whole, is probably nearer thirteen miles long than twelve, though

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there is no exact measurement) is for the most part of a different character, the stream becoming much swifter and narrower, and its use is made more difficult by riffles and rapids of varying depth and strength, and shallow and rocky places through which the channel makes its way with less or more facility according to the height of water. There are no falls in the river, and the rapids or shoals are not of a size or nature to prevent prospectors', fishermen's and loggers' loaded boats, of about twenty feet in length being laboriously poled, or 'tracked' by line, following the more or less contracted channel, up to the lake during any part of the year, except at the top of freshets, which are of uncertain occurrence owing to their being largely caused by the varying rain or snow fall in the mountains surrounding the lakes. The river is not obstructed by ice, and is capable of being used to drive logs in a commercial sense for between eight or nine months in the year, the time for so doing depending upon the freshets, which do not as a rule occur in the latter part of June, or in July or August, or till the latter part of September. The river, as a whole, is not of so turbulent a nature as streams which are generally met with in the mountainous section of British Columbia, and it has more than the average natural facilities for driving logs.

"It is contended for the defence that the stream has no higher claim to be considered navigable than that portion of the Miramichi River above Price's Bend, which is described in the *Queen v. Robertson* (1) and which was held not to be navigable, but in my opinion it is impossible to really compare the two streams in view of the somewhat meagre description given of the Miramichi. The fact that boats can only utilize a portion of a stream in the ascent thereof by resorting to more or less slow or laborious methods does not of itself determine its navigability any more than does the fact that the descent may be corres-

(1) 1882, 6 S. C. R. 52, at p. 129.

pondingly swift and easy. In my opinion it comes to a question of degree, and regard must be had to the custom and nature of the country and the manner in which such streams are utilized by those experienced in their nature and peculiarities. The well-known navigation by steamboats of certain turbulent rivers in this Province might well be regarded as an impossibility by those who had not the local knowledge and experience. I feel that the question is not an easy one to decide, but after giving due effect to the evidence and argument, I have been unable to reach any other conclusion than that this river is a navigable one.

"Submitting respectfully the foregoing for your Lordship's consideration,

"I have the honour to be, Sir,
Your obedient servant,
"(Sgd.) ARCHER MARTIN.

"VICTORIA, BRITISH COLUMBIA, December 16th, 1908."

The report was duly filed on the 22nd December, 1908, and notice of the filing thereof duly given to the defendants shortly thereafter.

No appeal was taken against the report, and by the Rules of the Exchequer Court the report became absolute. (See Rule 214).

Thereupon the Plaintiff set the case down for hearing, praying for judgment as asked by the information; and the case came on for argument before me on the 13th April, 1909.

Mr. *Newcombe, K.C.*, appeared for the Plaintiff; the Attorney-General of British Columbia (the Honourable Mr. *Bowser, K.C.*, and Mr. *Lafleur, K.C.*, appeared for the respective defendants.

On the opening of the case an application was made on behalf of the defendants for leave to appeal from the

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report on two grounds, and after considerable discussion, the defendants were allowed to appeal.

The grounds of the appeal are as follows:

"1. The finding of fact contained in the fifth paragraph of the said report, and contained in the following words of the said paragraph:—

"The result of defendants' proposed undertaking upon the salmon (Sockeye) spawning beds in the lake would be specially detrimental, not to speak of the harmful effect upon that fish and other kinds of salmon and trout caused by the reduction of the ordinary volume of water in the river, thereby curtailing the spawning area and probably entirely preventing fish from ascending to the upper reaches of the river at the proper season of the year.

"2. The finding of fact contained in the seventh paragraph of the said report, to the effect that the Lillooet River is a navigable river."

It was considered by counsel for the plaintiff and defendants that it would be in the interest of the parties that the appeal should be argued at the same time as the motion for judgment, and that I should pronounce judgment on the findings of the report as given by the learned Referee, or as subsequently varied by me, if varied.

I will deal with the grounds of appeal later, although in my judgment the legal rights of the plaintiff will not be affected even if the report be varied as contended for by the defendants.

The two main questions argued on the part of the plaintiff were:—

1st. That the Water Clauses Consolidation Act, 1897, cap. 190 of the Revised Statutes of British Columbia, does not confer powers as against the property of the Dominion, and that if this legislation purported to so enact, the enactment would be *ultra vires* and of no effect.

2nd. That the proposed grant referred to in paragraph four of the Information would be an interference with

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the public right of navigation, and that therefore the plaintiff is entitled to an injunction to restrain such diversion of the water.

On behalf of the defendants, Mr. *Lafleur* argued very forcibly and succinctly the case from the standpoint of British Columbia. His contention is: 1st, that the property which passed from British Columbia to the Dominion, pursuant to the agreement referred to in paragraph 1 of the information, is not property within the meaning of section 91 of the Confederation Act, and that the property in question still forms part of the Province of British Columbia, with respect to which the Legislature of British Columbia had full power to legislate, and that the property in question was affected by the provisions of the Water Clauses Consolidation Act, 1897, cap. 190, referred to.

2nd. That prior to the agreement and statutes referred to in the first paragraph of the Information certain statutes had been enacted by the Legislature of British Columbia which interfered with riparian rights as they existed theretofore, and the Dominion took subject to these rights and the power of the Legislature of British Columbia to amend such prior statutes.

3rd. That the litigation was premature, as the grant to the defendants, The Burrard Power Company, Limited, had not yet been approved by the Lieutenant-Governor in Council.

Subsequently this contention was modified into a contention that it was premature in so far as the right to an injunction is concerned.

If the property in question is properly included in the division of property covered by section 91, then if not affected by prior legislation of British Columbia, the case for the defence fails.

The argument for the defence rested mainly on the language of the Judges of the Board of the Judicial Com-

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mittee of the Privy Council in the precious metals case—*Attorney-General of British Columbia* v. *Attorney-General of Canada* (1). This case was duly considered by the Supreme Court in the case of *Farwell* v. *The Queen* (2).

In the case of *The Queen* v. *Farwell* (3) the agreements with British Columbia and the effect of the statute of British Columbia, 47 Vict. Cap. 14, were considered by the learned judges.

Sir W. J. Ritchie, C.J., states as follows :—

"I am clearly of opinion that the application of the defendant on the 22nd November, 1883, conferred on him no right, title, or interest in the land applied for. I am also of opinion that the line of the Canadian Pacific Railway, as well in law as in fact, was, on the 13th January, 1885, when the survey and plan were filed in the Lands and Works Department of British Columbia, duly located, that the filing of such survey and plan conferred on defendant no right, title, or interest in the land, and that on the 16th day of January, 1885, the date of the grant, the Province of British Columbia had ceased to have any interest in the land covered by said grant, and that the title to the same was in the Crown for the use and benefit of the Dominion of Canada and consequently conveyed no right, title, or interest to the defendant in said lands." (P. 423).

Strong, J.—

"I am of opinion that the objection that the statute required a grant or some subsequent instrument to carry it into execution wholly fails. It was clearly self-executing and operated immediately and conclusively as soon as the event on which it was limited to take effect happened, that is, as soon as the 'line of railway was finally located.' Whether upon that event occurring it operated by relation from the date of its enactment so as to avoid

(1) 14 App. Cas. 295. (2) 22 S.C.R. 553.
(3) 14 S.C.R. 392.

intermediate grants by the Province of British Columbia is an inquiry which the facts of the present case do not require us to enter upon, for the respondent acquired no title to this land until after the line of railway was finally located." (P. 425).

Fournier, J.—

"In the case of *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1) which was decided by this Court yesterday, I had occasion to express my opinion upon the question of the ownership of the precious metals in these railway lands, but as regards the construction to be put upon the statute granting provincial lands in aid of the construction of the Canadian Pacific Railway, I think the expressions used are quite sufficient to convey the lands to the Dominion, and therefore Farwell's title from the Government of British Columbia is void." (P. 428).

The judgment of the Supreme Court in *Attorney-General of British Columbia* v. *Attorney-General of Canada* having been reversed by the Board of the Privy Council so far as the right to the precious metals are concerned, the question again arose in the Supreme Court in the case referred to of *Farwell* v. *The Queen* (2).

King, J., in pronouncing the judgment of the Court, said,—

"These lands are within what is known as the Railway Belt, a tract of land transferred to the Dominion by Act of British Columbia, 47 Vic. Ch. 14 (1883). In October, 1885, an information of intrusion was filed against Farwell in respect of the lands in question. He then set up as a defence that his possession was under a grant issued to him by the Queen under the great seal of British Columbia in January, 1885, and that prior thereto the lands were in the hands and possession of the Queen.

(1) 14 S.C.R. 345. (2) 22 S.C.R. 553.

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To this the Attorney-General of Canada replied that, at the date referred to, the lands were in the hands and possession of the Queen, in right of the Dominion, and not in right of the province. It was so held by the Supreme Court of Canada (14 S.C.R. 392), and the defendant was put out of possession on 6th January, 1892." (P. 557).

* * * *

"But, secondly, there is no inconsistency between *Queen* v. *Farwell* (1) and *Attorney-General of British Columbia* v. *Attorney-General of Canada* (2). The former case held that the Act of British Columbia transferred to the Dominion the rights in the lands which had been formerly enjoyed by the province. The latter held that the Act transferred to the Dominion those rights only and did not transfer the *jura regalia*, including therein the precious metals then in question. These were held to be in the Crown, subject to the control and disposal of the Government of British Columbia." (P. 558).

The opinion of Mr. Justice Burbidge is reported in 3 Ex. C. R. 271.

Quoting at page 559 from *St. Catharines Milling Co.* v. *The Queen* (3) Mr. Justice King said :—

"And then speaking of the distribution of property under the *British North America Act* :—

'It must always be kept in view that, wherever public 'land with its incidents is described as "the property 'of" or as "belonging to "the Dominion or a province, 'these expressions merely import that the right to its 'beneficial use, or to its proceeds, has been appropriated 'to the Dominion or to the province, as the case may be, 'and is subject to the control of the legislature, the land 'itself being vested in the Crown.'

And again, at page 560 :—

(1) 14 S.C.R. 392. (2) 14 App. Cas. 295.
(3) 14 App. Cas. 46.

"It is thus abundantly (and perhaps unnecessarily) shown that the beneficial interest in the Crown's territorial rights, as distinguished from the *jura regalia*, are appropriated to and held by the Dominion as fully and effectually, and by the same tenure, as the same had been previously appropriated to and held by the province. The title is in the Sovereign in right of the Dominion, in the same sense (as to territorial rights) as it was in the Sovereign in the right of British Columbia before the Act of 1883. Mr. Justice Burbidge has effectually disposed of the suggestion that, upon a sale of the lands by the Dominion, the grant is to be passed under the great seal of British Columbia on application of the Dominion. The rights of the Crown, territorial or prerogative, are to be passed under the great seal of the Dominion or province (as the case may be) in which is vested the beneficial interest therein, otherwise they cannot be said to be enjoyed by it, or under its control." (pp. 560,1).

The *British North America Act*, Sec. 91, enacts "The exclusive legislative authority of the Province of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say :—

"1. The Public Debt and Property, &c."

The 11th section of the Union agreement provided for the payment of $100,000 per annum by the Dominion to British Columbia. It also provided :—

"And the Goverment of British Columbia agree to convey to the Dominion Government, in trust to be appropriated in such manner as the Dominion Government may deem advisable in the furtherance of the construction of the said railway, a similar extent of railway throughout its entire length in British Columbia, not to exceed however twenty (20) miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North West Territories and the Province of Manitoba."

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The lands in the Province of Manitoba were vested in the Crown for the benefit of the Dominion. They formed part of the Province of Manitoba just as the present lands formed part of the Province of British Columbia. Can it be contended that because the Dominion Government agreed to appropriate a certain portion of these lands for the same purposes as the appropriation of the lands in British Columbia, therefore the Legislature of Manitoba could pass enactments interfering with Dominion rights?

The late Sir John Thompson, as Minister of Justice, had occasion to express an opinion upon this question. In 1887 the Legislature of Manitoba passed two Acts, intituled respectively, "An Act respecting the construction of the Red River Valley Railway," and "An Act to amend the Public Works Act of Manitoba." By the former Act the Government of Manitoba was given authority, amongst other things, to construct a line of railway from a point within the City of Winnipeg to a point in or near the Town of West Lynne. By the latter Act the Minister of Public Works for Manitoba was authorized to construct any public work at the expense of the province, of which the construction might be assigned to him by the Lieutenant-Governor in Council, and whether such work was authorized by the statutes then in force or not. It was also provided that sums needed for the construction of such public works might be raised by loan upon the credit of the province, bearing interest at a rate not exceeding five per centum. Both these Acts were disallowed by the Governor-General in Council on the recommendation of Sir John Thompson. The following observations are taken from his report:—

"It is evident that under such an Act a railway such as the Red River Valley Railway could be constructed by the Minister of Public Works as a public work of the Province of Manitoba. It is evident, also that each of the Acts referred to is in conflict with that policy of the Par-

liament and of the Government of Canada, reconfirmed at the last session of Parliament, by which it is sought to prevent the diversion of trade from the railway system of Canada to the railways of the United States

"In addition to this fundamental objection, the Act respecting the construction of The Red River Valley Railway is, the undersigned thinks, open to the following objections:—

(1). By section 8, sub-sections 2, 4, 6 and 7, and sections 12 and 22, authority is given, among other things, to enter upon lands and take possession thereof, and to appropriate so much of such public lands as is deemed necessary for the purposes of the railway, and also to take therefrom earth, trees and other materials.

"The public lands of Manitoba are for the most part, with the exception of those especially transferred to the province, vested in Her Majesty in the right of the Dominion of Canada, and it is not competent, the undersigned thinks, for the legislature of that province to authorize any one to enter upon, and to appropriate to any purpose, the lands so vested in Her Majesty in the right of the Dominion of Canada.

"They are part of the public property of Canada, which, by the 91st section of the *British North America Act*, 1867, is exclusively within the legislative authority of the Parliament of Canada, and in respect of which therefore, the Legislature of the Province of Manitoba has no legislative authority.

(2). By section 8, sub-section 9, authority is given to connect the Red River Valley Railway with any other railway at any point on its route; and provision made for determination by arbitrators, of any difference that may arise in respect of such connection.

"This power if attempted to be exercised in respect of any railway constructed under the authority of an Act of the Parliament of Canada would lead to a conflict of

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law and authority, as the Parliament of Canada has made provision with reference to the same subject. (See R.S. C. c. 109, s. 6. s.s. 13 and 14). Again, this power if attempted to be exercised in respect to the connection with any railway at the boundary of the province, or with a railway extending beyond the limits of the province, would be in excess of any authority which the Legislature of Manitoba could grant, as may be clearly seen by reference to the *British North America Act*, 1867, sec. 9, clause 10 (a).

"It is obvious that the objection pointed out in refereuce to the Legislature of Manitoba purporting to give power to enter upon and appropriate public lands vested in Her Majesty in the right of the Dominion of Canada, applies equally to the Act to amend the Public Works Act of Manitoba, especially if an attempt were made to use that Act for the construction of railways within that province, as indeed it must apply to every Act by which the legislature of that province purports to give authority to enter upon such lands."

Mr. Lafleur laid considerable stress on the recent decision of *McGregor* v. *Esquimalt Railway Co.* (1). The reasoning upon which that decision was based was that the land in question ceased to be Dominion property. The Dominion had granted the lands, and therefore the grantee became subject to the enactments of the Legislature of British Columbia.

So, in the present case, if the Dominion granted any portion of the lands to settlers, the settlers would become subject to the enactments of British Columbia, but so long as the property remained in the Crown for the benefit of the Dominion the Legislature of British Columbia could not legislate so as to affect Dominion property.

The attempted expropriation of the unrecorded waters vested in the Dominion as found by the Referee would be

(1) (1907) A.C. 462.

a serious interference with property vested in the Crown for the benefit of the Dominion.

The Referee finds the facts in paragraph 2 of the Information to be proved. There is no appeal from the first part of this finding that "both the Lillooet River, which "is a tributary of the Pitt River, and the Lillooet Lakes, "from which it rises, are wholly situate within the limits "of the said Railway Belt."

There is no appeal from the finding of the Referee that the allegation of paragraph 5 of the Information is proved.

It is manifest that the rights of the Dominion as riparian owners are seriously affected by the construction placed on the British Columbia statute by the defendants and the grant of the waters, and in my opinion if the effect of the British Columbia legislation is as contended for, the statute would be *ultra vires*, so far as the questions involved in this case are concerned, and void. In any event, I am bound to decide in accordance with the decisions of the Supreme Court above referred to.

Mr. Lafleur referred me to the British Columbia Land Ordinance of 1865. It is referred to in *Martley* v. *Carson* (1). This Ordinance conferred rights upon "every person lawfully occupying and *bonâ fide* cultivating lands." Even if it were in force it has no application to the case before me. It was cited as showing the policy of British Columbia (owing to the nature of the country) to depart from the strict rules of the common law in favour of riparian owners.

The next statute referred to was No. 144—33 Vict. B.C., in the revised laws of British Columbia. Section 2 of this statute repealed the Land Ordinance of 1865 before referred to. Section 32 provided :—

"Every person lawfully entitled to hold a pre-emption under this ordinance and lawfully occupying and *bonâ fide* cultivating lands may divert any unrecorded and

(1) 20 S.C.R. 634.

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unappropriated water from the natural channel of any stream, lake or river adjacent to or passing through such land," etc.

This statute was amended by the Statute 35 Vict. No. 31, but without making any material alteration. Neither of these statutes, if they were in force, have any application to the case before me.

Bearing in mind that by the terms of the Union agreement, and the various statutes confirmatory of this agreement, the property in question was vested in the Crown for the benefit of the Dominion, I proceed to consider the subsequent legislation.

The statute 55 Vict. Cap. 57 (1892) is "An Act to "confirm to the Crown all unrecorded and unappropriated "water and water power in the province and for other "purposes."

The second section of this statute is as follows :—

"2. The right to the use of all water at any time in river, water course, lake, or stream, not being a navigable river or otherwise under the exclusive jurisdiction of the Parliament of Canada, is hereby declared to be vested in the Crown in the right of the province, and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any river, water course, lake, or stream, excepting under the provisions of this Act, or of some other Act already or hereafter to be passed, or except in the exercise of the general right of all persons to use water for domestic and stock supply from any river, water course, lake or stream vested in the Crown and to which there is access by a public road or reserve."

It will be noticed that this section expressly excepts from its operation "any navigable river, or (water) "otherwise under the exclusive jurisdiction of the "Parliament of Canada."

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Cap. 190 of the Revised Statutes of British Columbia, 1897, is the statute under the provisions of which the grant of the water power in question was made. The title of the Act is as follows :—

" An Act to confirm to the Crown all unrecorded and unappropriated water and water power in the Province, and to consolidate and amend the law relating to the acquiring of water rights and privileges for ordinary domestic, mining and agricultural purposes, and for making adequate provision for municipal water supply, and for the application of water power to industrial and mechanical purposes."

It recites the Water Privileges Act of 1892 :—

" Whereas, by the ' Water Privileges Act, 1892,' all water and water power in the province, not under the exclusive jurisdiction of the Parliament of Canada, remaining unrecorded and unappropriated on the 23rd day of April, 1892, were declared to be vested in the Crown in right of the province, and it was by the said Act enacted that no right to the permanent diversion or exclusive use of any water power so vested in the Crown should after the said date be acquired or conferred save under privilege or power in that behalf granted or conferred by Act of the Legislative Assembly theretofore passed, or thereafter to be passed."

It also recites :—

" And whereas, it is necessary and expedient at the present session to provide for due conservation of all water and water power so vested in the Crown as aforesaid, and to provide means whereby such water and water power may be available to the fullest possible extent in aid of the industrial development, and of the agricultural and mineral resources of the province."

This recital deals with water so vested in the Crown by virtue of the Water Privileges Act of 1892, namely,

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all water and water power "not under the exclusive jurisdiction of the Parliament of Canada."

The Interpretation clause states :—

"'Water' or 'stream' shall include all natural water-courses, whether usually containing water or not, and all rivers, creeks, and gulches, and all water power, not being waters under the exclusive jurisdiction of the Parliament of Canada."

If I am correct in my view that the property in question is property of the Dominion embraced within the meaning of section 91 of the *British North America Act*, this British Columbia legislation does not cover the water in question. If it did, it would be so far *ultra vires*. On the other hand, if the contention of the defendants is correct and that the Dominion have no higher rights than any other grantee, so far as ownership of the lands and riparian rights are concerned, and are subject to local legislation, then the Legislature of British Columbia would be supreme, and unless the plaintiff can make a case on the other branch, namely, as interfering with navigation, the Information must be dismissed.

It is conceded that the waters in question are wholly within the limits of the Railway Belt transferred to the Dominion, and consequently the ownership of the lands would carry with it the bed of the lake and of the river and of the waters in any event where it is non-tidal. See (Fisheries Case), *Attorney-General of Canada* v. *Attorney General of Ontario* (1); *Corporation of Kenora* v. *Keewatin* (2).

A question not pressed before me is the defence raised by the 11th paragraph of the defence that the proper forum is elsewhere. *Esquimalt Water Works Co.* v. *Corporation of City of Victoria* (3), page 510 of the report of which may be referred to as bearing on this defence.

(1) [1898] A. C. 700.
(2) 16 O. L. R. 184.
(3) [1907] A. C. 499.

I proceed now to deal with the appeal of the defendants from the report of the Referee. As I have stated if my opinion on the main questions is correct, then the questions raised by the appeal are immaterial.

The first objection, is to the finding of fact in the 5th paragraph of the report relating to the injury to the fishing rights, the property of the Dominion as owners of the lands, including the beds of the river and lakes.

The plaintiff does not base his claim on any interference with any general law relating to the protection of fish. The claim is made as owners of the lands and waters. If the Legislature of British Columbia have the right to pass the enactments in question, then the question of injury is immaterial.

I agree with the finding of the Referee. The case is not one which can be remedied, as argued by Mr. *Lafleur*, by a fish-ladder in the dam. This might be a remedy if the waters were dammed up and overflowing the dam into the natural channel of the river, but here it is proposed to divert the waters away from the channel practically leaving the river below the dam with very little water.

The next ground of appeal is from the finding of fact in the 7th paragraph of the report to the effect that the Lillooet River is a navigable river.

It is admitted that the river as far up as the town line bridge, and possibly a mile or two beyond, is both tidal and navigable in fact.

Mr. *Lafleur* confines his contention to that part of the river above the point up to which it is conceded to be a navigable river. I agree with the contention of the appellants. I do not think the river is navigable in fact in that portion of its course. Loose logs can be floated down during portions of the year, and small boats partially poled and lined up, but in my judgment this does not constitute that part of the river a navigable river. Were the law

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of the Province of Quebec applicable it could not be considered even a flotable river. *Tanguay* v. *Canadian Electric Light Co.* (1)

In 1871 it was enacted that "the civil and criminal "laws of England as the same existed on the 19th "November, 1858, and so far as the same are not from "local circumstances inapplicable, are and shall be in "force in all parts of the colony of British Columbia."

In *Attorney-General* v. *Harrison* (2) Chancellor Spragge deals fully with the facts that should be taken into account in applying the test of navigability. *Queen* v. *Robertson* (3) is applicable; also *Bell* v. *Corporation of Quebec* (4).

In the judgment of Mr. Justice Anglin in the *Keewatin Power Co.* v. *Town of Kenora* (5) there is a full discussion of the authorities. See also *Attorney-General of Quebec* v. *Fraser* (6) applicable to the Province of Quebec.

I do not discuss the question further for the reason that if the first point is decided in favour of the plaintiff, it is immaterial whether the upper reaches are navigable or not. If the first question is decided adversely to the plaintiff, then if my view, which I will discuss later as to the interference with navigation, is sustained, it is equally immaterial.

If it be held that the Legislature of British Columbia have power to enact as they have done, and that there is no right in the plaintiff to have redress for interference with navigation, then it is equally immaterial.

I have dealt with the questions raised by the appeal, as the defendants are entitled, if thought advisable to appeal, to have the findings as they should in my opinion be. The report should be varied in accordance with my finding.

(1) 40 S. C. R. 1.
(2) 12 Gr. 466.
(3) 6 S. C. R. at p. 129.
(4) 5 App. Cas. 84.
(5) 13 O. L. R. 237.
(6) 37 S. C. R. 577.

The contention of the plaintiff is that the diversion of the waters of the Lillooet River will seriously interfere with the navigation of the river. The Referee so finds, but whether as to the upper stretches, which I find non-navigable, or the whole river is not quite clear.

Taking the evidence, which is voluminous, there does not seem to be much doubt but that the river below is navigable even without the flow of the tide. I think it equally clear that if the proposed diversion takes place there will be a very serious interference with the navigability of the river below. Can it be that because at the point of diversion the river is non-navigable nearly all the water can be diverted and practically ruin the navigation below?

This is not basing the case upon any interference with riparian rights, but testing it solely in respect to an interference with navigation.

Most of the cases reported are cases in which the interference has occurred in the navigable portions of the river.

Section 4 of Cap. 115 of the Revised Statutes of Canada is as follows:—

"4. No bridge, boom, dam or aboiteau shall be constructed so as to interfere with navigation, unless the site thereof has been approved by the Governor in Council, nor unless such bridge, boom, dam or aboiteau is built and maintained in accordance with plans approved by the Governor in Council."

It is argued that this section only applies to dams erected in the navigable part of the river. This may be, but the section does not so read.

Section 19 of the same statute is as follows:—

"19. No owner or tenant of any saw-mill, or any workman therein or other person shall throw or cause to be thrown, or suffer or permit to be thrown any sawdust, edgings, slabs, bark or rubbish of any description what-

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soever into any river, stream or other water, any part of which is navigable or which flows into any navigable water."

This section is evidently to prevent the acts therein referred to being done on the unnavigable parts of a river so as to interfere with the navigable portion.

In any event, in my opinion, the navigability of a river cannot be destroyed by a diversion of the waters above.

At the opening of the reference counsel for the defendants, The Burrard Power Company, Ltd., admitted the truth of the allegations made in the 4th paragraph of the Information.

The Referee also finds the facts proved with the addition of pointing out that the point of return "at or near Lot 404" is not on the Lillooet River, but on Kanaka Creek. There is no appeal from this finding.

I think the plaintiff is entitled to the declaration claimed in paragraphs (a), (b) and (d) of the Information, also to an injunction if desired.

The defendants must pay the costs of the plaintiff, including the costs of the reference.

Judgment accordingly.

Solicitor for plaintiff: *E. L. Newcombe.*

Solicitors for defendants: *Bowser & Wallbridge.*

ON APPEAL FROM TORONTO ADMIRALTY DISTRICT.

BETWEEN

WALDIE BROTHERS, LIMITED, (DEFENDANTS) ..... } APPELLANTS; 1909 June 2.

AND

WALTER R. FULLUM AND ANNIE FITZGERALD (PLAINTIFFS)..... } DEFENDANTS.

Tug and Tow—Inland waters—Damage to Tow—Negligence of Tug—Liability—Limitation—Change in Statute by Revisors—Effect of.

Held (affirming the finding of the Local Judge) that where a barge while being towed by a steam tug in the waters of Lake Huron was stranded by the careless navigation of the tug, such carelessness subsisting in the faulty steering of the tug and failure to give proper directions as to the steering of the tow, coupled with the absence of a proper look-out on the tug, the tug was liable in damages to the owners of the barge.

2. *Held* (reversing the finding of the Local Judge) that under the circumstances of the case the appellants were entitled to the benefit of the limitation of liability mentioned in R. S. C. (1886) c. 79, s. 12, namely $38.92 for each ton of the tug's tonnage, without deduction on account of engine room. *Sewell* v. *The British Columbia Towing and Transportation Company* (9 S. C. R. 527) explained and distinguished.

3. In revising and consolidating the Act 31 Vict. c. 58, the commission of revision in 1886 omitted a heading to sec. 12 of such Act as originally passed, which was held per Strong, J. in the case of *Sewell* v. *The British Columbia Towing and Transportation Company* (*supra*), to restrict the apparent generality of the terms of that section.

Held, assuming that the omission of the heading was legislating so as to make the law in Canada harmonize with the English law, that the action of the revisors in omitting such heading from the statute was validated by the provisions of Chap. 4 of 49 Vict. 1886 respecting the Revised Statutes.

THIS was an appeal from a judgment of the Local Judge of the Toronto Admiralty District.

The facts of the case are set out in the following judgment of the trial judge, dated the 4th January, 1909 :—

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HODGINS, L. J.—This is an action by the owners of the barge *James G. Blain* against the defendant company, as owners of the tug *J. H. McDonald*, for damages caused to their barge by the said tug in stranding her on Pandora shoal rock in the north channel of Lake Huron, while towing her from her anchorage to Algoma Mills with a cargo of coal, on the 20th July, 1906.

The defence contends that the damage was caused (a) by "inevitable accident," and not owing to any negligence on the part of the owners of the tug; that (b) the said tow did not follow directly in the course steered by the said tug, but steered to the right and to the left; that (c) the damage was caused by the negligent steering of the said tow; and that (d) the said tug was under the command and control of the master of the said tow, and that it was his duty to direct the course to be steered by the said tug, and that it was his failure to give proper directions for that purpose that caused the damage to the said tow.

In the case of the *St. Clair Navigation Company* v. the ship *D. C. Whitney* (1), I reviewed the cases dealing with the Admiralty doctrine of "inevitable accident;" and although my finding on the question of the jurisdiction of the Admiralty Court over ships of the United States in collision cases, was reversed by the Supreme Court (2), on the ground that the Ashburton Treaty of 1842, having Article by VII (which Article has never been confirmed by any legislative Act of Great Britain Canada, or the United States), (3) made the Canadian channel of the Detroit River "equally free and open to the ships, vessels and boats, of both nations," that the arrest of the America ship *Whitney* under a warrant issued from this Admiralty Court, "while exercising her right of innocent passage in Canadian waters, in accord-

(1) [1905] 10 Ex. C. R. 1.
(2) 38 S. C. R. 303.
(3) See Imperial Act of 1843, 6 and 7 Vic., c. 76; Canadian Acts of 1849, 12 Vic., c. 19; Acts of Congress of 1848, c. 167.

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ance with the treaty rights of her nation from one foreign port to another, could not, of itself, justify the attempted exercise of Canadian jurisdiction," and that she was therefore immune from arrest in such Canadian waters, and so was not subject to the jurisdiction of this Admiralty Court. But as there was no reversal of my finding on the doctrine of "inevitable accident," it is now binding on me. And as the evidence does not warrant a finding of "inevitable accident" as the cause of the damage to the plaintiff's barge in this case, I must overrule this contention of the defendants.

And here I might say that I had lately to dispose of a substantially similar case (1) to that of the *Whitney* case, of the arrest of an American ship while exercising her right of innocent and continuous passage through Canadian waters, from one American port to another; and in so disposing of it, I had to yield judicial obedience to the supreme authority of the Judicial Committee of the Privy Council, and to the Imperial Merchant Shipping Act of 1894, as to the jurisdiction conferred on British Courts over any ships "being on, or lying, or passing off," British coasts within Her Majesty's Dominions, under section 685, and to the Imperial Order-in-Council of 1897, reciting the consent of the Government of the United States that the British Regulations relating to collisions should apply to the ships of that country when beyond the limits of British jurisdiction, and declaring that "such ships for the purposes of such Regulations be treated as if they were British ships." (1)

As to the other defences which refer to the contract liability of towage of ships and the relative duties of tug and tow, I had to consider and review such defences in the case of the *Montreal Transportation Company* v. *The Ship Buckeye State* (2), and to disallow similar defences

(1) *Dunbar Dredging Company* v. *The Ship Milwaukee* 1907, 11 Ex. C. R. 179.

(2) Reported *post*.

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there. To the authorities there considered, the following may be added.

In the *Zouave and Rich*, (1) the Court said: "The tug is presumed in the undertaking she makes, to know the channel and all its perils; and undertakes to take her tow line safely through. It comprehends knowledge, caution, skill and attention."

In the *Wilhelm* (2) the tug brought the tow too near the shore; and by so doing parted the tow line, which caused the tow to drift ashore. Taft, J., held that this was negligence, and a grave fault; and showed want of reasonable care and skill, in the offender. And also in the *J. W. Paxon* (3) where the tug in towing the tow caused both to strike a sunken wreck, known to the captain of the tug, the tug was held guilty of negligence, and therefore liable.

In the evidence in this case, the captain of the tug admitted that he was very familar with the locality of the Pandora shoal; and that he knew by Sandford Island where he was, but supposed he was all right; and he also said that when he was about three hundred yards west of the shoal, he shifted the course of his tug half a point by the compass, and that he expected this half point change would take him about two hundred feet north and clear of the shoal. But as the actual result of the half point change brought the barge directly on the shoal, it is a reasonable presumption that had he kept straight on the course he was steering, and not changed by the half point, he would have passed about two hundred feet south of the shoal.

In addition to the duty of the tug towards her tow as above reviewed, there is evidence of the neglect of the captain of the tug to provide a proper lookout; and this neglect appears to have been intensified by the facts urged

(1) 1864. 1 Brown's Adm. 111. (2) 1893, 59 Fed. Rep. 169.
(3) 1885, 24 Fed. Rep. 302.

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by the counsel for the defence, which are: (a) that the night was smoky and hazy; (b) that the place of navigation was a dangerous locality; (c) that the tow was too heavily laden; (d) that the tow did not follow the course of the tug owing to her wide sheering, which the captain of the tug could not say was caused by any improper steering, or use of the helm, of the tug, but he attributed her bad sheering to shallow water, and her being too heavily laden; (e) and that the captain of the tug desired to delay starting until the next morning, which was declined by the captain of the tow. The rule applicable in such cases is, the more imminent the risk, the more imperative is the necessity for implicit obedience to the duty to have a vigilant lookout.

The captain of the tug admits that he did all the lookout and steering; but the British and Canadian Navigation Rules are explicit as to the duty of proper lookout. Art. 29. "Nothing in these Rules shall exonerate any ship, or the owner, or Master, or crew, thereof, from the consequences of any neglect to carry lights or signals; *or of any neglect to keep a proper lookout*; or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

This question of a proper lookout came before me in the *Whitney* case, (1), and in *Cadwell* v. *C. F. Bielman*, (2), and to the authorities there cited, may be added the following :—

In the *Genessee Chief* (3), the Court held that it was the duty of every steamboat navigating waters to have a trustworthy and constant lookout, besides the helmsman; and that whenever a collision occurred with another vessel, and there was no other lookout on board but the helmsman, it must be regarded as *primâ facie* evidence

(1) 10 Ex. C. R. 15. (2) 1906, 10 Ex. C. R. at p. 161.
(3) 1851, 12 How. U. S., 463.

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that the collision was occasioned by the fault of the offending vessel.

And in *Chamberlain* v. *Ward* (1), where the mate who was in charge of the deck, and in control and management of the ship, and was also the lookout, the Court said : " Steamers navigating in the thoroughfares of commerce, must have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required ; and they must be actually and vigilantly employed in the performance of the duty to which they are assigned."

Equally emphatic was the judgment of Mr. Justice Swayne in the *John Trotter* case quoted in the *Armstrong* (2) :—" Where there is no lookout, the fault is of the grossest character, and every doubt relating to the consequences is to be resolved against the tug. It is impossible, in the nature of things, that the captain can properly perform his other duties, and also that of lookout, and he must not attempt it. A crew is not competent without a lookout either on tugs, or steamers. If there be none, the tug cannot avoid the responsibility by the oaths of the captain or crew, if there be the slightest doubt as to the spring-head of the catastrophe."

The evidence of Captain Cowles in this case shows that not very long before the accident there was a discussion, and a difference of opinion, between him and Captain Hamilton of the tug, as to the locality of Sanford Island, one of the special and admitted landmarks for guiding the course of the tug. Captain Cowles said : " He (Captain Hamilton) said to lookout ahead to see if I couldn't see Sanford Island on the starboard bow. Why, I said, I am looking for it on the other bow. Oh no, he says, it is on the starboard bow. I think the engineer came out on deck very shortly afterwards, and he asked the

(1) 1858, 21 How. U. S., at p. 570. (2) [1864] 1 Brown's Adm. at p. 135.

engineer to look to see if he couldn't pick up Sanford Island, and he could not see it; and pretty soon,—I dont know whether the engineer or me saw the light,—one of us saw Sanford Island on the port bow. One of us saw it first; I think it was the engineer. We saw it about the same time, Sanford Island on the port bow where I had figured it was; and the Captain said, "that is Sanford Island over there all right;" and he headed upand put the Island on the starboard bow. Further on Cowles said: "I asked him again if I shouldn't steer for him, and he said no, that he was used to steering and handling the tug, and could see just as well inside the pilot house as he could out."

On the evidence given in this case, and the law applicable to it, I must find that the defendants are responsible for the damage to the tow and her cargo, caused by the improper navigation of the tug in stranding the barge *James G. Blaine*, on the Pandora shoal.

But the defendants contend that, under the provisions of either the Imperial Merchant Shipping Acts, or the Canadian *Act respecting the Navigation of Canadian Waters*, (1) they are entitled to the limitation of their liability as owners of the tug to $38.92 per ton on the 41.33 tonnage of their tug *J. H. McDonald*, for the loss and damage to the plaintiff's barge complained ot; on the ground that the said loss and damage occured "without their actual fault and privity." The damages complained of by the plaintiff are $4.739.77.

When the *B.N.A. Act* of 1867 was passed by the Imperial Parliament, the Canadian statute then regulating the liability of owners for damages arising from a collision between two ships in Canadian waters was the 27th and 28th Victoria, (1864), c. 13, sections 11 to 14, under the heading *Duty of Masters; Liability of Owners as to collisions.* And by the *B.N.A. Act*, section 129, that

(1) R.S.C. (1886), c. 79, s. 12.

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statute, being then "a law in force in Canada" it was continued in Ontario and Quebec, "subject nevertheless to be repealed, abolished, or altered by the parliament of Canada." And after this confirmation of the Provincial Act of 1864, the Parliament of Canada during its first session in 1868, exercising its legislative power to make laws respecting "Navigation and Shipping," repealed the above, and other Provincial Acts, and enacted the *Act respecting the Navigation of Canandian Waters*, 21 Victoria, c. 58, containing the clauses which were subsequently construed by the Supreme Court, as hereinafter mentioned. This Act continued in force until 1880, when it was repealed by the *Act to make better provision respecting the Navigation of Canadian Waters*, 43 Victoria, c. 29, which came into force on the 1st September next after its passing. Both of these Acts in their preamble recitals; in the "Regulations for preventing collisions;" in the several clauses relating to "collisions"; and in the legislative heading over the clauses respecting the "Duty of Masters; Liability of owners as to Collisions", clearly indicated that they were to apply to the cases of damages caused by collisions between vessels navigating the Canadian waterways; for headings prefixed to the sections of a statute are regarded as preambles to those sections.

Such was the judgment of the Supreme Court in considering the prior Act of 1868, in the case of *Sewell* v. *British Columbia Towing and Transportation Company*, (1) where it was held that the damages caused by the improper navigation of the defendant's tugs, in towing a ship and stranding her on a reef, were not subject to be reduced, or limited, by the limitation clauses of the English Merchant Shipping Act of 1862 (2), nor by the limitation clauses of the *Act Respecting the Navigation of Canadian Waters*, of 1868, 31 Victoria, c. 58; because the legislative

(1) (1883), 9. S.C.R. at p. 530.

(2) See the *Andalusian*, 3 P.D. 182.

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purpose of such limitation clauses (11-14) was indicated by the preamble, and by the heading over such sections: "Duty of Masters. Liability of Owners as to Collision," which defined the limited application of the said sections. Strong, J., in giving judgment and construing these clauses, said: "I cannot see my way to holding that this restricted liability applies to cases other than those of collision. Further, the preamble to the statute itself, which sets forth its object to be to enact certain rules of navigation and regulations for "preventing collisions," shows that the scope of the Act itself was much more confined than the English Act, and was only intended to insure careful navigation, and prevent cases of collision."

In *Lang* v. *Kerr, Anderson & Co.* (1), Lord Cairns, L.C., held that "headings" to sections of an Act of Parliament are to be looked upon as marginal notes, for they show that Parliament had carefully and analytically divided the Act into those different parts. See further *Eastern Counties L. &c. R. Co.* v. *Marriage* (2), where the general heading over sections of an Act of Parliament was held to indicate the proper judicial construction they were to receive.

The judgment of the Supreme Court indicates, I think, the judicial construction which should be given to the latter Act, of 1880, 43 Victoria, c. 29, prefaced as it is by a substantially similar preamble to that in the Act of 1868, and also specially reciting the agreement of certain foreign Governments that the British regulations respecting collisions should apply to their ships "when beyond the limits of British jurisdiction"; and re-enacting the same legislative purpose in the heading over the owners' limitation clauses, (12–14), of that Act, which had been construed by the Supreme Court in the *Sewell* case, (*supra*).

(1) (1878), 3 A. C., at p. 536.

(2) (1860) 9 H. L. Cas. 32; s. c. 7 Jur. N. S. 53.

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This Act of 1880 remained in force until the revision of the statutes of Canada in 1886, when under the Act 49 Victoria, c. 4, it was authorized to be repealed by the Proclamation of the Governor General in Council, and the consolidated and revised *Act respecting the navigation of Canadian Waters* (1) was substituted for it. But in consolidating the substituted Act, the revisors appear to have assumed legislative authority to strike out the words "as to collisions" in the heading over the limitation clauses of the consolidated Act, while retaining the term "collision" in the corresponding sections to those in which it had appeared in the original Navigation Act of 1880.

The revisors of the statutes of 1886 had the opportunity of considering the applicability of the *Sewell* judgment of the Supreme Court of 1883, construing these limitation clauses of the prior Canadian Navigation Act of 1868, prescribing the tonnage liability of shipowners in collision cases, and which, if compared with the Act of 1880, then before them for consolidati n, they should have realized that such clauses were a re-enactment of the tonnage liability clauses of the prior Act under the same heading and wording; and therefore governed by the same judicial construction in the Courts of Canada as had been given to such clauses by the Supreme Court in in the *Sewell* case. It was therefore their duty to reproduce in the consolidated and revised Act the same controlling heading in the same words that Parliament had used in the prior Acts, so as to preserve as applicable to future cases the judicial construction given to such heading and limitation clauses in the case referred to.

To strike out, and so repeal, the headings over the clauses of a statute, which by the judgments of the House of Lords, our Supreme Court, and other courts, have been held to be parts of such statute, and indications of the legislative purposes of the clauses or parts of

(1) R. S. C., (1886), c. 79.

such statute, and as material in furnishing a key for their proper construction, is the prerogative of legislative power. And legislative power is defined to be the law-making authority in a State which makes, alters, or repeals, the laws thereof, or declares what the law shall be, the power to enact new rules for the regulation of future conduct, rights, and controversies.

Possibly the revisors of this Navigation Act of 1886 may not have had the intention of repealing the legislative words "as to collision," over these tonnage liability clauses, which had influenced the Supreme Court in the *Sewell* judgment, and had not intended to usurp the legislative prerogative of Parliament; or possibly their attention may not have been called to that judgment, and the judicial construction given to those clauses by the Supreme Court. But innocence of intention, or want ot knowledge of the Supreme Court judgment, cannof excuse a disregard, or usurpation, of the legislative prerogative of Parliament to repeal or alter headings of sections or words of statutes which have been judicially construed by the courts;—for by so doing they originate fresh forensic and judicial difficulties in considering how far previous judicial constructions apply to the consolidated Acts in the Revised Statutes of Canada. That similar difficulties may have to be considered in future shipping cases may be conceded, owing to the continuation of the altered wording of the heading over the same limitation clauses in the revised Act respecting Shipping in Canada (1). The succession-relation of the Revised Statutes of Canada to the original and repealed statutes, was thus explained by Wilson, C.J., in *Regina* v. *Durnion* (2). "The repealed Acts have not been absolutely repealed and abolished; nor do the Revised Statutes take effect as new and independent enactments. But all

(1) [1906] R.C. chapter 113, secs. 920-923.

(2) [1887] 14 Ont. R. at page 681.

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matters are to be carried on under the Revised Statutes as if no repeal had taken place; for the Revised Statutes are not new laws, but a consolidation, and declaratory of the law as contained in the former Acts.

And in *Frontenac License Commissioners* v. *County Frontenac* (1), Boyd C. indicated a similar view: "The purpose of the revision was to revise, classify, and consolidate, the Public General Statutes of the Dominion, and the repeal of the old statutes incorporated in the revision, was rather for convenience of citation and reference, by giving a new starting point, than with a view of abrogating the former law" * * * "The effect of the revision, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity." The point in hand was long ago passed upon by a jurist of the highest repute, Shaw, C. J., in *Wright* v. *Oakley* (2), from which I quote his words: "In terms the whole body of the statute law was repealed, but these repeals went into operation simultaneously with the Revised Statutes which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealed Act stood in force without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect therefore they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and re-enactment of new ones."

Further, I think that the doctrine governing the construction of statutes *in pari materia* may also be invoked in this case. As stated by Lord Mansfield, C. J., in *Rex* v. *Loxdale* (3), "Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be

(1) [1887] 14 Ont. R. at p. 745. (2) (1843) 5 Metc., at p. 406.
(3) (1758), 1 Burr. at p. 447.

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taken and *construed together*, as one system, and as explanatory of each other." Lord Justice Knight-Bruce approved of this in *ex parte Copeland* (1), by saying: "Although the Act has been repealed, still upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former Act." And Lord Justice James in *Greaves* v. *Tofield*, (2), is equally clear: "If an Act of Parliament uses the same language which was used in a former Act of Parliament, referring to the same subject, and passed with the same purpose, and for the same object, the safe and well known rule of construction is, to assume that the legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them." And *Maxwell on Statutes* (3) says that a statute may be construed by such light as its legislative history may throw upon it.

In the *Wild Ranger* (4) Dr. Lushington held that the ancient law of unlimited liability of ship-owners for damage done by one ship to another was still binding on the Court of Admiralty, except in so far as that law had been modified by Acts of Parliament. The earliest modification of that law was made in 1734 by 7 George 2, c. 15, amended in 1786 by 26 George 3, c. 86, and further amended in 1813 by 53 George 3, c. 159. These were repealed by the Merchant Shipping Act, of 1854, c. 104 and s. 504 substituted therefor, which was amended by the Merchant Shipping Amendment Act of 1862, c. 63. By the Merchant Shipping Act of 1894, c. 60, the prior Acts were consolidated, and the limited liability of British and foreign ship owners was defined in sections 502-509. These sections were amended in 1898 by 61 and 62 Victoria c. 14; in 1900 by 63 and 64 Victoria c.

(1) (1852,) 2 DeGex M. & G. at p. 920.

(2) L. R. 14 Ch. D. at p. 571.

(3) 4th ed. p. 76.

(4) 1863, Lush. 562, s. c. 7 L. T., N. S. 725.

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32; and in 1906, by 6 Edward 7 c. 48, s. 70. The American law on this subject will be found in *Marsden on Collisions* (1).

Reasons of Trial Judge.

For the reasons given above I prefer to follow the judicial decision of the Supreme Court in the *Sewell* case, rather than the unauthorized attempt at legislation by the Revisors of the Statutes of 1886, and hold that the limitation in the Canadian Shipping Act, R.S.C. (1886), c. 79, sec. 12, prescribing the liability of shipowners, not having been regularly repealed by Parliamentary legislation, applies only to cases of damages caused by collisions between vessels navigating the Canadian waterways; and that it is not invocable to limit the liability of defendants for the damages caused by the improper navigation of the defendants' tug, which caused the shoaling of the plaintiff's barge on the Pandora shoal.

There will be a decree for the plaintiff, with a reference to the Registrar to take the accounts and tax to the plaintiffs the costs of the action and reference.

March 22nd, 1909.

The appeal was now argued at Toronto.

A. H. Marsh, K.C., for appellants;

F. E. Hodgins, K.C. and *W. D. McPherson, K.C.* for respondents.

Mr. *Marsh*: The facts shortly stated with regard to the accident are these: That the tug went to some place near Blind River, that is up in the Georgian Bay district, where the barge was lying waiting for a tug; the tug came alongside, hailed her, and they arranged to have the tow taken into the Algoma Mills by the tug. It was then dark, the night was hazy and smoky, and the tug undertook the duty and carried the tow around all right for about five miles. Then, under circumstances I will have to detail more fully, the tow was stranded upon a

(1) 5th ed. p. 179.

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sunken rock called the Pandora Rock, a rock that is wholly under water, at the highest point being six feet under water and shelving off, varying in depth. It is entirely under water. That is a matter of importance. The tow was stranded on this sunken rock and damaged. It took seven weeks to get her off. The cargo was largely jettisoned. It is a question of the amount of loss and who has got to bear it.

The plaintiffs say this loss was owing to the negligence of the defendants or the master of the tug. We say no, it was not owing to their negligence at all. It was, in the first place, owing wholly to the negligence of the plaintiffs themselves in the bad steering of their tow, which allowed what is called sheering back and forth and produced the damage; and we say, even if the whole damage is not imputable to the plaintiffs, at least the plaintiffs were guilty of negligence, and the Admiralty rule would apply as to a division of the damages.

[THE COURT: The question is whether the tug or the tow was liable?]

Yes. Then, preceding that, however, we rely on the appeal not only on the facts, but also on a couple of questions of law. The first question I wish to deal with is purely a question of law.

The defendants claim here that even though they were, and should be found guilty of negligence so as to make them liable, still they are entitled to the protection of the limitation of liability clauses contained both in the Imperial Merchant Shipping Act and in the Dominion Act. The Dominion Act is not an exact copy, that is not *verbatim* but it is practically the same as the Imperial Merchant Shipping Act. There is scarcely any difference except in mere phraseology.

The provisions of the Imperial Merchant Shipping Act will be found set out in the 11th paragraph of the statement of defence. That this, it leaves out all the immaterial

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matter, and everything that is material is set out *verbatim* in the 11th paragraph of the defence. The provisions of the Merchant Shipping Act are there referred to, namely section 503 of the Imperial Act of 1894, chapter 60. Those are the provisions which I say we are entitled to the protection of as contained in the Imperial Act, and then I simply refer to the Canadian Act, which is practically the same thing. Now, the provisions are:

"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity."

Now, my learned friend will make a point of that, and I shall refer to authority as to the meaning of that term.

Section 503 of the Imperial Merchant Shipping Act of 1894 says: "Where any loss or damage is caused to any other vessel or to any goods, merchandise, or other things whatsoever on board of any other vessel by reason of the improper navigation of the ship, [the owner of the ship shall not] be liable to damages beyond the following amounts, that is to say in respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal property or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage."

This is, of course, when the loss is not the result of the owners' actual fault or privity. So we say that gives us protection in any event, we shall not be bound for damages beyond eight pounds for each ton of the tonnage of our tug. Then sub-section 2 of the Act says: "For the purposes of this section the tonnage of a steamship shall be her gross tonnage without deduction on account of engine room."

Now, the Dominion Act which was in force at the time of the happening of the accident is practically in the same words, although not *verbatim* the same. The Act which was in force at the time of the accident is not the

present revised statute of 1906, but is contained in the Revised Statutes of 1886, chapter 79, section 12, now contained in the Revised Statutes of 1906, chapter 113, sections 921, 922 and 923, where the phraseology is still changed slightly, but practically the language is the same as in the statutes of 1886.

I will next refer to the legal construction that has been put upon the provisions of the Imperial Act.

[THE COURT: Is the judgment of the trial judge founded on the Imperial Act?]

He says he does not find any reason whatever why we are not entitled to the protection of the Imperial Act, and I shall show your lordship he would have done a great deal better if he had not given any reasons why we are not entitled to the protection of the Canadian Act, because the reasons given are directly opposed to the statute.

[THE COURT:—Does he hold the statute would apply but for the fact of default on the part of the defendants?]

No. My learned friend argued as to that question of fault. He has not found anything whatever in regard to the application of the Imperial Act. He does find the Dominion Act does not apply because of the decision of the Supreme Court in the case of *Sewell* v. *The British Columbia Towing Co.*, which was decided under a different statute, and which case doubtless led to the amendment of our statute, and that British Columbia case has no application to the statute of 1886, because it had been amended. But he founded his whole judgment in regard to that matter upon what he calls the illegal and unauthorized attempt of the revisors of the statutes of 1886 to amend the law as it formerly stood in the previous statute not revised. He says that their attempt to amend was illegal and unauthorized, beyond their powers, and all that, overlooking entirely the fact that it was all confirmed by statute.

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[THE COURT:—There was a general Act passed confirming it ?]

That is what we have here. But page after page of this judgment is devoted to showing how the revisors went beyond their powers.

[THE COURT:—I suppose *primâ facie* the tow was liable for its navigation].

There are some authorities that hold to the contrary, and very high authority too, the Judicial Committee, but I must confess there are conflicting cases.

Now, counsel for respondent contend we are not entitled, or did contend below that we are not entitled, to protection here because of our actual fault or privity in the negligence. I will refer to authoritics showing that those terms as used in the statute do not cut us out from protection, for, in the first place, we are entitled *primâ facie* to the protection of these limitations of the statute where the damage is caused through improper navigation.

I will refer your lordship, then, to what has been said about that term "improper navigation." It is said:—

"This includes faulty navigation arising from the negligence not only of the master and crew of the ship, but also ot any person who has been employed by the shipowner in connection with the construction, overlooking or management of the ship."

That was held in England in the case of *The Warkworth*," (1).

Then again as to the meaning ot "actual fault or privity," of course we are not to be protected if the negligence was with our actual fault or privity. Now, it has been held in England that the fact the master of the ship in default was on board the ship when the negligence in question occurred, is no reason for charging the other owners with responsibility. That is, we had our master

1) L.R. 9 P.D. 20.

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on board here, and if any body was guility of negligence it was our master, the master of our tug. But this case I am referring to now shows that the fact the master of the boat was on board does not deprive the owners of the protection of this statute. That is so laid down in the case of The *Obey* (1). And then in that same case I have already referred to, *The Warkworth* (*supra*) the Master of the Rolls deals with the two phrases "improper navigation" and "actual fault or privity." He says, "The owner's liability is limited for all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action of the ship by which damage is done is due to the negligence of any person for whom the owner is responsible." That clearly covers our case here. If anybody on our side was negligent at all it was the captain of our tug, and he is the person for whose negligence we are responsible, if he was negligent at all, as it is held in the case of *The Warkworth* (*supra*). It is shown there in a case of such as this we are entitled to the protection of the statute.

Then I come to the *Sewell* case, upon which the trial judge bases his whole finding with reference to our being entitled or not entitled to the protection of the statute. (*Sewell* v. *British Columbia Towing Co.*, (2). It has no application here because of the change in the statute. There the defendants were held not to be entitled to the protection of the Imperial Act—it would be implied otherwise they would be entitled—because they had not proved British registry. We have proved British registry here, we have put in the register of the ship in question as part of our evidence. So then all reasons which prevented the defendants in the *Sewell* case from relying on the Imperial Act has no application here, because we have proved British registry.

Now, in the Revised Statutes, in the heading "Liability of Owners as to Collisions" the revisors have left out

(1) L.R. 1 Ad. & Ec. 102.

(2) 9 S.C.R. 527.

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all reference to collision, so then it leaves the wording of section 12 to operate without any restriction upon it at all, to operate with regard to all cases of negligent navigation just the same as the Imperial Act was and always has been. That is, the revisors have brought our statute into conformity with the Imperial Act, and our present revision of 1906 does the same thing. The result of that, then, was to make the *Sewell* case wholly inapplicable to this case and to entitle us to the protection of the Imperial statute.

Now, 49 Vict. chap. 4, recites that there had been a revision made under direction of Parliament, that is speaking of the revision of 1886, and reciting that the original roll had been certified to be the roll referred to in future, and then it goes on with a number of provisions, among others, that the certified roll, including amendments and so on, shall be deposited and shall be deemed the original. I refer to section 4 of that statute:—

"The Governor in Council after such deposit of the said last mentioned roll may by proclamation declare a day from and after which the same shall come into force and shall have effect as law by the designation of the Revised Statutes of Canada."

Section 5: "On, from and after such day the same shall accordingly come into force and effect as and by the designation of the Revised Statutes of Canada to all intents as if the same were expressly embodied in and enacted by this Act to come into force and have effect on, from and after such day."

And then express provision is made for the very sort of thing that occurred here, that is alterations being made, section 8, sub-section 2:—

"But if upon any point the provisions of the said Revised Statutes are not in effect the same as these repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the Revised Statutes

take effect"—so it does not cover the past at all—"the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail."

I do not see how anything could be more clear than that.

The present Revised Statutes of 1906, chap. 113, were not in force at the time of the happening of the accident, but it is immaterial; it is the same thing there as was in force by the previous revision.

Defendants rely on section 951, because it repeals so much of the Imperial Merchant Shipping Act as is inconsistent with this part of the Canadian Act. Your Lordship must remember that the Canadian Act is divided into parts. This particular part happens to be part 15, where this provision of section 951 is contained. Section 951 comprising a portion of part 15 of the Canadian Act says that it repeals "so much of the Imperial Merchant Shipping Act as is inconsistent with this part"; that is, part 15 of the Canadian Act. But when we look to see what part 15 deals with, it deals wholly and solely with deck and load-lines, what they call the Plimsoll Act in England.

If you examine it to see what is dealt with by this part, you find it deals with nothing but deck and load-lines. Now then, if anything more is required it is made more plain if we look back of this section 951 of the present Act and find where it came from. What we find is this, that it came from the statute which was in force at the time when the accident happened namely, chapter 40 of 54 and 55 Victoria, which was a statute that stood all by itself apart from the Shipping Act and dealt with nothing but deck and load-lines. Section 20 of that statute, that is chapter 40 of 54 and 55 Victoria, repealed so much of the Imperial Act as was inconsistent with the

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said Canadian Act. So then what my learned friend now relies upon as contained in the Revised Statutes of 1906 is simply copied from this statute which I am now referring to, which was a statute standing all alone by itself, altogether apart from the Shipping Act and dealing distinctly with deck and load-lines.

[Mr. *Hodgins*: In substance the same. The Canadian Parliament has chosen to enact provisions which cannot stand with and are substituted for the English Act. I do not rely wholly upon Section 951.]

Well, my contention on that point will be the differences between the Dominion Act and the Imperial Act touching limitation of liability are simply verbal changes so immaterial in difference that one cannot be said to repeal the other at all, so that we are entitled here to have the protection, I submit, of both the Imperial provision and the Canadian provision.

With regard to the Imperial Statute being in force here, I suppose there is no question about that at all. It is stated so to be in the third volume of our Revised Statutes of Ontario, page 45, and then the Imperial Merchant Shipping Act is reprinted in the Dominion Statutes of 1895 at page 3.

Now in that is my whole argument upon this first ground of appeal, namely, that we are entitled to the protection of these statutes, one or both.

Then the next ground of appeal is that the judgment should have made the provision which is usually made under this statutory limitation of liability. Where there are outstanding claims of persons not before the Court, the defendants are entitled to be protected against those outstanding claims, if they have reason only to apprehend there are outstanding claims they are entitled to be protected against them in the way provided for by the practice of the Admiralty Court. There are two ways in which this can be done. The common way is, where a

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claim is made against defendants for negligence, and they admit their liability, admit their negligence, and say, "Well, in addition to the claim made by you, a plaintiff, we have reason to apprehend that other people will have claims growing out of this same alleged negligence or the same negligence we admit", and so one way which the persons against whom the negligence is alleged can get relief against apprehended outstanding claims—the apprehended outstanding claim is that of the cargo-owners—they can bring an action themselves, an action for limitation of liability. They can bring that as a cross action, or they can bring it either before or after the original plaintiff brings his action, they can bring it before by way of counter-claim, or bring it afterwards as a cross-action, asking for leave to pay the money into Court and have the Court distribute the money to all persons proved to be entitled, whether vessels-owners, cargo-owners, persons whose lives have been lost, or whatever the case may be.

Now, we have not pursued that course, because we do not admit liability. If we had admitted liability we could have pursued that course. What we have done is to adopt the other course of pleading in our defence, and then also setting the defence up by way of counter-claim that we have reason to apprehend outstanding claims and asking in our defence that relief should be given to us of the same nature as if we had brought an action for limitation of liability. Originally we did not plead that in our defence for this reason: The statement of claim was made by Walter K. Fullum alone, and in his statement he alleged he was the owner of the barge, and that the damage that was caused to the barge and cargo was damage which he suffered, the whole loss. There was no need then for any pleading. We did not know of anybody else having any rights in the matter at that time. It subsequently developed, however, that the

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plaintiff Fullum did not own the cargo, did not own any interest in it, and that he was only a two-third owner of the barge. So at the trial the judge ordered Miss Fitzgerald, the owner of the other third of the barge, to be made a party plaintiff. That, of course, absolves us from liability as to her, we have no need for fear of her having any outstanding claim, but it leaves us unprotected as to claims of cargo-owners whose cargo was jettisoned. Accordingly we obtained leave to set up this in addition to our defence as originally pleaded, and this is in the latter part of section 14 of our defence:—

"No action other than this action has been brought against defendants or against said tug in respect of said accident, but the defendants apprehend other claims in respect of damages to the said tow and to goods, merchandise and other things on board the said tow at the time of the said accident.

"15. If it should be determined by the Court that the defendants are liable to pay any damages in respect of the matters complained of in the plaintiff's statement of claim, then the defendants desire by way of counterclaim to repeat, and they do repeat, all the allegations made in the plaintiff's statement of defence as amended, and they claim judgment for limitation of liability such as they would have been entitled to in a separate action for limitation of liability."

We were allowed to plead that, but no relief was given to us in respect of that, that is, there is just the ordinary reference made to the Registrar.

Now, as showing we are entitled to plead in that way I refer your lordship to *Wahlberg* v. *Young* (1). I would also refer your lordship to *The Clutha* (2) Williams & Bruce's Admiralty Practice (3).

Then it was contended by my learned friend that we could not take advantage of any such practice as that

(1) 45 L. J. C. P. 783. (2) 35 L. T. N. S, 36.

(3) 3rd edition, page 347,

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without admitting liability on our part, without admitting that the defendants were negligent, that they were liable. But the practice is held to be the contrary, that is, it is held that admission of liability on the part of the defendants is not necessary in order to enable the ship at fault to take advantage of the statuory limitation of liability. That was held in the case of *The Sisters* (1) and *The Amalia* (2).

Then the third ground for appeal is either that the accident was an inevitable accident and not due to the negligence of the defendants, or that it was due to the negligence of the plaintiffs, and that brings us then to the questions of fact.

Now, the grounds on which I put it that the plaintiffs are liable for negligence are as follows : First, that they had no lookout. I will have to refer to law on that point presently. They rely largely on our liability because we had no lookout. We say, if that is so you are equally liable ; you had no lookout. Secondly, the barge was overladen. That was negligence, not on our part, but on the part of the plaintiffs. Then the third ground is, the accident was caused by the sheering of the barge.

So if any of those grounds of negligence exist on the part of the plaintiffs, then, even though we have been negligent, we are entitled to the application of this special Admiralty rule.

Then here is the way in which the rule of contributory negligence is dealt with in the case of *Tough* v. *Warman*, where the trial judge charged the jury on the fact of negligence on the part of the plaintiff and on the part of the defendant and so on, and that was confirmed by the full Court of Exchequer. The charge to the jury was in this way :—

(1) 1 P. D. 281. (2) Brown & Lush. 151.

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"That if there was no negligence on the part of the defendants, or if the plaintiff directly contributed to the collision"—which happened to be the matter in question there—"they (that is, the jury) should find for the defendants, that if the defendants directly caused it they should find for the plaintiff." That was held to be the proper direction. A more convenient place to refer to this case than in the original report is in the *Ruling Cases*, because all the cases are brought together. It will be found in 19 *Ruling Cases* 194.

Then I come to the law referred to by your lordship some time ago. What is the law regarding the respective duties of the tow and the tug as to managing things so as to keep away from harm? The first case I refer to on that point is the case of the tug *Stranger* (1), which shows that it is the duty of the tow to closely follow the wake of the tug. It is said there that it is the duty of a tow to follow directly in the course of the tug, and the tug therefore is not liable for damages sustained by a tow which sheered out of the course and struck a rock, but if the sheering of the tow is caused by some manœuver of the tug, then the tug will be liable.

Then I come to the point that has been controverted to a considerable extent. The cases are not all in the same direction. The point which was referred to by your lordship, that is, which controls, does the tug control the tow, or the tow control the tug, that is the point. Now, what I submit is that the tow controls the tug and should give it proper directions. (Cites the *Altair* (2), *Smith* v. *The St. Lawrence Tow Boat Co.* (3), *The Niobe* 4).

A vessel in tow of a tug proceeded in a thick fog and grounded in consequence in the River St. Lawrence, and it was held that the weather was so bad that the vessels

(1) 24 L. T., 364.
(2) [1897], P. 105.
(3) L. R. 5 P. C. 308.
(4) 13 P. D. 55.

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ought not to have been under way, and that as they continued under way without any attempt on the part of those on board the tow to stop the tug, those persons must be taken to have assented to the tug proceeding; that there was negligence on the part both of those on board the ship and tug in proceeding in the way in which they did during the fog; and that as those on the ship contributed to the accident which occurred the owners of the ship could not recover from the owners of the tug for the loss which they had sustained (1).

Now, my learned friends depended strongly on our alleged negligence by reason of not having a lookout, and they contend that would saddle us with liability at any rate. Well, I have already pointed out there was the same necessity for a lookout on the tow as on the tug, so they were equally at fault if there was any fault.

Then my learned friends rely on a provision in the Statute which they say, by reason of our not having a lookout puts the onus upon us, so that *primâ facie* we were responsible for the accident. I want to point out that is not the case.

Now, the navigation rules are contained in section 2 of the Canadian Act, chap 79 of the Revised Statutes of Canada 1886. I may say our present Revised Statutes of 1906 do not contain the navigation rules, but the Revised Statutes 1886, chap. 79, had at the very beginning, the navigation rules.

Then Article 24, as contained in the revision of 1886, contains the only thing that is said about lookout. It is this:—

"Nothing in these rules shall exonerate any ship, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of any neglect of any precaution required by the ordinary practice of seamen, or by the special circumstances of the case."

(1) See *Smith* v. *St. Lawrence Tow Boat Co.*, L. R. 5 P. C. 308.

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Now, here is the section of the Act my learned friends rely upon as showing, according to their contention, that by reason of not having a lookout that saddles us with all responsibility in this case.

[THE COURT—This accident did not arise through default of a look-out.]

They argue to the contrary.

What I want to point out is that section 6 does not apply in this case. Section 6 reads in this way:—

"If any damage to person or property arises from the non-observance by any vessel or raft of any of the rules prescribed by this Act" (Lookout is not prescribed by the Act. Article 24 only says that the provisions shall not exonerate a ship from the consequences of not having a lookout; it does not prescribe a lookout.) "such damage shall be deemed to have been occasioned by the wilful default of the person in charge of such raft or the deck of such vessel at the time, unless the contrary is proved, &c."

I need not read it further. This section does not apply, because there is no lookout prescribed in the article. Even if there had been a rule requiring a lookout, then the section would not have been applicable, the damage here was not one that arose from the non-observance of any such rule. The lookout would have been useless.

Then just one word more on the Imperial Merchant Shipping Act. I want to refer to this because my learned friend relies so strongly on it. Under the Merchant Shipping Act, in a case of collision a ship proved to have infringed any of the regulations for preventing collision contained in or made under the Act is to be deemed to be in fault. That is similar to this section my learned friend relies upon, he says we have not had a lookout, we are deemed to be in default.

Just one more point; and that is this Admiralty rule as to apportionment where both parties are in default.

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We have, as far as I have been able to find, only one case in our reports here dealing with that, namely, the *Heather Belle* (1). It is shown there that the course to adopt is this. First, if you have a case of negligence where the defendant is entitled to protection of the statute limiting liability, apply your statute limiting the liability and so find out what is the maximum amount for which the defendant would be responsible. Having then arrived at the maximum amount of liability in that way, you next, if it is found that both sides are guilty of negligence, apportion that maximum amount equally between the plaintiff and the defendant.

So here, then, the first thing to do, if these defendants are liable at all, is to find the maximum limit of their liability with reference to the statute protecting them; and then, having found that maximum liability, if it is found that the plaintiffs were also guilty of negligence, you divide that maximum liability between the plaintiffs and the defendants.

Mr. *Hodgins*, for the respondents:

I would like to deal somewhat with the facts before going into the law.

The case came before the learned local judge, and his findings are in favour of the plaintiffs on the evidence of the three witnesses called by the plaintiffs as against the explanations given by the witness Hamilton, the sole witness for the defendants. And I take the point with some confidence that the court will not, unless it is absolutely demonstrated that the learned judge is wrong, reverse him after he has seen the witnesses where the question he decided is, which of them are telling the correct story of the course followed that night?

The Privy Council practically laid down that rule in Admiralty in the *Kitty D.* (2), where the Supreme Court

(1) 3 Ex. C. R. 40, at p. 56. (2) 22 T.L.R. 191.

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had reversed the trial judge, assuming that he had erroneously found on the facts. The Privy Council decided that having seen and heard the witnesses it was to be presumed he was right, and unless it was clearly demonstrated he was wrong, the court would uphold him.

I make these observations because of my learned friend's suggestion of what he called the animadversions upon the witnesses being unjustified. They may be in his view certainly they were not in mine, because Captain Hamilton began his examination in-chief by asserting that in this short distance he had to go he followed a straight course and the compass course, that he got exactly to the spot where he was to change, that is within two or three hundred feet of the shoal, that he then changed half a point, which brought him into the true course for Algoma Mills, that he was proceeding upon that course when the sheer took place and the barge stranded. That was his examination-in-chief. In his cross-examination it developed that he was not prepared to say that he steered a straight course, that he was then prepared to say that the barge threw him off, that he was all the same confident that he got to the proper place and changed his course, and it was not until re-examination that his counsel saw it was necessary that questions should be put to him to bring those two theories into line. The questions were put, and he then admitted that his original theory as to having followed the straight course for that length of time and arrived at that exact spot known to him by the locality was not quite correct, but was a pure matter of judgment and a matter of guess, and he thought he was all right and would do the same again. He did not, I think, show up in the way indicated that he was a man who would not be governed by a good deal of biased interest. His reputation was certainly at stake in the matter.

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There were two distinct theories; ours being that, in, following this course the tug kept to the south by error the captain expecting that he was going in the more northerly course, and that he would find Sandford Island on his starboard bow. That when it was picked up it turned out to be on the port bow, showing he followed a more southerly course. That then realizing it, he immediately turned and kept a quarter of a mile on the north-east course, which, if he had followed the proper distance, would have carried him a quarter of a mile past that shoal to the north.

Now, what we say is this, our theory is that he intended to take this course to the north, but knowing he was heavily laden he took a course down south owing to these shallow grounds. There is no evidence one way or the other upon that. His contention is he took a more southerly course, and when he ran just about as far as he ought to run if he was on the proper course, he discovered Sandford Island. It loomed up on the port bow instead of as, it ought to have, looming up on the starboard bow if they were keeping on that course.

There are pines on that island 50 feet high. It is a well-known landmark. That is about as far as he would come if on a straight course, only he would have landed here instead of there (indicating on chart). He made a turn and ran right on the rock. That is our theory in a nutshell.

[THE COURT :—Intending to go north of the rock ?]

Yes. It is reasonable to suppose he had gone on this southerly course, and had he proceeded he would have cleared this if he had gone straight on.

There is a channel 400 or 500 feet wide, so he could have kept well up here (indicating on chart) if he wanted to avoid that and go down, then he could have turned here and kept to the north side. Then, instead of finding himself 100 feet to the north of that, he would have

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found himself with the tow following along behind in that way. He must have turned here in order to be able to substantiate the fact that he went for about a quarter of a mile up along that course before the vessel's course was turned. That is the whole thing in a nutshell as far as the contention of the plaintiffs goes.

[THE COURT: Are you at issue at all as to the fact that the means of navigation were being obscured by darkness?]

We are to this extent. This night is said by the witness Hamilton on his examination-in-chief, to be smoky and hazy, slightly smoky. As a matter of fact it was in the month of July, the 20th. Now, the evidence is that at 9 o'clock that night when the tug arrived out to where the *Blaine* was anchored, Sandford Island was plainly in sight. It must have been within something like a mile and three-quarters to two miles away, because Captain Hamilton, the captain of the tug, says that he picked it up again—I am just going to explain why that was so, —that he picked it up again when he got within a mile. He says at one place a mile and three-quarters, and two miles on another occasion. The fact was this, that at 9 o'clock at night it was visible when he commenced to tow, and he says "I lost sight of it for a time." Perhaps the night grew darker, but he picked it up again as he went on. He says, "I picked it up a mile and a half." That is in one part of the evidence. In another part he said a mile and three-quarters or two miles away. So it became visible. And that is one reason why we charge him with negligence, that he picked up this island, according to his own admission clearly in sight long before he came in dangerous ground, and that he picked up the small island a mile or a mile and a half away. I think your lordship will find some island close to Sandford Island called O'Dwyer. And Captain Hamilton's story is that as he got closer and closer he saw Sandford

Island, he saw O'Dwyer Island, and corrected his position, and he knew exactly where he was. Now, that is his version, and that all of course proves the night, which he originally said was slightly smoky, was not in any way a drawback to him; and that when he got, let us say, within a mile, to be perfectly fair to him, of those two islands he knew where that charted shoal was.

I am taking it upon its own showing. He says, "there is only one course, I have got to take it and I did take it, that is the compass course bringing me three and a half miles from Pandora shoal exactly in line with it where I turn north." Now, taking it upon his own evidence, we say they have started upon that course and deviated from it and kept on deviating, and that he was guilty of negligence. But I think the negligence is that having been able to pick up these lights, as he swears, in plenty of time, that he kept on so far that when he turned he kept right over the shoal.

[THE COURT: As I understand it, from the time they sighted the island you say they ought to have sheered north sooner or else kept south?]

Yes.

[THE COURT: But having sighted the island and being off his course he ran too long before checking the ship. That is your contention?]

Yes.

[THE COURT: A lookout would not have obviated that?]

A lookout would have settled the point.

Let me put it in the strongest way I can If the lookout had been at the bow of that boat and had picked up Sandford Island and reported its position to the captain, and the captain and he checked over one with the other the position of Sandford Island, this accident would not have happened. That is my contention.

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[THE COURT: What do you say to this proposition? Supposing it is admitted the captain is duly qualified, that the defendants had every reason to believe in his competence, and that through error of judgment he caused this accident. Would you contend there is liability on that set of facts?]

Yes. In Admiralty practice the rule does not apply we are all so familiar with, because the man who makes a mistake is generally a man of absolutely no substance at all, a poor mariner of some kind, and therefore the Admiralty laws make the owners responsible, even although a competent captain is employed and he has done his best.

It is obvious it would be almost ridiculous if the defence was that a man used his best judgment at the moment, and that he had a certificate. In England they are held liable every day for infringing the rules and going out of their course. Here, of course, is a man who, we say, took the wrong course. We prove it out of his own mouth.

Now, as to the question of sheering. My learned friend says that the sheering is what is responsible for the whole difficulty. Just let me point this out as an answer. The sheering, if it existed at all, must have existed during the whole transaction. This man admits that it went on during the whole two hours and that it made it hard, he says, to follow the compass course, but he did follow the compass course; that is his statement. Now, it seems to me that he is in this position; that if the sheering was affecting the course of his tug, and he was conscious of it, as my learned friend says, during the whole of that period of time while he was running the four miles, he was bound to allow for it; and that it is not enough for him to say now, "she was sheering bad and notwithstanding that I went on the course I was accustomed to take with a barge that steered well, and after I had reached the

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right spot, I turned to the north." He is bound, if the sheering does affect the course of his tug, to make due allowance for it.

Then if he turned at the right spot it is perfectly evident that the sheering had not affected the course of his tug. He must take one position or the other, either it did not affect his course, or it did affect his course and he was bound to right it. But he was responsible for that, and was bound to make due allowance for that. He does not appear to have done so.

Then as to the law. Now, the contention, is that there is no appeal here, that this is a final judgment and it must go to the Supreme Court direct. The fact is that this action does finally settle the question, and the very important question so far as my learned friend is concerned, as to the limitation of liability. It is absolutely held by this judgment that he is liable for all the damages. There seems to be a difference between the English mode of looking at the matter and ours, but here under the rules the judgment appears to be final. All that is done is to refer the damages to the Referee who then, if he makes a report, files it, and the report becomes absolute. It is by force of this judgment that the money is then paid out.

The *Duke of Buccleugh* case (1), which my learned friend referred to as settling the fact that this is not a final judgment, proceeds, as far as two of the judges are concerned, on a different wording altogether, that they have power to add and substitute plaintiffs at any time, which they think means after final judgment. Then in Lord Esher's judgment he held that this was not a final judgment because it had to go to the Referee and another order made.

[THE COURT: I do not understand that is the ground taken. Any appeal from any final judgment, decree or

(1) [1892] P. 201.

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order of any local judge in Admiralty may be made to the Exchequer Court.]

The *Admiralty Act*, 1890, section 20, provides that in cases of appeal we can go to the Supreme Court if against a final judgment, but if against an interlocutory judgment we have to go to the Court of Exchequer.

Now as to the question of responsibility. I have got some cases for your lordship on that. Before I deal with them I should like to submit the references in *Marsden on Collisions* (1) as showing that negligence of the master and crew make the ship-owner liable by maritime law. That is the rule that applies in a great many cases, where a competent man is employed to do a certain thing the owner is not directly responsible, but I should have imagined the statute—if the case comes under that statute—would settle it beyond question, that is the limitation of liability. If that statute applies, then, and limits the liability, it shows the circumstances of the liability which it limits, and it can only take place where there is no privity of the owner.

Upon the question of responsibility of the tow, I point out to your lordship the barge had no motive power. The barge was taken up by the tug and was, according to the evidence, wholly under the control and subject to the direction of the tug, and the tug-master himself took entire control, and, as I say, in making the turn he gave no direction or anything else to the vessel. He says it is their duty to follow in his wake, they have nothing to say about it, he sets the course. That appears to have given rise to a state of affairs where liability has always been held to attach. *Marsden on Collisions* (2) and *Abbot on Shipping* (3) point out that in the first place where there is on motive power in the barge, and the tug is therefore in charge, the tug is responsible; and secondly, that where

(1) 5th ed. at pp. 70, 71.
(2) 5th ed. p. 193.
(3) 14th ed. at pp. 305, 306.

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no orders are given by the tow that the tug is responsible for negligence. These are the two principles which appear to be laid down. Where no directions are given by the vessel in tow or by the pilot it has been laid down by the Privy Council that the rule is for the tug to direct the course. That is *Smith* v. *The St. Lawrence Tow-Boat Co.* (1). And it is pointed out in *Abbot* that if the service is performed at night and the weather foggy or bad, or if at sea or in a river or harbour which is crowded, the pilot's ability, that is on the tow, to direct the tug's movement is diminished, while with several of these difficulties combined his control may become very slight, and in consequence they point out if the tow gives no directions the tug is liable. Now *Smith* v. *The St. Lawrence Tow-Boat Co.* is a very short judgment, and is to this effect:—

"It appears to be clear that when no directions are given by the vessel in tow, the rule in the case of tug-steamers is that the tug shall direct the course. The tug is the moving power, but it is under the control of the master or pilot on board the ship in tow." (2)

Now here it is a clear question of the tug directing the course. I further refer your lordship to the *Quickstep* (3), a later case than the one in 13 P. D., cited by my learned friend, the *Niobe*. There are other cases referred to in the master's judgment which I call your attention to, as they all seem to be in the same direction.

Now, if that be so, that entirely shifts the onus in this case, and even if we were guilty of what may be termed contributory negligence, that is if our sheering were found as a fact affecting it, that is no answer to the liability which arises from the tug taking the wrong course and bringing us into a position of danger.

(1) L. R. 5 P. C. 308.

(2) L. R. 5 P. C. at p. 313.

(3) 15 P. D. 196.

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The *Sewell* case which has been referred to, and with which I have to deal on the question of law, is a most interesting and instructive case on the facts upon that very point, both on contributory negligence and as to the duties of tugs in a case very similar to this. I point out it is exactly applicable when your lordship notices that the channel to the north gives a stretch of open water into which he could have gone. The *Sewell* case was exactly this case. It says the course was dangerous and rocky in a certain direction, there was a stretch of open water the tug could have gone into, and not doing that the tug was responsible.

I would refer your lordship to *Spaight* v. *Tedcastle* (1), where it is laid down :—

" It must be shown that the injured party, or those with whom he is identified, might with proper care subsequently exerted have avoided the consequences of defendant's proper want of care."

The proposition I put to your lordship is this, you find in the section in the old Act exactly the same words that are in the Canadian Act to day. I say those words have been construed to mean certain things limited to cases of collision. I say that undoubtedly the fact that there was a heading weighed very largely with the Court.

I say irrespective of the heading in the clause in which there had been a change, the identical section in words is before your lordship today that was before the Supreme Court in the *Sewell* case, where, rightly or wrongly, that was decided by the Supreme Court to mean a certain thing.

There is a decision of the Supreme Court that those words mean certain things, they do not include anything but cases of collision. (Refers to the *Sewell* case.)

Now, I deal with the point that is taken in the judgment. The original statute said :—" Duties of masters

(1) L. R. 6 App. Cas. 226.

in cases of collision." Now, it is said that was the whole reason for the judgment, but what is the effect of the deletion of those words in the subsequent revisions? Confessedly, although my learned friend read Statute 49 Victoria, confessedly those were not new Acts, those were intended to be a consolidation of the old Acts. The omission of that was, if it has any effect at all, clearly beyond the powers of the revisors, and my submission is that the Act, notwithstanding what we say was the wrongful omission of it by the revisors and not the legislative omission, that this Act must be construed exactly as if those words were there; and that the case is not such that your lordship can treat it as a deliberate act of the legislature. If Parliament had amended the Act by striking those words out, there would not be any doubt about the fact that there was some reason to be attached to it; but in this case where the act is that of revisors, and where the statute is not amended, but is merely consolidated, and that was stated, I will show your lordship then the rule applies that the act of the revisors cannot prejudice and does not affect the statute. There are a number of cases upon that. They are *Nicholls* v. *Cumming* (1); *License Commissioners* v. *Frontenac* (2); *Crane* v. *Ottawa* (3); *Whalen* v. *The Queen* (4); *Lamb* v. *Cleveland* (5); and *Brock* v. *Toronto* (6).

I want to call your lordship's attention, because the point is of considerable importance to us, to the fact that that statute which was supposed to be amended, 43 Victoria Chapter 29, was in the schedule of the Acts not repealed, but is referred to in this way; "consolidate subsection 1 which is recommended for repeal." So that the omission of those words by reason of what appears in the schedule and what was being done, was merely a consol-

(1) 1 S. C. R. pp. 420, 425.
(2) 14 O. R. 741.
(3) 43 U. C. Q. B. 498.
(4) 28 U. C. Q. B. 108.
(5) 19 S. C. R. 78.
(6) 45 U. C. Q. B. at p. 53.

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idation at that time, and not a repeal and not an alteration. Then the entire preamble of the Acts are referred to in Chapter 1 of the Statutes of 1886, Section 4, Sub-section 56, which shows what the entire preamble of the Act is. The rest are similar sections. There is no authority at all for those grouped sections.

I argue upon the authority of those cases, and in view of the fact that is merely a consolidation, that when that Act was passed after the *Sewell* case, making that amendment, it was evidently not intended to be changed; and that your lordship would be bound to construe that, if the case had come up immediately after this, exactly as was done in the *Sewell* case, because there was no intention to repeal. And I say that the form of words having been carried down through subsequent re-enactments makes no difference in that respect.

With regard to the English Act, our contention is that under section 735 there was a right given to the Colonial Legislatures to repeal or abrogate any portion of the Act; that it is not necessary it should be repealed in words; that the same principle applies as has been applied in the Privy Council in constitutional cases in Canada; that where a Provincial Legislature has legislated within its rights and that field is properly invaded by the Dominion Government, this practically follows, though not in so many words. The two cannot stand together; if there is any repugnance the Dominion statute governs.

I say here the enactment by our Parliament of almost the same sections, taken as a group, which deal with both ships of British registry and Canadian registry, is a clear indication that the Colonial Government was legislating in the direction of a provision inconsistent with, and which cannot stand with, the English Act.

Section 9 of the Act of 1886 says :—

"The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a

consolidation and as declaratory of the law as contained in the said Acts or parts of Acts, so repealed, and for which the said Revised Statutes are substituted."

"That if upon any point the provisions of the said Revised Statutes are not in effect the same"—it does not say, "not in words the same;" it is "not in effect the same"—"as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions * * * subsequent to the time that they take effect the provisions contained in them shall prevail, but as respects all transactions, &c., anterior, the provisions of the repealed Acts and parts of Acts shall prevail."

I contend, first, that is limited to repealed Acts; secondly, that it only deals with statutes which are not in effect the same. There is nothing to suggest that the words used in the section are not capable of the meaning given to them in the *Sewell* case. The omission of the heading is not conclusive, because the other sections in the same group are confined to cases of collision, and this is the marginal note, which apparently is the work of some of the revisors.

If in this schedule it had been repealed and the other substituted I would not have a word to say; but they merely consolidated it, and we can imagine it dropped out by a printer's error or anything you like, but it was the same thing being consolidated and re-enacted.

There is one other point I want to make, that is with regard to the rules—perhaps it is not of much importance now if your lordship takes the view the look-out is not of much consequence. I refer to Section 917 of our present statute and to the case of *Tucker* v. *Tecumseh*, referred to in the judgment, (1), and *Stoomvaart* v. *Peninsula, etc. Co.* (2), as showing that the necessity to follow these regulations is absolute and can only be departed from in case of actual necessity. That is to the

(1) 10 Ex. C.R., 44, (2) 5 A.C. 876.

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same effect as in *Marsden* at page 496. Although my learned friend says it is not a regulation that they should have a lookout, no one can read the regulations as published without feeling that they are impliedly binding upon the defendants.

Mr. *McPherson*, *K.C.*, followed for the respondents. I will only take your lordship's time for a moment on the question of having a lookout upon the tug. Take the circumstances of the night out in Georgian Bay, coming in an easterly direction with no light direct on the course to steer by, but a light in the rear, the Missisauga light, that was the only one he had and it was over his stern. He could look about in his pilot-house and keep that light, he could get the range by taking that light in conjunction with his bow, but he had nothing forward at that time. The only thing he had to steer by was what he called in the witness-box the loom of Sandford Island. Your lordship has seen the chart we brought over. It is a lithographed copy of the one marked. If there had been a lookout stationed there for the express purpose, one he knew was a competent lookout—it cannot be said that Cowles who was there as a passenger can be regarded as a competent lookout, he was not sailing in those waters—if a seaman had been there familiar with these land-marks, and had made out these landmarks it would have aided the captain in making that turn and changing his course at the right time.

In *Marsden on Collisions* (1) it is said that the lookout must be vigilant and efficient according to the exigencies of the case. The denser the fog and the worse the weather, the greater the cause for vigilance to avoid collision.

I do not think he did make out Sandford in time to clear it. He had gone too far south and east when he made his swing. His tug was drawing 7 feet 6 inches

(1) 5th ed. p. 464.

of water and he cleared the rock himself, but we, drawing 9 feet, when we came up we stranded. Fullum personally is quite clear about that, page 8 question 60 :—

Q. How long before you struck did he put his wheel over to starboard! A. Oh, I can't say; possibly three minutes."

According to Captain Fullum, the minute they discovered the island they changed their course. The other captain says they were all anxious; Cowles the passenger was on deck; they brought up the engineer and were trying to get out of the loom of Sandford Island.

Consequently, not having a lookout and not complying with the regulations, they must be liable for all negligence. I do not think I need take up your lordship's time any longer on that. There is the case of the *Jane Bacon* (1) showing the necessity of a tug having a lookout.

The text of that is:—

"It is the duty of a ship with another in tow to keep a sharp vigilant lookout, because the tow cannot always see ahead."

That is *Marsden's* note. The text of the case bears out that.

CASSELS, J., now (June 2nd, 1909), delivered judgment.

This is an appeal on behalf of the defendants from the judgment pronounced by the Local Judge in Admiralty for the Admiralty District of Toronto on the 4th January, 1909.

I will deal with the third and fourth grounds of appeal before discussing the first and second grounds.

The third and fourth grounds of appeal are as follows:

"3. The learned trial Judge should have found that the stranding of the barges in question was due to inevitable accident, and was not due to the negligence of the

(1) 27 W. R., 35.

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defendants, or he should have found that it was due to the negligence of the plaintiffs.

4. If the learned trial Judge was justified in finding that the defendants were guilty of any negligence in connection with the said stranding, he should have found that the plaintiffs also were guilty of negligence which contributed to the said stranding, and he should have applied the Admiralty Rule that, where both parties are in default, the defendants should not be found liable for any amount exceeding one-half of the amount of the damages growing out of the said accident, as limited by the statutes aforesaid."

The appeal was very fully and ably argued in Toronto on the 22nd March, 1909, by counsel for appellants and respondents, and I have had the benefit of a transcription of the arguments.

Since the hearing of the appeal I have perused the evidence carefully, as well as the arguments.

I do not think I should interfere with the findings of fact of the learned trial Judge.

The question turns upon fact. The trial Judge was in a better position to weigh the conflicting evidence of the witnesses than I can be. He has done so, and I cannot say his conclusion is incorrect.

The tug was out of her course. She was westerly and southerly of Sandford Island. The captain of the tug, Fullum, if the evidence of Cowles is accepted, believed that when Sandford Island was seen it would be on the starboard side of the tug. Cowles was of opinion it would appear on the port side, and so informed Fullum. It turned out that Cowles' opinion was correct. The captain (Fullum) knew the location of Pandora reef and its position in relation to Sandford Island, and on sighting Sandford Island put the wheel to starboard, turning the course of the tug to the north so as to reach the channel

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north of Pandora reef and Sandford Island. The result was the stranding of the barge.

Fullum states he was in the proper channel and that he navigated the tug in a proper manner. It is difficult to understand if he was in the proper channel why he should have believed Sandford Island would appear on the starboard.

The tug had no lookout as required by the rules. The question as to whether the absence of a lookout is conclusive depends on the circumstances of each case. The trial judge places great stress on this point. Cowles in his evidence gives as his reason for concluding that Sandford Island would appear on the port bow that the Mississauga light and the lights from Blind River were visible, and he judged from the location of these lights. The lights at Algoma Mills were also visible. It may well be that had there been a lookout, it would have been ascertained that the tug was not on the course the captain assumed her to be. In any event when the difference arose between Fullum and Cowles as to the location of Sandford Island, the captain of the tug should have accepted the suggestion of Cowles and allowed him to steer while he, Fullum, went forward and took observations.

The captain of the tug attributes the accident to the barge to the bad steering of the barge causing it to sheer. There is no evidence of bad steering. It is only an inference by reason of it sheering. If Fullum's story is correct he knew from the commencement of the towage that the barge sheered. If so, he must have known that if he turned the wheel to starboard so as to turn the tug to the north the barge would be very likely to sheer.

The evidence as to the sheering is contradictory, and it is not proved if the evidence on behalf of plaintiffs is accepted. The tow line was from fifteen to eighteen fathoms in length, and if Fullum's evidence were accepted

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no sheering could have caused the barge to run on the shoal unless she hauled the tug eastward.

The learned trial judge has dealt fully with the relative duties of tug and tow.

The case of *Sewell* v. *The B. C. Towing and Transportation Co.* (1) contains a concise statement of the law. The barge had no motive power. The tug had assumed the complete control of the navigation. There is no evidence of contributory negligence on the part of the barge.

I think these two grounds of appeal should be dismissed.

The first ground of appeal is as follows :—

"1. The learned trial judge should have found that the defendants are entitled to the benefit and protection of the provisions limiting liability as contained in the Imperial Merchants' Shipping Act, 1894, Chapter 60, Section 503, and as contained in the Revised Statutes of Canada, 1886, Chapter 79, Section 12, now contained in Revised Statutes of Canada, 1906, Chapter 113, Sections 921, 922 and 923."

The learned trial judge followed the judgment in *Sewell* v. *British Columbia Towing and Transportation Co.* (2) in which it was held that the defence of limited liability only applied to cases of collision and not to the facts in question in that case—a case very similar in its facts to the present case. That case turned on the fact that the 11th and 12th clauses of the Canadian Act in force at that time are prefaced with a heading in these words :—"Duty of Masters—Liability of Owners as to Collision." The reasoning is set out on pages 550, 551 of the report of the *Sewell* case.

In revising the statutes (see R. S. C. 1886, Cap. 79, Sec. 12) this heading is omitted. It is true that in the margin is written : "Liability of owners limited in case

(1) 9 S.C.R. 527. (2) 9 S. C. R. 527.

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of collision without their fault"; but this marginal note cannot control. The learned trial judge evidently was of opinion that the omission of the heading changed the construction as decided in the *Sewell* case. He has reasoned at length that this change in the statutes was on the part of those revising the statutes, and that their action in omitting the heading was *ultra vires*. Assume that the omission of the heading was legislating so as to make the law in Canada harmonize with the English law, then the trial judge has omitted from consideration the effect of Cap. 4, 49 Vict., respecting the Revised Statutes. Section 8 of this statute is as follows:—

"8. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts or parts of Acts so repealed, and for which the said Revised Statutes are substituted:

2. But if upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail."

In the revision of the statutes in 1906, Cap. 113, Section 924, there is a heading: "Duty of Masters—"Liability of Owners of Ships." The stranding in question in this case was prior to the Revised Statutes of Canada, 1906, coming into force.

The sub-sections (*a*) and (*b*) of the Revised Statutes of 1886, Cap. 79, Sec. 12, would apply to cases that might not happen owing to a collision—(*c*) and (*d*) to cases of collision. The statute to my mind has to be construed as if the *Sewell* case were being decided under the

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statute as consolidated in 1886, in which case the decision on this point would have been in my opinion the same as the decision under the English Act. The law in England is clear that under a similar statute the limitation clauses would apply (*Wahlberg* v. *Young* (1) "without their actual fault or privity." See also the *Warkworth* (2), and, in appeal, same volume, page 147. The *Obey* (3).

In the present case there was a British registry distinguishing it in that respect from the *Sewell* case. Mr. Marsh contends he is entitled to rely on the British statutes. I do not find it necessary to consider this question.

This ground of appeal is allowed and the judgment below should be varied. There is no disagreement as to the towage.

The second ground of appeal is as follows:—

"1. The learned trial Judge should have granted to the defendants the relief sought in paragraphs 14 and 15 of the defendants' amended Statement of Defence."

The 14th and 15th paragraphs of the amended Statement of Defence are as follows:—

"14. No action, other than this action, has been brought against the defendants, or against the said tug in respect of the said accident, but the defendants apprehend other claims in respect of damages to the said tow, and to goods, merchandise and other things on board the said tow at the time of the said accident.

15. If it should be determined by the Court that the defendants are liable to pay any damages in respect of the matters complained of in the plaintiffs' statement of claim, then the defendants desire, by way of counterclaim, to repeat, and they do repeat, all of the allegations contained in the defendants' Statement of Defence, as

(1) 24 W. R. 847.
(2) L. R. 9 P. D. 20.
(3) L. R. 1 Ad. & Ecc. 102.

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amended, and they claim a judgment for limitation of liability, such as they would have been entitled to in a separate action of limitation of liability".

These paragraphs were allowed as amendments by the learned Judge. There does not seem to be any strong objection on the part of the plaintiffs to the claim of the defendants.

The judgment should be varied by giving the defendants the relief asked for, and all proper provisions and directions should be inserted therein.

As both plaintiffs and defendants have succeeded in part and failed in part, I give no costs of this appeal.

Judgment accordingly.

Solicitors for appellants: *Marsh & Cameron.*

Solicitors for respondents: *McPherson & Co.*

ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT.

BETWEEN

1908
Sept. 7.

ISAIAH WATTS (SOLE OWNER OF THE SCHOONER *REGINA B.*) CHARLES L. AUCOIN, JOHN PORRIER, THOMAS PORRIER AND ANSEN BARGONS (PLAINTIFFS)..... } APPELLANTS;

AND

THE STEAMSHIP *JOHN IRWIN* (DEFENDANT)..... } RESPONDENT.

Shipping—Collision—Steamer and sailing ship—Regulations—Arts. 20 and 21—Right of sailing ship to go about when not compelled to.

Art. 20 of the Regulations for Preventing Collisions at Sea provides that where a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

Art. 21 provides that where by any of the rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Held, that under the latter rule, a sailing ship when she is compelled to go about cannot do so close ahead of a steamer, so as to embarrass the latter and make it difficult for her to keep out of the way.

2. In this case a sailing ship and a steamer were so close together as to involve risk of collision. The sailing ship undertook to go about without being compelled to and without any good reason to justify the manœuvre, and by so doing embarrassed the steamer and rendered her unable to avoid a collision.

Held, that the sailing vessel had violated Art. 21, and was responsible for the collision.

APPEAL from a judgment of the Deputy Local Judge for the Nova Scotia Admiralty District.

The case arose out of a collision in Halifax harbour.

The facts of the case are fully set out in the reasons for judgment on the trial, which are printed below.

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v.
THE
STEAMSHIP
JOHN IRWIN.

Reasons of Trial Judge.

DRYSDALE, D. L. J.:

This action is brought by the owners, master and crew of the *Regina B.* a schooner of 79 tons, which was sunk in a collision had with defendant steamer in Halifax harbour on the night of the 19th of October, 1908. The *Regina B* in charge of Captain Aucoin was, on said night between 9 and 10 p.m., coal laden, beating into Halifax Harbour, the wind was north, or, according to the Captain of the *Regina B*, a little east, of north "baffling to the east", as he puts it.

The contention of those on board the *Regina B.* is that after coming inside of Meagher's Beach light, at or near the point marked "G.x" on the chart used, the vessel commenced a starboard tack towards middle ground buoy; and, according to plaintiffs preliminary act, on a west northwest course; that this tack was continued until they passed the middle ground buoy about 200 yards, and passing to the south of it; that the schooner then tacked and stood to the north-east on the port tack; that before and at the time of, and after tacking, they had observed the red light of the steamer *John Irwin* only as she was coming down the harbour; that after they had proceeded about 200 yards on the port tack and when about abreast of middle ground buoy, the *John Irwin* suddenly opened her green light, altered her course and bore down on them, striking the *Regina B.* on the port side aft of the main rigging, with the stem and starboard bow of the *John Irwin.*

The master of the *Regina B.* has drawn a diagram marked "G-1" to illustrate his contention as to the manner of the collision. The contention of the *John Irwin* is that they were coming out the harbour on the fairway, heading south with the middle ground buoy always on their starboard bow; that they saw the *Regina B.* standing to the west on the starboard tack and showing her green light; that she was then about ¾ of a mile

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distant, and bearing a point and a half on the *John Irwin's* port bow; that they then starboarded their helm so as to bring green to green and pass astern of the schooner; that whilst they were so proceeding with the intention of passing astern and having brought green to green, the *Regina B.* suddenly came up in the wind and tacked close ahead; that although they then at once ported their engines, the *Regina B.* was struck aft of the main rigging, but by the stem and port bow of the *John Irwin.*

Under the evidence I have to consider which of these contentions is supported. There is no dispute as to where the collision occurred; it was in the main ships' channel, very near the fairway; the *John Irwin* was admittedly going out the harbour, and it is fair to assume on the usual course in the fairway. Her officers so state, and she would, as they state, naturally be keeping the middle ground buoy on her starboard bow, and if this were so I cannot understand the statements of those on board the *Regina B.* when they say they were west of the buoy mentioned some two hundred yards when they tacked, and still saw only the red light of the *John Irwin.* If they were as far west as the buoy, the *John Irwin* keeping the fairway, as I have no doubt she did, would be shewing her green light, and I think when the *Regina B.* undertook to tack she could not have been as far west as her captain alleges. A steamer, it is true, must keep out of the way of a sailing vessel when such vessels are proceeding in such directions as to involve risk of collision. But it is also true that where by the rules one of two vessels is to keep out of the way the other shall keep her course and speed, and under this rule I take it to be settled that a sailing ship must not, when she is compelled to, go about close ahead of a steamer so as to embarrass the steamer and make it difficult for her to keep out of the way; and that where risk of collision exists a sailing ship is not entitled to go about until

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compelled to. The real point in dispute here is whether the *Regina B.* improperly tacked right, or close, in front of the steamer, and thus violated Rule 21. Captain Aucoin's statements as to the bearing of the *Irwin* when he first saw her are most unsatisfactory. In his examination he first states that he first saw the *John Irwin* when he was on a W. N. W. course on the starboard tack about half way between Meagher's beach buoy and middle ground buoy; that the *Irwin* was then about $\frac{3}{4}$ of a mile or a mile distant, coming out the harbour, and bearing about a point or a point and a half on his (the *Regina B's.*) starboard bow, and that the *Irwin's* red light got broader on his bow as he continued his western tack. This statement cannot be accepted as to the bearing, as it is a very material contradiction of plaintiffs' preliminary act. In such act the bearing of the *John Irwin* when first seen is given as five or six points on the starboard bow of the *Regina B.* when the *John Irwin* was first seen at a distance of about one mile, though the captain then further states that after continuing his starboard tack to the west of middle buoy the *John Irwin* was at the point when he decided to tack about a half mile distant, and bearing about $2\frac{1}{2}$ points on his starboard bow with his red light only showing. Such a statement puts the *John Irwin* in an altogether improbable place and position, considering her course out of the harbour, and her bearing when first seen; and Captain Aucoin's statements as to this position and his own reasons for tacking were most unsatisfactory. Another striking feature of Captain Aucoin's testimony was as to his course at the time of, and the manner in which the ships came together. He states he was sailing on a northeast course on the port tack for about 200 yards after tacking west of middle ground buoy when the collision occured, and that sometime after he was on that course the *John Irwin* opened her green light and came

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in contact with him aft of the main rigging, with her stem and starboard bow. It is apparent this would require an extraordinary change of course on the part of the *John Irwin* at short range, and it difficult to accept such a statement; and the *Regina B.* could not with the wind as stated sail on a N. E. course; the best she could do would be probably a point north of east. Again, this method of collision is inconsistent with the admission that the *John Irwin's* port anchor in the collision fouled the main rigging of the *Regina B.* Looking at the whole evidence I am satisfied the vessels came together in the manner indicated by the officers of the *John Irwin*, that is to say—that the *Regina B.* had just come up in the wind, and was in the act of tacking; that the *John Irwin* in the effort to clear her under a port helm struck with her stem and port bow. As to the manner of the collision I accept the statements of the officers of the *John Irwin.* I am satisfied that when the two vessels were so close that risk of collision existed the *Regina B.* improperly undertook to go about without being compelled to, and without any good reason for so doing; that her conduct in this respect embarrassed the *John Irwin* which would otherwise have cleared her; that she was guilty of a violation of article 21, and such violation was the cause of the collision. It was contended that the *John Irwin* was in fault in not slackening her speed or stopping and reversing earlier. As to the speed the *John Irwin* was making I find it was about 7 miles an hour, which, under the circumstances, seems reasonable. I accept the statements of the officers of the *John Irwin* as to her course out of the harbour, and as to the positions of the vessels just before the collision. When the captain speaks of minutes during which he was under a starboard helm I think allowance must be made always as to time, the substance of the statement is in the fact that he went to

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port enough to bring green to green, and after the *Regina B.* tacked so close as to make a collision almost inevitable no fault or delay can be attributed to the *John Irwin's* captain in his effort to stop and reverse, or in any of his emergency orders. It is true it is the duty of a steamer, where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done to avoid collision; at the same time, as stated in the leading case on the subject, if a steamer is to be condemned for having omitted to do something which she ought to have done, it seems right to require proof of three things—first; that the thing omitted was clearly in the power of the steamer to do; second, that if done it would in all probability have prevented collision, and thirdly that it was an act which would have occured to any officer of competent skill and experience in command of the steamer. When the captain of the *John Irwin* brought green to green, as I find he did, the original risk of collision was determined; and going at a moderate rate I do not see he was then under any obligation to slacken or stop, and after the *Regina B.* tacked in front I do not think under the evidence there is anything that I can reasonably say he omitted that he ought to have done. In fact as to the conduct of the *John Irwin's* officers throughout I do not find any act or omission on their part that in my opinion should decree them in fault.

The action will be dismissed.

June 12th, 1909.

The appeal was argued at Halifax.

A. G. Morrison, K.C., for the defendant, contended that the *John Irwin* was out of her course, not having kept on the western side of the channel. She was therefore to blame for the collision, *The Rhondda* (1).

(1) 8 App. Cas. 549.

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Furthermore, when the *Regina B.* proceeded to come about she was half a mile away from the steamer, and there was abundant opportunity for the steamer to avoid collision. But the latter failed to keep out of the way, and so brought about the collision. She was solely to blame. The *Regina B.* was obliged to tack or go ashore. Cites the *Norma* (1). The *Palatine* (2) is express authority for the right of a sailing vessel to go about, while the obligation upon the steamer is still to keep out of her way.

As to greater credence to be given to evidence of those on board the *Regina B.*, cites *The Dahlia*, (3).

As to lights on sailing vessels, cites *The Earl Spencer* (4).

H. Mellish, K. C., for the respondent, contended that there was no evidence to justify the *Regina B.* in going about, when she did, as a matter of necessity. The steamer was on the proper course; she was steered to go astern of the schooner, and if the latter had kept her course there would have been no collision. The case of the *Palatine*, cited by counsel for appellant, supports a counter proposition to the one he contends for. The onus is on the plaintiff to show that the collision occurred by the fault of the defendant, and that onus has not been discharged. Cites *Marsden on Collisions* (5) *Williams & Bruce's Adm. Pr.* (6).

Mr. Morrison replied.

CASSELS, (now September 7th 1909) delivered judgment.

This is an appeal from the decision of Mr. Justice Drysdale, Local Judge in Admiralty at Halifax. The appeal was argued before me at Halifax. By consent of both parties Captain Neil Hall was requested to sit with me and hear the appeal as nautical assessor.

(1) 35 L. T. N. S. 418.
(2) 1 Asp. M. L. C. N. S. 468.
(3) 1 Stuart 242.
(4) L. R, 4 Ad. & Ec. 431.
(5) 5th ed. pp. 285, 236.
(6) 3rd ed. p. 99.

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The appellants' case was forcibly argued by Mr. *Morrison, K.C.*

Captain Hall made his report, which reads as follows :—

"Having been requested to act as Nautical Assessor herein, and after hearing with your lordship the argument of counsel both of plaintiffs and defendant, and after carefully perusing all the evidence, I am of the opinion that the evidence goes to show the night was dark, the sky clear, and the wind blowing a stiff breeze northerly. Under such circumstances lights should be seen their full range.

"The steamer *John Irwin* going down Halifax Harbour, sights a green light on his port bow, which after proved to be the starboard light of the schooner *Regina B.* Ordinary precaution seems to have been taken by the steamer *John Irwin* to clear the *Regina B.*

I do not think the *Regina B.* could have been west of the middle ground buoy that night, or she must undoubtedly have seen the green light of the *John Irwin.* The crew of the *Regina B.* say they saw the red light of the *John Irwin* at the time of tacking west of the middle ground buoy, and continued to see the red light till just before the collision. This I cannot believe to be correct.

In regard to the *John Irwin*, porting her helm and going full speed astern was the only action she could take in the emergency, and in my opinion the *Regina B.* tacked almost under the bows of the SS. *John Irwin.*

For the above reasons I find the schooner *Regina B.* in fault."

I have, since being furnished with this report, carefully considered the evidence and documents adduced and produced before the trial judge.

To a great extent the question involved is one of disputed fact. I think the trial judge arrived at a correct conclusion on the evidence adduced, and I agree entirely

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with his carefully considered finding, and also with the conclusions of the Nautical Assessor.

The appeal is dismissed with costs.

Judgment accordingly.

Solicitor for appellants: *A. G. Morrison.*

Solicitors for respondent: *McInnes, Mellish, Fulton & Kenny.*

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

AND

THE INVERNESS RAILWAY AND COAL COMPANY, LIMITED..... } DEFENDANTS.

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Sept. 9.

Expropriation—Land and land covered with water—Public harbour—Special adaptability—Piers and channel fallen into disrepair—Basis of compensation.

For the purpose of forming a public harbour certain uplands together with certain beach lands were expropriated from the defendants by the Crown. Some years before, the defendants had constructed two piers, and had dredged an entrance from tide-water to the pond where such piers were situated; but at the time of the expropriation both of the piers had been allowed to fall into disrepair and the entrance or channel had been completely filled up with sand. The defendants claimed compensation, amongst other things, for the special adaptability of the property expropriated for harbour purposes, and for the value of the stone remaining in the piers at the time of the expropriation. There was no evidence to show that there was any competition of purchasers for the purpose for which the land had been taken by the Crown, or that there was any possibility of tht defendants obtaining a purchaser who would use the land for that purpose.

Held, (following *in re Lucas and Chesterfield Gas and Water Board* (1909) 1. K. B. 16) that the defendants had not made out a case for compensation in respect of their claim for special adaptability.

2. *Held*, (following *Streatham and General Estates Co.* v. *The Commissioners of Her Majesty's Works and Public Buildings.* (52 J. P. 615 and 4 T. L. R. 766) that the value of the stone could not be taken into account.

THIS was an information filed by the Attorney-General of Canada for the expropriation of lands for the purpose of a public harbour.

The facts are stated in the judgment.

June 19th and 21st, 1909.

The case came on for hearing at Halifax, N.S.

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Argument of Counsel.

H. Mellish K. C., for the defendants, contended that the tender of the Crown was too small. It allowed nothing for the special adaptibility of the property for shipping purposes. It is an easy matter for a harbour to be constructed with the two piers remaining there as built by the defendants. The piers with the stone in them as they stand will at least save the Government an expenditure of $12,000 in making the harbour. There is 6,000 cubic yards of stone in the piers, and it is of the greatest utility for the purpose required. The salient feature of the damages in this case is that the lands had a special adaptability for commercial purposes by reason of the water frontage. Cites *Re Lucas and Chesterfield Gas and Water Board* (1).

R. T. MacIlreith, for the plaintiff, contended that the property did not possess a marketable value for shipping purposes. There was no reasonable probability that a purchaser could be found within a reasonable time who would pay a price beyond the merely normal, or agricultural value. Under such circumstances *Lucas and Chesterfield Gas and Water Company* (*supra*) did not apply.

The value for the purposes of compensation under the statute must be taken to be the value at the date of the expropriation. At that date the defendants had allowed their channel to be completely obstructed with sand, and the crib work of the piers to become very largely decayed. Cites *Vezina* v. *The Queen*, (2); *The King* v. *Shives* (3).

CASSELS, J., now (September 9th, 1909), delivered judgment.

This is an information filed on behalf of His Majesty the King by the Attorney-General of Canada to have the

(1) (1909) 1 K. B. 16. (2) 17 S. C. R. 1;
(3) 9 Ex. C. R. 200.

value of certain lands and lands covered by water ascertained.

The property sought to be expropriated consists of about twenty acres of dry land and thirty two acres of land covered with water. The expropriation is for the purpose of forming a harbour at the town of Inverness, situate on the west coast of Cape Breton.

The date of the expropriation is the 29th April, 1909. At the trial it was suggested that the description of the lands taken did not accord with the lands expropriated as shewn by the plan. It was agreed to by counsel that the plan should govern, and if the description as furnished is erroneous a new description should be prepared in accordance with the lands as delineated on the plan.

The lands in question comprise three acres of what is known as uplands, situated to the southwest of the former piers constructed for the purpose of making a channel into what is known as McIsaac's pond; about seventeen acres of beach lands situated between the Gulf of St. Lawrence to the north and McIsaac's pond on the south, and of about thirty-two acres of land covered with water comprising a portion of what is referred to in the evidence as McIsaac's pond. The other portion of McIsaac's pond necessary for the purpose of a harbour and situate to the west of that part of the pond owned by the Inverness Railway and Coal Company, Limited, is owned by one D. J. McDonald, the value of McDonald's interest to be ascertained in an action against him tried at the same sittings as the action in question.

The Crown offered as full compensation for all the lands taken, and damages to adjoining lands, the sum of $1,500. By their defence the defendants claimed the sum of $7,000 for the value of the lands taken, and $2,000 for injury to the adjoining property.

At the trial an amendment was allowed increasing the claim for value to $17,000 instead of $7,000, it being

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shown that it was a clerical slip making the claim $7,000 instead of $17,000.

The claim of the defendants is for $17,000 and $2,000, in all $19,000.

The defendants, the Inverness Railway and Coal Company, Limited, are the owners of the greater portion of the town of Inverness, and are working coal mines. Most of the lands owned by them were purchased for them by the County of Inverness. The lands in question were purchased from one Hussey who acted as agent for some Swiss capitalists. It appears from the evidence of Bernasconi that in 1897 two piers were constructed by Hussey extending from McIsaac's pond to the Gulf of St. Lawrence, and a certain amount of dredging performed permitting an entrance from the gulf to the pond, and through the pond to a wharf at the eastern end of the pond. By means of this work a harbour was formed and vessels of light draught could enter from the gulf and be loaded at the wharf. Since the acquisition by the defendants a railway has been constructed running along the west coast of Cape Breton The defendants ship the coal mined by them over this railway as far as the Strait of Canso where the coal is loaded on to vessels.

The entrance constructed from the gulf to McIsaac's pond has for years been allowed to fall into disuse, and at the time of the commencement of the expropriation proceeding the channel was completely filled up with sand. The woodwork on the piers from the low water mark to the top has rotted.

Considerable evidence was given at the trial to show the quantity of stone in the piers. Arens, the engineer of the defendants, places the quantity at about 6,000 yards above low water level. Bernasconi the engineer for the Crown places the quantity at 3,000 yards, of a value of 45 cents a yard, after allowing 15 cents a yard for removal.

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For the defendants it is contended that compensation should be allowed on the basis of the special adaptability of the premises in question for harbour purposes. It was not claimed by Mr. Mellish that the stone should be paid for as stone.

The Crown has admitted the title of the defendants, and I therefore assume they or their predecessors in title acquired a right to construct the piers in question.

In my view the question of special adaptability should not be taken into account. I do not think the defendants bring themselves within the rules enumerated by the Court of Appeal in England in *re Lucas and Chesterfield Gas and Water Board* (1), decided by Bray, J. at the trial (2). In this latter case the authorities are collected and commented on. Most of them will be found in *Browne & Allan's Law of Compensation*, (3) There could be no competition as in the case of water reservoirs which might supply several different localities, and where competition might arise.

In this case the market value of the land and land covered by water has to be arrived at. If in fact its peculiar adaptability for harbour purposes be taken into account it would add to its market value. I am left in ignorance on this point. The price paid by the defendants for this particular harbour right has not been furnished. I do know that they have allowed it to be disused and filled up, and no harbour existed at the time of the expropriation. According to the evidence of Arens, the engineer of the defendants, it would cost $150,000 to dredge for harbour purposes, and $40,000 additional for the construction of piers, and McDonald's interest in the pond would have to be acquired.

I deal with the question irrespective of special adaptability for harbour purposes. The value of the stone I do not take into account. See *Streatham & General*

(1) [1908] 1 K. B., p. 571. (2) [1909] 1 K. B., p. 16.
(3) 2nd. ed. p.

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Estate Co. v. *The Commissioners of Her Majesty's Works and Public Buildings* (before the Divisional Court) (1) (and before the Court of Appeal) (2).

In a case of this nature it is difficult no doubt for counsel to furnish evidence as to values. I am inclined to accept the evidence of the witnesses for the Crown. McLean, McInnes and McIsaac place a value of $75 an acre for the three acres of upland to the west of the pier. McIsaac places a value on the 17 acres of beach at $30, and on the 32 acres of land covered with water, at $35 an acre.

In all 3 acres at	$75.00	.....	$	225 00
17	"	30.00	.....	510 00
32	"	35.00	.....	1,120 00
			$	1,855 00

If the defendants are allowed $2,000 and interest, I think they will be fully compensated.

The defendants are entitled to their costs.

Judgment accordingly.

Solicitor for the plaintiffs: *W. H. Fulton.*

Solicitor for the respondent: *R. T. MacIlreith.*

(1) (1838) 52 J. P. 615. (2) 4 Times L. R. 766.

IN THE MATTER of the Petition of Right of

JOHN P. LEGER.....SUPPLIANT;

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Sept. 13.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Government railway—Damage caused by fire from locomotive—Liability—Government Railways Act, sec. 5, sub-sec. (j)—Nonfeasance—7 & 8 Edw. VII. c. 31, sec. 2, sub-sec. 2—Application.

While the Minister of Railways and Canals, under the provisions of sec. 5, sub-sec. (j) of the *Government Railways Act*, is empowered to repair buildings used in connection with the Government Railways, he is not compellable to do so; and his omission to make such repairs is not negligence within the meaning of sub-sec. (c) of sec. 20 of the *Exchequer Court Act*.

2. In the absence of liability therefor created by statute the Crown is not liable for mere non-feasance. *Leprohon* v. *The Queen*, (4 Ex. C. R. 100); *Davies* v. *The Queen* (6 Ex. C. R. 344); *Sanitary Commissioners of Gibraltar* v. *Orfila* (L. R. 15 A. C. 400); *McHugh* v. *The Queen* (6 Ex. C. R. 374); *Hamburg American Packet Co.* v. *The King* (6 Ex. C. R. 150) (1).

PETITION OF RIGHT for damages arising out of a fire alleged to have been started by a locomotive on a Government railway.

The facts are stated in the reasons for judgment.

June 9th and 10th.

The case came on for hearing at St. John, N.B.

M. G. Teed, K.C, and *F. J. G. Knowlton*, for the suppliant;

J. P. Byrne, for the respondent.

Mr. *Teed*, contended that the evidence showed beyond all doubt that the fire was started by a locomotive on the

(1) NOTE:—In this case no negligence of any officer or servant of the Crown was found, and the provisions of 7 & 8 Edw. VII. c, 31, sec. 2, sub-sec. 2, were applied as to the amount of damages recoverable.

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railway. (Cites *Canada Southern Ry. Co.* v *Phelps* (1); *Grand Trunk Ry. Co.* v. *Rainville* (2); *Smith* v. *London & Southwestern Ry. Co.* (3).

It is upon the Crown to show that its servants have not been negligent under the provisions of 7 & 8 Edw. VII., c. 31, sec. 2, sub-sec. 2. They have not discharged that burden.

The Crown is also liable for not keeping the roof of the shed in repair, on the principle of law that everyone is obliged to so deal with his property as not to injure his neighbor. Operating a railway is a business liable to injure adjoining properties by fire. It is, therefore, incumbent upon the owner of the railway to keep his own buildings in such a state of repair as will minimize the risk of fire spreading to the buildings of his neighbor. Cites *Vaughan* v. *Menlove* (4); *Beven on Negligence* (5); *Scott* v. *London Dock Co.* (6).

It was the intention of Parliament to widen the liability of the Crown by adopting the provision of the general Railway Act with regard to fires started on the railway. Cites *Blue* v. *Red Mountain Ry. Co.* (7).

Mr. *Byrne* argued that but for the new provision as to liability for fires started by locomotives on the railway the suppliant would be out of court. He is therefore entitled to a share of the $5,000 fixed by the Act 7 & 8 Edw. VII. c. 31 as the maximum amount payable by the Crown in respect of damages arising from a fire started by a locomotive on the railway, and to no more. He has failed to prove negligence against the Crown, and the evidence is that modern and efficient appliance were used in the locomotives to prevent the escape of fire. Cites *Beven on Negligence* (8).

Mr. *Teed* replied.

(1) 14 S.C.R., 132.
(2) 29 S.C.R., 201.
(3) L.R. 5 C.P. 98; L.R. 6 C. P. 14.
(4) 3 Bing. N. C. 468.
(5) 3rd Ed. 496.
(6) 3 H. & C. 601; 13 Am. & Eng. Ency. Law 2nd ed. p. 404 vo, "Fire."
(7) 12 B. C. R. 460.
(8) 3rd ed. p. 309.

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CASSELS. J., now (September 13th, 1909), delivered judgment.

This is a petition of right, the trial of which took place before me at St. John on the 9th June, 1909.

The suppliant claims the sum of $17,500 as damages by reason of the destruction by fire of his hotel buildings, barns, etc. The buildings of the suppliant were situate at Bathurst, near the station buildings of the Intercolonial Railway. A fire started on the roof of the freight shed in the early morning of the 25th May, 1908, and spread to the buildings of the suppliant, which were completely destroyed.

The suppliant alleges that the fire occurred through sparks or cinders emitted from an engine of the Intercolonial Railway, and that the engine in question was not provided with proper appliances. The suppliant also alleges that the roof of the freight shed was in an improper state of repair, the shingles being loose, allowing cinders to get under them and so making the probability of fire more likely than if it were in a good state of repair. His contention is that it was the duty of the railway authorities to keep the roof of the freight shed in a proper state of repair so as to minimize as far as possible the danger of fire. The contention of the suppliant is that even if the engine were furnished with all the necessary appliances to minimize the escape of sparks or cinders, nevertheless if the fire was caused by sparks or cinders emitted from an engine that the respondent is liable by reason of the negligence of the railway in allowing the roof of the freight shed to get into such a state of disrepair as to make a fire probable.

An alternative claim is based upon the provisions of the statute 7 & 8 Edward VII., cap. 31, section 2, sub-section 2.

This sub-section reads as follows :—

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"2. Whenever damage is caused to property, by a fire started by a railway locomotive working on the railway, His Majesty, whether his officers or servants have been guilty of negligence or not, shall be liable for such damages: Provided that, if it is shewn that modern and efficient appliances have been used, and that the officers or servants of His Majesty have not otherwise been guilty of any negligence, the total amount of compensation recoverable under this sub-section shall not exceed five thousand dollars, and it shall be apportioned among the parties who suffered the loss as the court or judge determines."

In the event of the suppliant being entitled to claim under the provisions of the statute a portion of the $5,000, and his right, if any, being limited to a claim under this statute, the suppliant, by consent of counsel for suppliant and respondent, is entitled to judgment for the sum of $3,284.67.

In the event of the suppliant being entitled to damages for the total loss occasioned to him by reason of the destruction of his premises, the question of the amount of damages is to be referred to the Registrar.

Since the trial I have carefully perused the evidence as extended by the stenographer, and also the various exhibits, and I remain of the opinion I expressed at the trial as to the proper finding on the facts. I think on the evidence that the only conclusions that should be arrived at are as follows:—

1. That the fire in question originated from sparks emitted from the engine of the railway. The fire could not have been started in any other way so far as the evidence adduced before me discloses. See *Canada Atlantic Ry. Co.* v. *Moxley* (1).

2. The engine in question was equipped with all modern and efficient appliances, and the Crown has saved

(1) 15 S.C.R. 145.

itself from liability so far as any claim is based upon negligence in operating an engine defectively equipped.

I am of opinion that the roof of the shed in which the fire originated was in a defective state of repair. The shingles were in such a state as to allow cinders to get under them and to make a fire more probable than if it were in good repair.

The first question is whether any duty exists on the part of the Crown towards the suppliant to keep its own buildings in repair so as to minimize the risk of fire to its own premises, and if so, and the fire spreads across the road to the suppliant's premises, is the Crown liable?

The second question is what is the meaning of the sub-section of the statute 7 & 8 Edw. VII., if the previous question is decided in favor of the respondent, and is the suppliant entitled to recover portion of the $5,000?

In answer to the first question, I am of opinion that the Crown is not liable by reason of the non-repair of the roof of the shed in question. But for the provisions of the statute 7 & 8 Edw. VII., cap. 31, s. 2, s-s. 2, there would, in my opinion, be no liability. This statute creates a liability on the part of the Crown to the extent of $5,000, notwithstanding that modern and efficient appliances have been used for the prevention of fire, leaving the liability in a case in which the officers and servants of His Majesty have been guilty of negligence as before the passing of the statute. But for statutory provisions the Crown would not be liable.

The Exchequer Court Act, section 20, sub-section (*c*) provides that the Exchequer Court shall have exclusive original jurisdiction to hear and determine "every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

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Does the case come within the purview of this section? Under the provisions of the statute respecting Government Railways, cap. 36, R. S. C. 1906, it is provided by section 5, sub-section (*j*) that the Minister may from time to time repair buildings. I know of no principle of law which compels the Minister to do so. I am bound by decisions which decide that the Minister is not an officer or servant of the Crown within the meaning of this section 20, sub-section (*c*), of the Exchequer Court Act. See *McHugh* v. *The Queen* (1); *Hamburg American Packet Co.* v. *The King* (2).

There is no evidence before me of any instructions to any officer or servant of the Crown to repair, or of any funds appropriated for that purpose.

In the absence of liability therefor created by statute the Crown is not liable for mere non-feasance. *Leprohon* v. *The Queen* (3); *Davies* v. *The Queen* (4); *Sanitary Commissioners of Gibraltar* v. *Orfila* (5); *McHugh* v. *The Queen* (6); *Hamburg American Packet Co.* v. *The King* (7).

On the other branch of the case I think the suppliant is entitled to succeed. The fire was started by a locomotive working on the railway. See *Jaffrey* v. *Toronto Grey & Bruce Ry. Co.* (8); *Canada Southern Railway Co.* v. *Phelps* (9).

The suppliant is entitled to judgment for $3,284.76, and the costs of the action.

Judgment accordingly.

Solicitor for suppliant: *M. G. Teed.*

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

(1) 6 Ex. C.R. 374.
(2) 7 Ex. C.R. 156, at p. 176.
(3) 4 Ex. C.R. 100, at pp. 110, 112.
(4) 6 Ex. C.R. 344, at p. 350.
(5) L. R. 15 A.C. 400.
(6) 6 Ex. C.R. 374, at p. 382.
(7) 6 Ex. C.R. 150, at p. 176.
(8) 23 U.C.C.P. 553.
(9) 14 S.C.R. 132.

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA ..... } PLAINTIFF;

1909
May 21.

AND

MARGARET HAYES, FINBAR HAYES AND FRANCIS McDOUGAL ..... } DEFENDANTS.

Expropriation—House in good repair—Special adaptability for apartment purposes—Compensation.

Certain premises situated on a city street were expropriated by the Crown for the erection thereon of public buildings. The house although not a new one was well and solidly built, and the owner claimed that it possessed special adaptability for the purpose of being used as apartments or flats.

Held, that the compensation for the property was to be assessed in respect of its market value, and that upon the facts the alleged special adaptability was not an element of such value. *Lucas and Chesterfield Gas and Water Board* ([1909], 1 K. B. 16) referred to.

THIS was a case of expropriation of certain property within the City of Ottawa for the purpose of erecting a public building thereon.

The facts are stated in the reasons for judgment.

April 26th and 27th, 1909.

The case now came on for hearing.

A. W. Fraser, K.C., and *D. H. McLean* for the plaintiff;

G. F. Henderson, K.C., and *E. J. Daly* for the defendants Hayes.

D. J. McDougal for the defendant McDougal.

Mr. *Henderson* contended that the property was especially adapted for the purposes of apartments or flats. It was in a locality convenient to the public buildings and business houses, and within a few minutes walk of the river bank with its fine scenery and boating facilities.

1909

THE KING v. HAYES.

Reasons for Judgment.

Mr. *Fraser* relied on *Lucas and Chesterfield Gas and Water Board* (1), as establishing that there was no element of special adaptibility in the compensation to be assessed in this case.

CASSELS, J., now (May 21st 1909), delivered judgment.

The information is filed to have the value ascertained of property owned by the defendant Margaret Hayes expropriated by the Crown.

The property in question is situate on Sussex Street, about 330 feet north of St. Patrick Street and about 1886 feet north of Rideau Street. Unlike the Condon and Murphy properties, the values of which I have dealt with (2), the property in question is valued by the defendant as residential property distinguished from mercantile property.

The property in question has a frontage on Sussex Street of 132 feet with a depth of 155.76 feet. There is no street in the rear.

The Crown tendered the sum of $17,500. The defendant claims the sum of $40,000.

The valuation has to be ascertained as of the 24th January, 1908.

In this case a considerable portion of the evidence taken in the case of *The King* v. *Condon* (3) as to the growth of the city of Ottawa, the various improvements such as parks, Interprovincial bridge, etc., all tending to the appreciation of values, has been accepted.

There is no doubt that the value of property has increased largely during the last ten years in some localities to a greater extent than in other localities.

On the premises in question is erected a valuable house, solidly and well built, erected a good many years ago by Hamilton Brothers. The main part of the house has a

(1) (1910,) 1 K. B., 16

(2) See *The King* v. *Condon, ante* p. 401.

(3) *Ante* p. 275.

p. 275; and *The King* v. *Murphy, post*,

frontage of 45 feet on Sussex Street by a depth of 75 feet. There are stables in the rear not at present in good repair.

The defendant bases her claim for a large amount of compensation on the special "adaptability" of this property for apartments, or flats.

A large amount of evidence has been given as to the cost of reconstructing the present buildings for apartment purposes, the probable return, and the investment etc. I will deal with this aspect of the case later.

A considerable portion of the evidence is as to what the buildings originally cost and what the value would be at the present time if a building of a similar character were erected. These witnesses ignore the market value at the time of expropriation.

For the defendant witness Cole places the value of the buildings at	$ 20,000 00
And the value of the land at $121.00 a foot frontage	16,000 00
	$ 36,000 00
Witness McDermott values the land at	$ 16,000 00
And the buildings at	20,000 00
	$ 36,000 00
Witness Noffke values the buildings at	$ 25,407 00
Witness Askwith values the buildings at	24,769 00
Witness Stewart for the Crown places the selling value at	17,000 00
He values the land at	$ 5,000 00
And the buildings at	12,000 00
	$ 17,000 00

His valuation of $17,000. is based on the selling value.

1909

THE KING v. HAYES.

Reasons for Judgment.

Witness Stuart values the building, as it is, to build at.....$ 15,217 00

His view is that it cost approximately $19,113, but would require a considerable expenditure to make it a first class house.

Witness Link, an employee of the Hamilton Bros., states the cost from $18,000 to.....$ 22,000 00

Witness Lebel values the land at.... 4,000 00
And the buildings at..... 13,000 00

$ 17,000 00

I have but little doubt that the buildings would cost to build at the time of the expropriation about $20,000. What I have to arrive at is the fair market value at the time of the expropriation, namely, 24th January, 1908.

Mrs Hayes purchased the property in question on the 13th October, 1889 for the sum of $8,000.00. She is receiving the sum of $30 a month for a portion of the lower flat.

On the 28th February, 1905, she gave an option on the property to one Taggart, terminable on the 15th July, 1905, for the sum of $15,000. Cole, a witness for the defendant, states that the property was worth at the time of his giving evidence $2,000 more than on the 24th January, 1908. He also states that during the last ten years property in that locality has increased about one hundred per cent.

Reference has been made once or twice to improvement by reason of the proposed expenditure of $100,000 to be made by the Grand Trunk Pacific on Nepean Point. There is no legal evidence before me on this point.

Having regard to the price paid by Mrs. Hayes for the property, the option given on the 28th February, 1905, and the prices paid by the Crown for adjoining properties, all set out in the evidence of Riopelle, more particularly

1909

THE KING v. HAYES.

Reasons for Judgment.

the Oliver property, the Lemieux property etc., I am of opinion that if the defendant is allowed the sum of $20,000 she will be fully recompensed for the market value, allowance for compulsory expropriation, contingencies, etc.

As I have stated, the Crown witnesses Stewart and Lebel place the selling value at $17,000 without making any allowances.

Mr. *Henderson* put forward a strong argument on the plea of special adaptability for an apartment house or flats.

According to Rogers, a witness for the defendant, the idea of apartment buildings was a sudden growth since 1st January, 1908.

Noffke, the architect, stated that he did not place much stress on the apartment house question; that it was sprung on him on the spur of the moment.

The suitability for apartments or flat purposes is something that would necessarily be taken into account in arriving at the market value. It is something that would add to the value in the market. There was and is any quantity of property in the neighborhood equally suitable. No apartment house has been erected in that locality.

In addition to the case of *The King* v. *Dodge* (1), referred to in the judgment in the case of *The King* v. *Condon*, I would quote from the language of Fletcher-Moulton, L. J., in the case of *Lucas and Chesterfield Gas and Water Board* (2). He states at page 29 as follows :—

" The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in

(1) 38 S.C.R. 149.

(2) (1909) 1 K. B., 16.

1909

THE KING v. HAYES.

Reasons for Judgment.

amount, but to that extent it is compulsorily changed in form ".

" The question has arisen only in the cases where the special adaptability is for the purposes for which lands are required only when used for works of public utility, which are naturally different from the uses to which lands are put while in private hands, and which therefore do not necessarily influence the price which such lands command in the market " (p. 30).

" The land in question is by its position and conformation marked out as a favorable site for an impounding reservoir to collect water for the public supply of a district." (p. 30).

In the case of *Countess Mary Ossalinsky and Mayor et al. of Manchester*, reported at length in Browne & Allen's *Law of Compensation* (1), the principles of ascertaining values are fully discussed by Grove, J., at page 661.

Stephen, J., at page 669, refers to the particular land :

" As to this particular piece of land, I will not say it is unique, but it is very nearly unique; it is one of the small number of places which is capable of being made into a reservoir which would supply any towns with which they might be connected ".

I allow the sum of $20,000 and costs. Provision must be made for the payment of the mortgage. Interest will run from the 24th January, 1908; the rents due can be set off.

Judgment accordingly.

Solicitor for plaintiff : *D. H. McLean.*

Solicitor for defendants Hayes : *E. J. Daly.*

Solicitor for defendant McDougal : *D. J. McDougal.*

(1) [1903] 2nd ed. at page 659.

BETWEEN

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA..... } PLAINTIFF;

1909
May 19.

AND

SABINA MURPHY AND GEORGE MURPHY..... } DEFENDANTS.

Expropriation—Market value—Sales of adjoining property—Basis of valuation.

In assessing compensation in a case of expropriation of land, the sales of adjoining properties affords a safe *primâ facie* basis of valuation.

THIS was a case of expropriation of certain lands and premises in the City of Ottawa for the purpose of erecting public buildings thereon.

April 23rd and 26th, 1909.

A. W. Fraser, K.C., and *H. W. McLean* for the plaintiff;

H. Fisher and *E. J. Daly* for the defendants.

CASSELS, J., now (May 19th, 1909,) delivered judgment.

This is an information filed on behalf of the Crown against Mrs. Sabina Murphy and George Murphy, her husband, to have the value ascertained of certain lands situate on the west side of Sussex Street.

The action was discontinued against George Murphy.

The land in question has a frontage of 33½ feet on Sussex Street, with a depth of 155 feet and 9 inches running back to Mackenzie Avenue.

The Boyden lot, 98 feet, fronting on Sussex Street adjoins on the north, and the Condon property, as to the value of which I delivered judgment recently, adjoins the Boyden property on the north.

1909

THE KING v. MURPHY.

Reasons for Judgment.

The Murphy property is situate a little over 100 feet nearer Rideau Street than the Condon property.

The Condon case differs from the present case inasmuch as in the Condon case the question of the value of the good-will had to be considered.

The lands and buildings have to be valued as of the 24th December, 1907. Considerable evidence adduced in the case of *The King* v. *Condon* (1) was by consent received as evidence in this case, such as the evidence showing the growth of Ottawa, etc.

I do not propose to repeat what I have written in the *Condon* case as to the principle of valuation.

The Crown offered the sum of $16,000. The defendant claims the sum of $35,000.

I agree with the view of the witnesses who state that the property should be viewed as a Sussex Street property with a depth of 155 feet and 9 inches running back to Mackenzie Avenue.

The main building has a frontage on Sussex Street of 33½ feet, with a depth of 72 feet. The house over the stores fronting on Sussex Street is entered from Mackenzie Avenue.

The idea of building an apartment house fronting on Mackenzie Avenue is to my mind absurd, and I think the witnesses who are of this view have a more accurate knowledge of the situation than those who conceived such an idea during the progress of the trial. To place an apartment house on a lot 33 feet by 75 feet without the right to light either north or south seems to be an absurdity. The erection of such a building would practically destroy the value of the present house.

The ideas of the witnesses vary very greatly as they happen to be either witnesses for the plaintiff or the defendant.

(1) *Ante* p. 275.

For the defendant, Noffke, an architect, places the value of the buildings at	$16,738 84
Witness Pratt values the land at	$10,000 00
And the buildings at	15,433 00
	$25,433 00
Witness Morris values the land at	$16,000 00
And the buildings at	17,000 00
	$33,000 00
Witness Askwith values the land at	$10,000 00
And the buildings at	15,305 00
	$25,305 00
Witness McDermott values the land at	$18,850 00
And the buildings at	16,000 00
	$34,850 00

For the Crown, witness Stewart, the Assessment Commissioner for the City of Ottawa, values the land at the sum of $4,100 00

And the buildings at	12,000 00
	$16,100 00
Witness Brown values the land at	$ 4,125 00
And the buildings at	11,836 00
Witness Stuart values the buildings at	$11,167 00
Witness Lebel values the land at	$ 4,200 00
And the buildings at	11,300 00
	$15,500 00

1909

THE KING v. MURPHY.

Reasons for Judgment.

I propose first to deal with the value of the land. I put aside as valueless the evidence given by Morris, who places the value of the land at $500 per foot frontage.

He places the value of what is called the Bishop property sold to Mr. Ewart at (for the land alone) $250 a foot frontage. This lot has a frontage on Sussex Street of 107 feet. It is a corner lot, the southeast corner of St. Patrick and Sussex. On this property are valuable buildings, not so well built as the buildings of Mr. Murphy.

Morris purchased this property, seven, eight or nine years ago (speaking of the date when giving evidence) for $6,500 or $7,000 including the buildings. On the 25th August, 1906, he resold to Mr. Ewart for $17,000. The evidence would show that between August, 1906, and 1st January, 1908, there has been but little increase.

$250 a foot for 107 feet means $26,857 for the land alone without the buildings.

Pratt, who gave his evidence in a very fair and impartial manner, states that Sussex Street forty years ago was the main street of Ottawa.

He further states that the value of land on Sussex Street was not as high in 1900 as in 1874.

He also states that between 1900 and 1st January, 1908, land on Sussex Street has appreciated in value about 75 per cent.

Mrs. Murphy purchased the lands in question in 1871. She paid $3,250, or practically $100 per foot.

I think if she is allowed $200 per foot frontage, or $6,300 she will receive fair and full compensation.

In valuing the buildings most of the witnesses seem to take the cubic contents and what it would cost to erect them at the present time.

The question I have to deal with is the market value at the date of the expropriation. The sales of adjoining property is *primâ facie* a safe basis.

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THE KING v. MURPHY.

Reasons for Judgment.

Riopelle shows the prices paid for adjoining properties. They are all set out in Exhibit No. 11 in the *Condon* case. We also have the Ewart purchase and other purchases.

It may be that the knowledge as far back as 1901, of the prospective expropriation by the Crown, had the effect of depreciating the west side of Sussex Street for mercantile purposes and benefiting Dalhousie Street.

I think if Mrs. Murphy is allowed the sum of $20,000 for land, buildings, compulsory expropriation, expense of moving, etc., it would be a fair allowance.

This amount should be paid with interest from 14th December, 1907, together with costs of action.

Judgment accordingly.

Solicitor for plaintiff: *D. H. McLean.*

Solicitors for defendants: *Murphy & Fisher.*

1909
Sept. 14.

DANIEL GILLESPIE, J. WILLIAM GILLESPIE AND D. PAUL GILLESPIE..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Expropriation—Foreshore — Title — Special adaptability of property for wharf purposes—Value to owner—Compensation.

In this case certain lands which fronted on a public harbour owned by the Crown in right of the Dominion of Canada were expropriated for the purpose of forming the shore end of a wharf extending out into such harbour. The suppliants had no grant and claimed no title to the beach or the land covered with water at medium high tide. The suppliants claimed that the special adaptability of the lands for wharf purposes should be considered as adding a very large value to the same in assessing compensation.

Held, that as the suppliants did not own the land covered by water nor the beach, that such special adaptability was not to be considered.

THIS was a case of expropriation of land for the purposes of a public wharf.

The facts are stated in the reasons for judgment.

June 23rd, 1909.

The case came on for hearing at Halifax, N. S.

T. R. Robertson for the suppliants, argued that under the decision in *Lucas and Chesterfield Gas & Water Board* (1), the special adaptibility of the land for wharf purposes had to be considered by the Court and damages assessed in respect of it. He referred also to *In re Gough and Water Board* (2).

H. Mellish, K. C., for respondent, contended that the remaining property of the defendants had been benefited by the expropriation. Heretofore useless land will now become valuable by the construction of the wharf.

(1) [1909] 1 K. B., 16.

(2) [1904] 1 K. B., 417

1909

GILLESPIE v. THE KING

Reasons for Judgment.

Mr. Robertson replied, citing *Coulson & Forbes on Waters*, (1).

CASSELS, J., now (September 14th, 1909), delivered judgment.

This was a petition of right tried at Halifax on the 23rd June, 1909.

The suppliants Daniel Gillespie, J. William Gillespie and D. Paul Gillespie claim as against the Crown the sum of $2,500 damages for the value of certain lands expropriated for the purpose of forming the shore end of a wharf extending out into the harbour of Parrsboro at the upper end of the basin of Minas in the Province of Nova Scotia.

The area of land taken by the Public Works Department is one rood, eight poles, slightly over one-fourth of an acre.

The evidence as to that portion of the Basin of Minas where the wharf is constructed forming a portion of the harbour of Parrsboro is meagre.

It was asserted by counsel for the Crown, and not contradicted, that the title to the soil is vested in the Crown as representing the Dominion. This is not contradicted, by counsel for the suppliants, and the evidence tends to show that the water at the point in question formed a part of the harbour prior to Confederation. The only evidence adduced was on the part of the suppliants. Dyas says vessels had always used the beach at the point in question when covered with water for harbourage purposes. Locke, an official of the Department, states he surveyed the harbour, and places the entrance to the harbour at a point further east than the place in question.

In Bligh's Orders in Council, cap. 80, page 706, an order in council is set out defining the limits of the harbour. It appears that the order in council is dated the

(1) Ed. 1902, p. 14.

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GILLESPIE v. THE KING

Reasons for Judgment

30th October, 1880. It was passed pursuant to 36 Vict. cap. 9, sec. 14 as amended by 37 Vict., cap. 34, sec. 14. The harbour is stated to extend east to Moose Creek. I think, although the evidence is not clear, that this Moose Creek is shown on the plan, Exhibit No. 11, further to the east than the location of the wharf marked at point "L" on the plan, Exhibit No. 11. I think it should be held that the place in question formed part of the harbour of Parrsboro and is vested in the Crown for the Dominion under *The British North America Act.* If it did not form part of the harbour, then at the time of Confederation it would have been vested in the Crown representing the Province of Nova Scotia under the judgment of the Board of the Privy Council in the *Fisheries Case* (1).

The suppliants claim no title to land covered with water at medium high tide water.

The navigability of the harbour depends on the flow of the tide which rises to a very great height at the point in question. The wharf in question is about half a mile from the centre of Parrsboro town, a town containing between 3,000 and 4,000 inhabitants, and is situate within its limits. The contention of the suppliants is that the place where the wharf is constructed is the only reasonably available spot in the locality for a wharf. An equally available situation for a wharf is about three chains further west, but a wharf built at that point would require to have an additional length of 125 feet to reach deep water. A wharf or wharves could be built further east, but would be exposed to the prevailing westerly and southwesterly winds sweeping in from the Bay of Fundy; and a wharf exposed to these winds would cost a much larger sum of money, as an L would have to be constructed to afford shelter at such a wharf. The wharf at the point in question is protected by the neck of land on the point of which Partridge Island Lighthouse is erected.

(1) [1898] A. C. 700.

1909

GILLESPIE v. THE KING.

Reasons for Judgment.

The advantage of the wharf at the point in question is claimed to be that there is a period of navigability for about four hours permitting steamboats to reach the wharf, unload, or land, and depart and return with the same tide.

Possession of the land in question was taken by the Crown on the 30th April, 1902, and the wharf constructed. The plan and description were filed on 9th April, 1907.

The suppliants base their claim for the large sum claimed on the fact of the special adaptability of the land in question for wharf purposes. The Crown denies the title of the suppliants. The title in one Owen McGuirk is admitted, but it is contended that the land in question did not form part of lot six, and did not pass by his will. Owen McGuirk died prior to the 25th May, 1900 (See Will and Certificate, Exhibit No. 6). Between the beach lot in question and lot six, as set out on the plan, a public highway appears to have been reserved but not in fact laid out on the ground.

Owen McGuirk's will reads:—

"Fourthly I give and bequeath to Charles Henry McGuirk Lot No. 6 in said Deed dated 23rd of March, 1881, from Caroline Ratchford to Owen McGuirk as *shore lands.*"

This deed of the 23rd March, 1881, granted the lands as follows:—

"All those certain tracts, pieces or parcels of land lying and being in Parrsboro aforesaid on the eastern side of Partridge Island River known as lot numbered five, six and seven in the division made by I. Olney Lewis, deputy surveyor of the lands originally granted to James Cameron and John Law, the said lots fronting on a line of road received for the accommodation of all the lots in said division, and which extends from the south of lot No. One at the inside of the beach, north forty degrees west eighteen chains to the western angle of lot No. Nine

1909

GILLESPIE v. THE KING.

Reasons for Judgment.

in the same division, each lot having a frontage of two chains on said reserved road, and extending back the same width, north fifty degrees east thirteen chains more or less to the southwestern side of another road reserved along marsh on the front of McGuirk's land, the latter road to have also a right of way to the main road to Mill Village and likewise to the shore of said river. Also so much of the marsh and gravel beach in front of the lots five, six and seven as will be comprehended within an extension of the side lines of said lots to the said river, together with all and singular the easements, tenements, hereditaments and appurtenances to the same belonging or in anywise appertaining, with the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim, property and demand both at law and in equity of the said Caroline Ratchford, Julia Anne Ratchford and Charles Edward Ratchford, of, in, to or out of the same or any part thereof."

The division plan cannot be found. The suppliants contend that the effect of this will coupled with the deed is to extend lot six so as to comprise the land in question, and that Owen McGurk in devising the lands as shore lands intended to pass the beach. I incline to the view that this contention is correct. If the beach in question did not pass by the will, then Owen McGuirk died intestate as to these beach lands in question and the title passed to his heirs. All the heirs have conveyed to the suppliants prior to the filing of the petition. The Crown in the description attached to the registered plan describes the beach lands in question as part of lot six. I find that the suppliants have proved their title.

As to the damages to be allowed, Mr. *Robertson* in his argument presented a very forcible and plausible case in favour of his contention that the special adaptability of the land in question for wharf purposes should be con-

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GILLESPIE v. THE KING.

Reasons for Judgment.

sidered as adding a very large value to the land expropriated.

Reliance is placed upon the case of *Lucas and Chesterfield Gas & Water Board* (1), and the class of cases there cited, most of which are reported in full in *Browne & Allan's Law of Compensation* (2). (In most of these cases the intrinsic value of the land taken was on or in the land itself). The land formed by itself, or in connection with other lands, a natural reservoir. There were also possible purchasers, as in the *Countess Ossalinsky* case (3).

In the *Lucas* case Vaughan Williams, L.J., refers to the property in question as "the natural and peculiar adaptability thereof for the construction of a reservoir" (3). At p. 25 he refers to the case of lands adjoining large works the owner of which would likely be willing to pay a larger price, etc. There would be no right of expropriation in the case put. At page 27 it is laid down:—

"Arbitrators are not to value the land with reference to the particular purpose for which it is required..... You must not look at the particular purpose which the defendants.....are going to put land to when they take it under parliamentary powers.....for any special purpose".

Again, at page 28:—

They should "value the possibility and not the realized possibility".

Fletcher-Moulton, L.J., at page 29, says that it must be estimated on "the value to him and not on the value to the purchaser".

And at page 31:—

"The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers

(1) [1909] 1 K.B. 16. (2) 2nd Ed. p. 659.
(3) [1909] 1K.B. 24.

1909

GILLESPIE v. THE KING.

Reasons for Judgment.

of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it."

Cripp's Law of Compensation (1) at page 117, puts it thus :—

"An owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return, and the term 'special adaptability' only denotes that the probable use from which the best return may be expected is special in its character."

Cases such as *Paint* v. *The Queen* (2) merely affirm the proposition that what has to be arrived at is the market value, having regard to the potential or prospective capabilities. Land used as a farm within a short distance from a large city may be expropriated. If it were merely valued as farm lands the owner would lose the added value of the almost certain possibility of, within a short period, the lands coming into the market as city lots.

Had the suppliants in this case owned the water lot as well as the beach and merely required assent to the erection of a wharf and interference with navigation, the case might be different.

The Crown in this case owns the land covered with water opposite the land expropriated, and has exercised its right to construct a wharf.

To allow the contention of the suppliants would be to allow the value to the Crown, and not to value the property at its proper value to the owner. It is said that in any event the minimum value should be $900 as recommended by Locke. I do not agree. It is quite evident that Locke had in view the gain to the Crown. It would be an absurdity to allow such a sum for one fourth of an acre of nearly useless land, if my view of the law is correct. If I am in error then I should say $900 is the

(1) 5th Ed. 1905. (2) 2 Ex. C.R. 149, affirmed 18 S.C.R. 718.

1909

GILLESPIE v. THE KING.

Reasons for Judgment.

maximum amount. The Crown refused to accept Locke's recommendation.

It is difficult on the evidence to place any value on the fourth of an acre in question.

I think if the suppliants are allowed $50, each party paying their own costs, justice will be done.

Judgment accordingly.

Solicitor for suppliants: *J. L. Ralston.*

Solicitor for respondent: *H. Mellish.*

1909
June 24.

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

AND

WILLIAM SAMUEL CUNARD, ERNEST HALIBURTON CUNARD, CYRIL GRANT CUNARD, AND ERNEST DEBLOIS BRENTON, EXECUTORS OF THE LAST WILL AND TESTAMENT OF WILLIAM CUNARD, DECEASED, AND LAURA C. CUNARD } DEFENDANTS.

Expropriation—Water-lot—Right of grantee to erect wharf—Interference with navigation—Constitutional law.

Held, following *Wood* v. *Esson* (9 S. C. R. 239), that the Crown in the right of a Province, without legislative authority therefor, cannot grant a water-lot extending into navigable waters so as enable the grantee to construct or erect any wharf or other obstruction thereon that would interfere with navigation.

THIS was a case of expropriation of lands for the purposes of the Intercolonial Railway at Halifax, N.S.

The facts are stated in the reasons for judgment.

June 24th, 1909.

The case came on for hearing at Halifax.

R. T. MacIlreith and *C. D. Tremaine* for the plaintiffs;

J. J. Ritchie, K.C., and *G. Stairs* for the defendants.

Judgment was delivered at the conclusion of the hearing by

CASSELS J.:—

The action is brought on behalf of the Crown to have the value ascertained of certain property situate in Halifax at that part of the harbour called the Narrows. The defendants rest their title to the water-lot upon a grant

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from the Government of Nova Scotia bearing date the 17th July, 1865. By this grant a water-lot in front of their property running out to a distance of 240 feet from the shore line was granted to the defendants. At the water end of this lot the depth runs in the neighbourhood of from 20 to 25 feet. If the defendants have the right to fill up this water-lot, and to build a pier at the end of the water-lot, the pier would extend parallel to the shore, about somewhere in the neighbourhood of 1800 feet in length. On the evidence this would be a very valuable right. According to the evidence of the defendants' witnesses, with a right of access across the tracks of the railway, the value would be from $20,000 to $25,000.

Evidence has been given of the value of other properties, namely, the Tully property not far away, the price for which was paid at a much less rate than that claimed was the value of the defendants premises. The difference between the Tully property and the property in question owned by the defendants is obvious so far as the value from a shipping standpoint is concerned. In the case of the Tully property the frontage is about considerably less than one-fourth of the frontage of the Cunard property. The evidence is clear that the Cunard property is a unique property, having a frontage of 1800 feet. If they were at liberty to build their wharf it would give them wharf accommodation for ocean-going steamers, something which could not be accomplished on a smaller property. Although the comparisons between the two are not in line, it is one thing to say that a water-lot with a frontage of 100 feet can be sold for so much; it is another thing to say a water-lot with a frontage of 1,800 feet with wharf accommodation and storage accommodation for large vessels is not of vastly greater proportion.

As the case stands, it is conceded that there has been no Act of the Provincial Legislature authorizing the Gov-

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ernment to grant the water-lot. As far as I am concerned I am bound by the decision of the Supreme Court in *Wood* v. *Esson* (1). The effect of that decision is that the Crown for the Province cannot grant a water-lot extending into navigable waters so as to enable the grantee to construct or erect any wharf or other obstruction that will interfere with navigation, without legislative authority. When you assume that the depth of the water at the point in question would be from 20 to 25 feet in depth, it necessarily involves the interference with navigation of the harbour at Halifax. The point of the decision of *Wood* v. *Esson* by which I am bound, is that the grant in question would be void; it being admitted that there was no legislative authority for the grant. It becomes necessary, therefore, to consider the case as if the present defendants had not acquired the right to erect any structure. This will bring it down to the question of the value of the particular land as land—as to this I pass no opinion. The Crown has offered, and His Majesty has stated, that he is willing to pay the sum of $10,000.

The value of these particular lots of land is less than the sum of $10,000. It is not necessary to go into details and find how much less they are in value without the water than the sum of $10,000. His Majesty having offered, through the Attorney-General of Canada, to pay this sum, I would not disturb the offer—and I think the sum of $10,000 is ample compensation for the rights which the defendant has, and the usual judgment will follow vesting the lands in the Crown subject to the payment of the $10,000. The tender having been sufficient the defendant has to pay the costs of the action. No interest is allowed.

Judgment accordingly.

Solicitor for plaintiff: *T. MacIlreith.*

Solicitor for defendant: *W. A. Henry.*

(1) 9 S. C. R. 239.

IN THE MATTER of the Petition of

JOSIAH WEDGWOOD & SONS, LIMITED,

AND

IN THE MATTER OF THE REGISTRATION OF THE TRADE-MARK "WEDGWOOD" AS APPLIED TO THE SALE OF CHINAWARE, EARTHENWARE, STONEWARE, JASPER, PORCELAIN, TILES, POTTERY, AND OTHER LIKE ARTICLES, IN PURSUANCE OF THE PROVISIONS OF THE TRADE-MARK AND DESIGNS ACT.

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Nov 13.

Trade-Mark—Specific mark—Name of individual—Application to register by company—Long user as applied to goods—Secondary meaning—Right to register in Canada.

Upon an application therefor by a limited company or corporation, the court ordered the name of an individual to be registered as a specific trade-mark, it being established that there had been such long user, in all the principal countries of the world, of the name as applied to the manufacture of certain goods as to give it a distinctive or secondary meaning.

In re *Elkington's Trade-Mark* (11 Ex. C. R. 293) referred to.

PETITION of Josiah Wedgwood & Sons, Limited, for an order to register a trade-mark.

The petition sets out the following facts :—

"1. That your petitioner for many years sold throughout the various Provinces of the Dominion of Canada, and throughout the world generally, chinaware, earthenware, stoneware, jasper, porcelain, tiles, pottery, and other like articles stamped with the trade-mark "WEDGWOOD," which has for many years been registered in England and other countries as a trade-mark designating goods manufactured by your petitioner and its predecessors in title to the business presently carried on by your petitioner.

2. That your petitioner is desirous of obtaining an order for the registration of the word "WEDGWOOD" as a general trade-mark in Canada.

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Reasons for Judgment.

3. That your petitioner made application for the registration of the said name "WEDGWOOD" as a general Trade-Mark in the Department of Agriculture, Trade-Mark and Copyright Branch, at Ottawa, Canada, as applied to the manufacture and sale of the said above enumerated articles.

4. That the registration of the said general Trade-Mark "WEDGWOOD" was refused in the form as presented, the Department holding that the name of an individual should be presented in some distinctive form for registration."

The allegations of the petition were substantiated by affidavits showing long user of the trade-mark in all the principal countries of the world.

November, 13th, 1909.

R. G. Code, K.C., appeared in support of the petition.

Nem. con.

CASSELS, J.—[After hearing the material read in support of the application]:—I am disposed to grant the petition, with one qualification which appears to me to be due to a mistake. You ask for a general trade-mark. I think that under the authority of the *Elkington* case (1), and in view of the long user for a great period of years of the name "Wedgwood" as applied to the manufacture of pottery, etc., that it has acquired a distinctive or secondary meaning, as is discussed in the "Stone Ale" case (*Thompson* v. *Montgomery* (2). I am not quite sure that it is right to treat it as a mere name; the petitioners are a limited company or corporation and not an individual seeking a trade-mark for his own name. I think, therefore, that I ought to grant the petition.

Order accordingly.

(1) REPORTER'S NOTE.—See *In re Elkington & Co's Trade-Mark* 11 Ex. C. R. 293.

(2) 41 Ch. D. 35.

TORONTO ADMIRALTY DISTRICT.

THE MONTREAL TRANSPORTATION COMPANY, LIMITED ..... } PLAINTIFFS; 1908 Nov. 10.

AGAINST

THE SHIP *BUCKEYE STATE*

AND

THE ATLANTIC COAST STEAMSHIP COMPANY ..... } PLAINTIFFS;

AGAINST

THE MONTREAL TRANSPORTATION COMPANY, LIMITED, AND THE SHIP *MARY ELLEN*..... } DEFENDANTS.

Shipping—Contract of Towage—Principal and Agent—Damages.

In cases of towage where the tow is damaged by the unskilful navigation of the tug, quite apart from the contract of towage the duty is imposed on the part of the tug to observe such ordinary care and skill in the towage as will avoid any possible damage or injury.

In a continuous contract for towage where part of the work is performed by a tug not the property of the contractor, and where damage is caused to the tow by the unskilful navigation of the tug, the owners of the tug are responsible to the tow, and not the original contractor.

IN the first of the above named actions the plaintiffs sue to recover from the defendant in respect of towage and salvage services, and the owners of the defendant barge dispute the claim on account of alleged damage said to have been occasioned to their barge while being towed under a contract made with the plaintiffs.

In the second of above mentioned actions, the plaintiffs, who are the owners of the defendant barge in the first mentioned action, seek to recover from the defendants for damages occasioned to their said barge while being

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towed under contract with the defendants, the plaintiffs in the first mentioned action.

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

The matters in dispute in both actions being almost identical an order was made for the joint trial of said actions, which took place at Kingston on the 28th, 29th and 30th April, and the 1st, 2nd, 25th 26th and 27th days of May, and the 6th day of November, 1908, when after argument judgment was reserved.

F. King, for the Montreal Transportation Company.

C. H. Cline, for the Atlantic Coast Steamship Company, and the Ship *Buckeye State.*

G. I. Gogo for John Jessmer, and the Ship *Mary Ellen.*

HODGINS, L. J., now (November 10th, 1908) delivered judgment.

The oral evidence on the contract of towage and the documentary evidence in the letters and accounts put in by the respective parties respecting that contract of towage, prove conclusively that the contract for the towage of the barges of the Atlantic Coast Steamship Company was for a continuous towage of such barges by the Montreal Transportation Company from Lachine in the Province of Quebec to Port Dalhousie in the Province of Ontario; and that there was no independent or special contract with the defendants John Jessmer and the ship or tug *Mary Ellen*, other than that in the "duty" of ordinary care and skill as hereinafter specified, and that the towage by the tug *Mary Ellen* of the ship *Buckeye State* was performed as agent of the said Montreal Transportation Company.

The evidence warrants me in finding that the barge *Buckeye State* met with two accidents during her towage from Lachine through the St. Lawrence Canals,—one at

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Lock 17 of the Cornwall Canal on the 28th November, 1907, and the other on the following day outside the lock of the Morrisburg Canal.

Taking the evidence as a whole, it is specially remarkable for the mass of contradictory and unsatisfactory evidence it has produced, and which, from judicial experience, and many published reports of cases, is regretfully usual in Admiralty cases; and in this case it merits the observation made by Dr. Lushington in a similar case before him that "the evidence is most conflicting." So in a judgment in 7 Bened. 11, the Court appears to have struggled with a mass of testimony with which the case had been loaded but from out of the "contradictions and bold statements" it endeavoured to draw reasonable conclusions of fact. And but for the evidence of two inarticulate operations of canal water on the barge *Buckeye State*, which have neither been disproved by contradictory oral evidence, nor accounted for by any reasonable explanation, I would have found it extremely difficult to decide on which side the balance of credibility lay.

Before, however, reviewing the evidence of the two accidents above referred to, it will be proper to consider what a contract of towage involves.

The ordinary contract of towage has been defined to be aid in the propulsion of one vessel by the employment of another vessel having within her the motive power which is used to expedite the voyage of the first mentioned vessel which requires the acceleration of her progress through the water: *Princess Alice* (1).

An amplified illustration of this definition is given in *The Merrimac* (2) (1874); where it was stated that the contract to tow a barge, and her cargo, is one in the line of carriage, or transportation for compensation; and is therefore a bailment of the kind denominated *locatio operis mercium vehendarum*, in which the master of the

(1) 3 W. Rob. 138. (2) 2 Sawy. 586.

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tug is bailee, and responsible for ordinary skill and diligence; and that the tug is responsible for the navigation of both vessels; and her duties as tower are those of an ordinary carrier for hire; just as if she had the tow on her deck instead of astern at the end of the two-line. And so when a tug negligently places a tow in peril, and she is thereby lost or damaged, it is no excuse on the part of the tug to allege that the tow might have been saved from such loss or damage but for a mistake of, or want of skill in, the crew of the tow.

The evidence of the damage caused to this barge *Buckeye State*—which is a large ship of 179 feet long,—at the wing wall of Lock 17 of the Cornwall Canal, shows that she was towed to that lock by the small tug *Mary Ellen*. The barge having no motive power of her own had to take her course and speed through the canal from the tug. I find on that evidence that the tug's course was north-westerly, and about forty feet from the north bank of the canal which narrows on the wing walls of the lock. The speed was about five miles an hour. This course I find would cause her bow to strike the north wing wall of the lock, which it did, and Captain Hansen of the barge stated (Q. 163) that to counteract the course taken by the tug he put his helm hard a-starboard. And when I asked him (Q. 1057) "When you saw your vessel pointing that way by the towing of the tug, did you use your rudder to counteract her pulling you to the north wall? A. Yes. "Q. Keeping her stem to the gates? A. Yes." "Q. And could you if the rudder had been more effectively used, have kept your stem straight for the gates of the lock? A. Not the way the tug was pulling us." I also accept the evidence of the captain and the mate of the barge calling out to the tug "to take care," (Q's 152-162), and that they had two boys of the crew on the south bank of the canal with lines, one line attached to the stern, and the other line attached to the bow of the barge;

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but that owing to the course taken by the tug so close to the north bank of the canal the lines became strained, and had to be let go. The striking of the wing wall then took place and is thus described. "Q. 183. Then what happened? "A. We had too much headway, and he could not pull us over and then we struck." "Q. 198. Now how did your boat strike? A. The stem first." "Q. 200. And then what effect had that on her? A. It split the stem and shoved it over to the port side. It struck like on the starboard corner of our stem, and split the stem and shoved it over to our port side. Then she glanced off that, and broke the cat-head and railing."

There were witnesses called by the defence who swore that the stem was not damaged or that they did not see any damage to the stem as had been sworn to by those on board the *Buckeye State*. But against their evidence one fact has been proved by unimpeached evidence, and that is after leaving lock 17 the barge began to leak more than ordinarily, which necessitated more frequent pumping than had been customary, and that such pumping had to be continued up to the time she reached the Morrisburg Canal.

But apart from this evidence of the extra leakage and pumping, it is a reasonable deduction that the resulting damage caused by the barge striking the wing wall of the lock, would necessarily be better known to those personally on board the barge, and who therefore would be more particular in investigating and realizing the details of the damage and leakage; and therefore more reliable than the casual examination and opinions of bystanders; and besides they would have a personal interest in making the investigation, and their memory would generally be more lasting and reliable, than the memories of mere bystanders.

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In *Sturgis* v. *Boyer*, (1) the Court said: "Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition; the tow under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole, of the officers and crew of the tow are on board, provided that it clearly appears that the tug was a sea-worthy vessel properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty, by refraining from such participation"..... "Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel." "By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and the crew of the tug their agents in performing the service. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding that the contract was negotiated with him, continues to be the agent of the owners of his vessel, and they are responsible for his acts in her navigation."

And similarly in the *Steamboat Deer* (2), it was held that a tug is liable for damages, resulting from negligence in her navigation to a vessel in tow, whether she is towing under a contract or not.

(1) (1860) 24 How. 122.

(2) (1870) 4 Ben. 352.

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In the case of the tug boat *Francis King* (1) it was proved that the parting of the badly joined hawser of the tug caused the pounding and consequently damaging of the barge, and the court held that such parting of the hawser cast upon the tug the responsibility of the loss of the barge; and that tug-boats engaged in that business must be competent in power and equipment and of sufficient strength to hold their tows in navigation.

But the case which bears some analogy to the present, is the case of *Jackson* v. *Easton* (2), where the contractors who had contracted to tow a barge, hired a tug for that service. During the towing, the boiler on the tug exploded, whereby the barge was damaged. In disposing of the case, the court said: "They (the contractors who were respondents) merely hired the tug to tow the barge. The tug was apparently a proper vessel, and one usually employed for such service. On the facts of the case, the respondents were no more than agents of the libelant (plaintiff) to hire an apparently proper tug to tow the boat. If the tug towing this boat in the employment of the respondents (the contractors), or even of the libelliant himself, had negligently caused the barge to collide with another vessel, certainly the tug and its owners, and not the respondents, would be liable for the damage." "No contract, express or implied, of the respondent with the libellant has been broken."

And as disclosing a somewhat similar damage to that alleged in this case, the case of *The Workman* (3) is instructive. There, by the action of the tug, the bark *White Wing's* stern came in contact with a wharf, and was broken off; several of the timbers of the bark's stern were rotten, and it was contended that the blow was very slight and not such as could injure a seaworthy vessel, and that the state of the timbers was the sole

(1) (1873) 7 Ben. 11.
(2) (1874) 7 Ben. 191.
(3) [1870] 1 Lowell 504.

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cause of the accident. But it was held that the bark was swung around in such a way as to bring her stern against some part of the wharf, and that the tug was liable; the undisputed fact showing that the tow had been brought against the wharf with greater or less violence, called upon the tug for sufficient explanation which had not been given.

These cases seem to affirm a doctrine that the relation between tug and tow, where a damage occurs by a collision by which the tow is damaged by the unskilful navigation of the tug, is not so much that which arises directly from the contract of towage, but rather that which imposes a duty on the part of the tug towards the barge, to observe such ordinary care and skill in the towage as will avoid any possible damage or injury. See further on this point, the *Julia*, quoted in *Smith* v. *St. Lawrence Tow Boat Company* (1); *Spaight* v. *Tedcastle* (2); *Heaven* v. *Pender* (3); *Sewell* v. *British Columbia Towage and Transportation Company* (4).

The defence to this claim of the barge *Buckeye State* contends that the barge had no lines out as required by the Government Canal Regulations; but on the evidence, I find that such lines were out and in the hands of two of the crew on the south side of the canal; but that owing to the course of the tug in keeping the barge too close to the north side of the canal the lines were so strained that they had to be let go. Besides, the case of *Jacques* v. *Nichol* (5), decided that the bare infringement of the canal regulations by the defendant's ship in that case would not of itself give any cause of action to the plaintiffs, and no negligence on the defendants' part which would give such a cause of action to the plaintiff had been alleged.

(1) [1874] L. R. 5 P. C. at p. 314; See *The Julia*, 14 Moore P. C. 210.
(2) [1881] 6 App. Cas. 217.
(3) [1883] 11 Q. B. D. 503.
(4) [1883] 9 S. C. R. 527, per Strong, J. at p. 547.
(5) [1866] 25 U. C. Q. B. 402.

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I must therefore find that the defendants John Jessmer and the ship *Mary Ellen*, are liable to the Atlantic Coast Transportation Company for the damage caused to their barge the *Buckeye State*, striking the wing wall of Lock 17 of the Cornwall Canal, which damage I assess at the sum of $460.

But as to the damage caused to the barge *Buckeye State* outside the lock of the Morrisburg Canal, I find on the evidence that such damage was caused by the barge striking the stone steps outside the lock when being drawn out of the lock by the power of her own winch, and that her so striking the said stone steps made the hole which caused the excessive leakage which was developed within half an hour arter leaving such lock, and necessitated the beaching of her at Iroquois, and the subsequent salvage services rendered by the tugs of the Montreal Transportation Company. And I find that the Montreal Transportation Company is not liable for such damage.

But the charges proper to be allowed for towage and salvage must be regulated by the actual work done under each such service. For towage the rate as established by the letter of the manager of the Montreal Transportation Company is $4 per hour; but for salvage services (including towage) where syphoning was done, the rate will be $10 per hour. And the parties on this ruling agree to assess the value of the salvage services performed by the Montreal Transportation Company to the barge *Buckeye State* at $2,428.75.

After carefully considering the several allegations made by the parties in their pleadings, and the difficulties caused by the general character of the evidence I think the fairest way to dispose of the question of costs is to allow to the Montreal Transportation Company against the defendant barge *Buckeye State* the usual costs of the pleadings in their (the first) action, and also one

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half of the taxable costs of the pleadings in the second action and of the consolidated trials; and to allow to the Atlantic Coast Steamship Company against the defendants John Jessmer and the ship *Mary Ellen* one half of the taxable costs of the pleadings in their (the second) action, and of the consolidated trials. No costs to the defendants John Jessmer and the ship *Mary Ellen.*

*Judgment accordingly.**

Solicitors for Montreal Transportation Company: *Smythe, King & Smythe.*

Solicitors for Ship *Buckeye State* and the Atlantic Coast Steamship Company: *Maclennan, Cline & Maclennan.*

Solicitors for John Jessmer and Ship *Mary Ellen: Gogo & Harkness.*

* On appeal to the Judge of the Exchequer Court this judgment was varied. See *post.* p. 429.

APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

THE ATLANTIC COAST STEAMSHIP COMPANY (PLAINTIFFS) ..... } APPELLANTS; 1909 Feby. 1

AND

THE MONTREAL TRANSPORTATION COMPANY, LIMITED, AND THE SHIP *MARY ELLEN* (DEFENDANTS)..... } RESPONDENTS;

AND

THE MONTREAL TRANSPORTATION COMPANY, LIMITED, (PLAINTIFFS)..... } RESPONDENTS;

AND

THE SHIP *BUCKEYE STATE* (DEFENDANT) ..... } APPELLANT.

Shipping—Admiralty Practice—Joinder of actions in rem and in personam—Irregularity—Pleading over without objection taken—Judgment—Appeal—Judgment varied.

In this case the plaintiffs had joined a personal action for the breach of a contract of towage against the towage contractor with one against the owner of a tug for damages arising from the negligent towing of a barge. No objection was taken by the defendants, who pleaded over, and the case proceeded to judgment; the trial judge finding that the owner of the tug performing the towage service was solely responsible for the damage, and dismissing the action as against the towage contractors who had hired the tug for the service. On appeal, the court, while expressing the opinion that the two actions were improperly joined under the practice in Admiralty cases, did not interfere with the proceedings below in that respect as no objection had been taken thereto; but intimated that the proper course would have been to complete the proceedings *in rem* and if it appeared that the amount of the damages fixed by the judgment was not recovered against the tug, then, if the towage contractors were legally liable, to bring an action against them *in personam* for the difference between the amount recovered and the damages fixed by the judgment.

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2. The court directed that the judgment should be varied by reserving the question of costs of the trial, and the question of the liability of the towage contractors, as well as for the costs of the appeals, until it was ascertained if the amount of the damages fixed by the judgment below could be realized against the tug.

APPEAL from a judgment of the Local Judge for the Toronto Admiralty District.*

January 26, 1909.

C. H. Cline, for the appellants.

F. King for the respondents.

CASSELS, J., now (February 19th, 1909), delivered judgment.

These were appeals from a judgment of Mr. Justice Hodgins delivered on the 10th day of November, 1908.

I have carefully perused the mass of evidence adduced before the trial Judge, and also the exhibits, and the written arguments of counsel.

In certain portions of the evidence reference is made by witnesses to plans, and a location is pointed to, the places indicated not being marked on the plans. This makes it difficult to understand portions of the evidence.

The trial Judge has very carefully considered the evidence. He not only had the benefit at the trial of seeing and hearing the witnesses, but has also carefully analyzed the evidence as subsequently transcribed.

The questions involved in these appeals, with the exception of the liability of the Montreal Transportation Company, Ltd., for the negligence of the tug *Mary Ellen* are purely questions of fact; and I would hesitate before overruling the finding of the trial Judge, even if inclined to take a different view of the effect of the evidence.

The remarks of the trial Judge as to the character of the testimony before him is fully justified.

* Reported *ante* p. 419.

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Reasons for Judgment

It is about as contradictory and unsatisfactory as could well be.

I agree that the contract of towage was for a continuous trip or voyage from Lachine to Port Dalhousie by the Montreal Transportation Company, and that the towage by the tug *Mary Ellen* of the ship *Buckeye State* was performed by the latter as agent of the said Montreal Transportation Company. I also think that the conclusion of the learned trial Judge that the *Buckeye State* met with two accidents, one in the Cornwall canal, Lock 17, and the other at Morrisburg, is in accordance with the evidence. It is quite obvious to my mind that the hole in the bottom of the barge which caused her to sink could not have been caused in the Cornwall Canal.

I do not interfere with the amount allowed the Montreal Transportation Company for services performed in the nature of salvage, nor with the damages allowed to the *Buckeye State* against the *Mary Ellen*. The application to permit a re opening of the case for the purpose of giving further evidence on behalf of the *Buckeye State* was rightly rejected. No sufficient reason is shown why this evidence should not have been given at the trial. The issues are set out in the pleadings, and it was obvious that evidence of the character sought to be given was material. The difficult question is the one raised by Mr. Cline that the Montreal Transportation Company is liable equally with the tug *Mary Ellen* for the damage occasioned in the Cornwall Canal.

The action was brought by The Atlantic Coast Steamship Company, the owners of the *Buckeye State*, against the Montreal Transportation Company, Ltd., and John Jesmer and the ship *Mary Ellen*. The trial Judge finds that the Montreal Transportation Company is not liable for the damage sustained by the *Buckeye State*, and dismisses the action with a portion of the costs to be paid by the *Buckeye State*. The *Buckeye State* was not a party to this

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action, and I presume it was intended that these costs should be paid by the plaintiffs, the owners of the *Buckeye State*. There is no lien for these costs. The Montreal Transportation Company was sued for breach of contract. The proceeding against the tug *Mary Ellen* was a proceeding *in rem*. I find no authority where the two causes of action arising in this case have been joined against separate parties (See *Burstall* v. *Beyfus*, (1) *The Bowesfield*, (2) *The Hope*, (3) *Saccharin Corporation* v. *Wild* (4) and the following American cases: *The Prince Albert*, (5) *Atlantic Mutual Ins. Co.*, v. *Alexandre*, (6) *The Zodiac*, (7) *The Clatsop Chief*, (8) and more especially per Story, J. in *Citizens' Bank* v. *Nantucket Steamship Co.*, (9).

No objection, however, seems to have been taken, and no motion was made by the defendants, or either of them, to confine the action.

It does not appear upon the record that the remedy against the tug *Mary Ellen* has been exhausted by the plaintiffs the Atlantic Coast Steamship Co.; and it may be that the judgment against the tug *Mary Ellen* will be fully realized.

The proper course would have been to complete the proceedings *in rem*, and if it appeared that the amount of the damages fixed by the judgment was not recovered against the tug, then, if the Montreal Transportation Co. are legally liable, an action against them in *personam* for the difference between the amount recovered and the damages as fixed by the judgment. (*The Orient*, (10) *The Zephyr*, (11)

(1] 26 Ch, D. 39.
(2) 51 L. T. N. S. 128.
(3) 1 Wm. Rob. 154.
(4) (1903) 1 Ch. 422.
(5) 5 Ben. 386.
(6) 16 Fed. Rep 279.
(7) 5 Fed. Rep. 220.
(8) 8 Fed. Rep. 163.
(9) 2 Story 16.
(10) L. R. 3 P. C. 696.
(11) 11 L. T. 351.

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There was no consolidation of the actions. The order of the 21st of March, 1908, made by the trial Judge is as follows:—

"Upon the application of the plaintiffs in both of the above named actions, and upon reading the writs of summons in the said actions, and upon hearing counsel for all parties, and counsel for all parties assenting thereto: It is ordered that in pursuance of rule 34 of the General Rules and Orders regulating the practice and procedure in this Court, the above actions shall be tried at the same time, at such place, and on such dates as may be fixed upon a further application; and that the same evidence shall, so far as applicable, be used in each action. And it is further ordered that the costs of this application be costs in the cause."

I do not at present deal with the question of the legal liability of the Montreal Transportation Co., nor with the costs payable by or to them.

I think these questions can be better dealt with, as well as the costs of the present appeals, after the remedy against the tug *Mary Ellen* has been exhausted.

No objection having been taken as to the misjoinder of the parties, I do not think it would be just to give effect to any objection at this stage.

The judgment should be varied by reserving the question of costs and that of the liability of the Montreal Transportation Co., as well as the costs of these appeals, until it is ascertained if the amount of the damages fixed by the judgment below is realized against the tug *Mary Ellen*.

Judgment accordingly.

Solicitors for appellants: *Maclennan, Cline & Maclennan.*

Solicitors for respondents: *King & Smythe.*

QUEBEC ADMIRALTY DISTRICT.

BETWEEN

1909
May 12.

THE MONTREAL TRANSPORTATION CO., LIMITED ..... } PLAINTIFFS;

AND

THE SHIP *NORWALK*.

ALEXANDER D. THOMSON.. INTERVENING PLAINTIFF.

Shipping—Collision—Inland Waters Regulations, 1905—Narrow channel—Negligence—Liability.

For vessels using the St. Lawrence River, the Imperial rules of the road apply from the Victoria Bridge down; above that point such vessels are regulated by the rules passed by the Governor-General in Council on the 20th April, 1905. (See Statutes of Canada 4 & 5 Edw. VIII. p. lx.)

2. The steamer *Norwalk* was proceeding after dark up the St. Lawrence River, and at a point in Lake St. Louis, east of Lightship No. 2, she observed the lights of the tug *Glide* with a tow of barges coming down, and about three thousand five hundred feet distant. Just about this point the channel becomes comparatively narrow and the current swift, making navigation difficult. Under Art. 25 (b) of the above last mentioned rules the descending steamer has the right of way, but must signal the approaching steamer what side of the channel she elects to take. The *Glide* signalled that she was going on the southern side. Under the circumstances it would have been prudent for the *Norwalk* to stop, but she took the risk of keeping on her course and was swung by a cross-current toward the southern side of the channel, which brought her into collision with one of the barges of the tow. It was shown that the *Norwalk* did not keep as far to the northward as she might have done.

Held, that the *Norwalk* was guilty of negligence, and was solely to blame for the collision.

THIS was an action for damages arising out of a collision between a steamer and a tow of barges in the St. Lawrence river.

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The facts are stated in the reasons for judgment.

A. R. Holden, K.C., and *E. E. Howard* for plaintiffs; *A.R. Clarke, K.C.*, and *A.R. Angers, K.C.*, for the ship.

DUNLOP, D. L. J., now (May 12th, 1909,) delivered judgment.

[After stating the allegations in the pleadings, and the grounds upon which Alexander D. Thomson was allowed to intervene in the action, the learned trial judge proceeded as follows :]

The evidence in this case is more than usually contradictory, even for a collision case, but a great many things are no longer in dispute which were apparently in dispute under the pleadings. For example, the dimensions and cargoes of the vessels, their ownership, the course followed by the tug and tow and the course followed by the steamer *Norwalk* up to the moment just before the collision, the channel, its direction, width and depth, more particularly in the neighbourhood of the St. Louis Lightship No. 2 near where the collision occurred—all are no longer in dispute.

The tug *Glide* belonging to plaintiffs left the Soulanges Canal on a voyage to Montreal on the afternoon of the 23rd October, 1907, having in tow two barges belonging to plaintiffs, the *Winnipeg*, a large barge about 180 feet long with a load of from about 1,200 to 1,300 tons, and the barge *Jet*, about 145 or 150 feet long with a load of flax-seed, having a gross tonnage of about 600 or 700 tons. The barges were lashed abreast to the *Glide* by a seven inch hawser, and the barges were lashed very firmly together by at least four lines from their respective timber-heads. In fact they were lashed as close as they possibly could be, and they formed as it were one ship.

It has been established that this was the correct mode of towing two barges down Lake St. Louis, although

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one barge might be, as was the case in the present instance, considerably smaller than the other. Now it was one of the principal charges made against plaintiffs in defendant's preliminary act and defence that this was an improper mode of towing; but no proof has been adduced to contradict the evidence of plaintiffs' witnesses that this was the ordinary way of bringing such barges down the lake; because, as the experts said, the tug had a much better control over the barges when lashed together in this way.

It has been also established that as you descend Lake St. Louis, coming near the Chateauguay Light, termed "Lightship No. 3," the channel narrows; and it continues narrowing till immediately below the St. Louis Lightship, termed "Lightship No. 2." Just below this lightship it widens out again. The channel there is proved to be in a north-easterly direction as far as a little below Lightship No. 2, where it turns eastward. The channel itself does not bend until opposite the black buoy, the lower of the two black buoys which are placed below the Light, being indicated on the chart (plaintiffs exhibit No. 2). The descending vessel taking the southern part of the channel would continue on its course without any alteration, if it kept in the centre of the south part of the channel, until 500 or 600 feet below Lightship No. 2, where it would take the bend east for Lachine.

The charts show, and practically all the witnesses state, that at Lightship No. 2 the channel, for boats of fourteen feet draft, is at least 400 feet wide, with the lightship practically in the centre of the channel. It is important to observe that this measurement is taken in the narrowest part of the channel, not north and south, but slightly north-west and south-east, in order to get it as narrow as that.

Mr. Fusey, an engineer, who was examined as a witness on the part of the plaintiffs, was cognizant of the

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whole matter and took the soundings and prepared the departmental chart (plaintiffs' exhibit 2), states in his evidence, and the charts confirm what he says, that in taking a line between the two black buoys east of Lightship No. 2, the width of the channel north and south is 850 feet, of which about 200 feet lies to the south of the east and west lines through the lightship, and 650 feet lies to the north of the east and west lines through the lightship.

It is proved that at Lightship No. 2 there is a strong current coming down from the channel of the Ottawa river, which is shown in the chart to be in a north-westerly direction, and sets across the channel towards the south.

The witnesses state that the current runs from two to three miles or more an hour, setting in a southerly direction across the channel, that is to say, that at Lightship No. 2 it would strike vessels a little on the quarter, almost abeam; then after they take the bend below the lightship would strike them more and more astern; a little further down it would strike them exactly astern. It will be seen hereafter that this current has an important bearing on the case.

As to the weather on the evening of the accident, which occurred about 7 p.m., all agree that it was clear though dark, and that there was a light wind blowing from the north or north-west. The lights on all the vessels are well proved. Both the *Glide* and *Norwalk* carried regular lights. The tow carried the regulation lights, to wit, a red light was carried on the *Jet* on the port side, and a green light on the *Winnipeg* on the starboard side. All went well with the *Glide* and tow from the time they left the Soulanges Canal until near the Lightship No. 3, when a steamer, the *Norwalk*, was seen, which afterwards came in collision with the barge *Jet* and evidently struck with great force her port bow shortly after the *Glide*

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and her tow had rounded the Lightship No. 2. The steamer *Norwalk* evidently struck the barge *Jet* with great force as the 7-inch hawsers by which the barges were towed were broken, causing the barges to break away from the tug and each other, thereby causing great damage to the *Jet* and practically destroying her cargo.

Now, taking into consideration the nature of the channel and its width and dimensions at or near where the collision occurred, in order to determine whether the *Norwalk* and the tug and its tow were properly managed at and previous to the time of the accident, which is after all the crucial point in the case, it is necessary to determine if possible the exact place where the collision occurred. It may be remarked that it is admitted on behalf of the *Norwalk* that they knew and recognized that a tug with a tow was descending the lake when about 3,500 feet away from it, as testified by Captain Goodrow, the master of the *Norwalk*. In view of this fact, if there had been proper management of the vessels, the collision should have been avoided.

It will be necessary, in order to discover who was responsible for the damage, to examine the very voluminous evidence taken in this case with care.

I find it proved, first, that the tow had come straight down the channel from Lightship No. 1 to Lightship No. 2, and that at the time of the collision the barge was heading a little to the south and swinging to port, that is to say to the south with wheel aport, and the tug was pulling also in the same direction. I find it proved, secondly, that the collision occurred when the cabin of the *Jet* was opposite Lightship No. 2, and, thirdly, that the *Jet* was from 20 to 30 feet to the south. In my opinion it has also been established, although on this point the evidence is contradictory, that the *Norwalk*, as well as the barges, were at the moment of the collision in the waters south or south-east of Lightship No. 2.

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Kennedy, on the *Glide*, swears that he saw the light of Lightship No. 2 over the bow of the *Norwalk* immediately after the collision. O'Connor and Mahoney saw it about a minute after the collision.

It is established, furthermore, that the *Jet* is about 138 feet between perpendiculars, and therefore about 145 feet over all; and that the cabin of the *Jet* is from 15 to 20 feet from her stern.

Having carefully examined all the evidence in this case I am of opinion that the collision occurred about 125 feet below, that is, east or south-east of Lightship No. 2. This is virtually confirmed by what the witnesses Moreau, Malette and Cholette state.

The witnesses for the *Norwalk* say that the collision took place from 50 to 75 feet below the lightship. In my opinion the witnesses on the tow were far better placed to judge the position of the *Jet* with regard to the lightship than those on the *Norwalk*, and it is reasonable to say that they were in a position to be certain that at the time of the collision the cabin of the *Jet* was opposite Lightship No. 2. But the witnesses on the *Norwalk* had to depend on their estimate of the distance of a light across a stretch of water on a dark night; and nothing could be more deceptive.

The channel is that portion which is either naturally of a depth of 14 feet, or has been dredged to a depth of 14 feet, and can be easily traced on the chart by noting the soundings; and the scale of the blue print chart produced showing the soundings is 400 feet to the inch. From the chart it will be seen that the narrowest part of the channel is a line through the first black buoy and the lightship, where it is about 440 feet wide. But it is important to note that the width through the point of collision, whether the collision occurred 50, 75 or 125 feet east of the lightship, is, as shown on the chart, and, as stated by the witness Fusey, about 850 feet wide; and

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it is the same width for 400 or 500 feet below, where it narrows slightly, but continues of ample width for nearly a mile below Lightship No. 2. It will be seen that the channel a few feet below Lightship No. 2 widens quickly to an extent of 850 feet, and there is at least 850 feet to the north of the line between the two black buoys, as is established by the chart and the evidence of the witness Fusey.

All defendant's witnesses contend that the tug and tow went north of the fairway of the channel; while plaintiff's witnesses swear exactly the opposite.

I think it was wrong to say that the lightship lies east and west, and that the channel was only 440 feet wide where the collision occurred. It was 440 feet wide at the shoals, which are westward and north-westward of the lightship, but the channel is much wider where the collision occurred.

The fairway swings up very much further north than the east and west line between the lightship. The principal part of the bend in the channel is considerably below the lightship, as the witnesses show and the chart establishes. All the expert witnesses say that the *Norwalk* should have stayed below when she saw a tug and tow coming down and recognized it as such; except Chestnut, the pilot of the *Norwalk*, upon whom the responsibility must fall if plaintiffs succeed in their action.

It has been proved, as I stated before, that the *Norwalk* recognized that a tug and tow was coming, when it was distant from the *Norwalk* about 3,500 feet. Captain Goodrow says that when he got to the turning buoy, which is about 3,500 feet east of the lightship, he saw the lights of a tow and recognized it as such. Though the experts say it would have been prudent for the *Norwalk* to have stayed below, it was not contended by plaintiffs' counsel that there was any statutory regulation to that effect; but it seems to me it was one of the duties which rested upon

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the *Norwalk* so to do in order to avoid the danger of a collision by meeting a tug and tow in a portion of the channel proved to be dangerous owing to the fact of its being comparatively narrow, and the very material fact that there was a strong cross-current. It seems to me that the current accounts to a great extent for the manner and place in which the collision happened; as it was shown that the *Norwalk* did not take this sufficiently into consideration. The pilot, Chestnut, seems entirely to have ignored the current; and Captain Goodrow frankly says he did not know of the existence of the current at the time of the collision but he knows it now. He was interrogated and answered as follows:—

"Q. I presume you know the channel changes its direc-
"tion shortly above that?

"A. A trifle, yes.

"Q. So that you get the current in a different position
"with regard to your boat shortly above that?

"A. I did not know then, but I do now.

"Q. You were relying on Chestnut for that kind of
"thing?

"A. Yes sir.

"Q. How soon after did you learn this?

"A. I don't know."

When the *Norwalk* decided not to stay below, as she could easily have done, as has been established in this case, notwithstanding what the pilot Chestnut says, she took the risk of coming on, and if in default must be responsible for the consequences of taking that risk. All the other witnesses say it was perfectly safe for upcoming vessels to slow up and stop, so far as the current is concerned, anywhere in the reach below Lightship No. 2; and experts say that is what they would have done if they had been in the position of the *Norwalk* and saw a tow coming down, particularly at night, in order to avoid meeting it in a narrow channel near Lightship No. 2,

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and more particularly in view of the cross-current. The *Norwalk* had plenty of time to have taken that precaution, but having taken the risk of coming on, should have kept as far to the northward of the channel as possible. This she did not do. Captain Goodrow does not seem to have known this, and they were coming along holding their course, just to clear Lightship No. 2 by 10 feet. There was a powerful cross-current which began to bear on the vessel and make it edge or sag off, and the result was that they found themselves in the southern part of the channel, as the current had been drifting the *Norwalk* continually towards the south, and I find the collision occurred in the southern part of the channel at the place above mentioned.

The material question in this case is as to the management of the *Norwalk* and the tug and tow immediately before and at time of the collision; because no one seems to have imagined there was any danger of a collision until it actually happened. I am of opinion it was imprudent in the *Norwalk* not to stop. I find she took the risk of coming on. I find further that there was nothing to prevent the *Norwalk* keeping further north than she did, as it is shown she just cleared Lightship No. 2 by ten feet; and that the collision might have been avoided if reasonable care and skill had been employed in the navigation and management of the *Norwalk* by its master and officers and crew. The *Norwalk* did not respect the right-of-way that the tug and tow was entitled to.

With respect to the sketch made by Captain Goodrow when examined, (fyled as Exhibit D-3) purporting to show the position of the boats at the time of the collision, I do not think that it shows the true position of the vessels at the time of the collision. This sketch is simply a rough copy of the plan or sketch defendants' exhibit No. 2, which was produced subject to plaintiffs' objection, and

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has not been proved. I refused to allow Captain Goodrow to refer to this plan owing to the objections made by counsel for plaintiffs.

These objections are now sustained; and inasmuch as this plan has not been proved, I order it to be removed from the record.

It seems to me strange that on the night of the accident, which is proved to have been fine though dark, with little wind, that those on board the *Norwalk* should not have heard three blasts twice repeated by the tug *Glide*, and which has been conclusively proved to have been the customary signal in those waters notifying up-coming vessels to check down, and also that they should not have seen the lights on the tow, while it is proved that they heard the one blast given by the *Glide* indicating that she was keeping to starboard. It has been proved that the whistle of the *Glide* was a loud and hoarse whistle, and could be heard a considerable distance off.

Another fact worthy of remark is that the witnesses examined by defendant say that when the collision occurred, the shock was but a slight one, and a glancing blow. Now it is proved beyond all question that the blow was a severe one, that the bow of the barge *Jet* was stove in; and she immediately filled with water; that the seven inch hawsers, comparatively new, which fastened the barge *Winnipeg* and *Jet* to the tug *Glide* were broken, and the barges at once separated; that the ropes fastening the barges together were broken; that two of the crew of the barge *Jet* at once jumped into the barge *Winnipeg* to save themselves. It was also shown by the evidence of two of defendant's witnesses that they in any event considered the collision a serious one in view of what they did. I refer to the evidence of Johnston and Ellis.

The pilot Chestnut of the *Norwalk* seems to have been very uncertain as to the course he should take. His evidence shows, (and more particularly the statement he

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made at the enquiry held before the Wreck Commissioner, and which in his evidence he has admitted to be correct) that he first intended to pass to the south of the lightship, but was reluctantly compelled, as he states, to go to the north. What he stated before the Wreck Commissioner, and what he admitted to be correct, is as follows:—

"Q. When did you first get the impression that the "quarters were going to be narrow?

"A. When I passed the upper Gas buoy.

"Q. That was the place where you realized that the "quarters were going to be close?

"A. Yes, that he was coming. I saw I would have to "take the north side, and said to myself that I did not "want to go there. I was kind of hanging off to let him "get past, and then go in behind him. He came over "between "C" and "F" [This refers to marks on a plan "produced before the Wreck Commissioner.] "In fact "I thought he was past us when he struck us, because the "tug was past us and I supposed he would follow right "after her".

Now with respect to the contradictory evidence as to the part of the channel where the accident occurred, all plaintiffs' witnesses swear positively that when it occured, the tow and barges were in the channel south of the lightship, while defendant's witnesses swear as positively it was in the channel north of the lightship. Pilot Chestnut says the barges were north of the lightship.

These are his words: "I did not think of going into "the south channel. I gave her [the tow] the whole "channel, and got to the north side myself. That is why "I went up past the Gas buoy as far as I did". It will be seen that this is contradicted by what he said before the Wreck Commissioner, where he states "I would sooner have gone to the southward, but could not".

As to the contention of the defendants that the *Norwalk* could not have been in the position where she was seen

after the accident, it seems to me that the blow and the force she received when the collision occurred would have turned her round so that she could have cleared the lightship at least 10 feet. Now, what did this blow do to the *Jet*? It stove in her bows; it stopped her—she was going 5 miles an hour; it broke 2 seven inch hawsers and also broke the ropes fastening the barges together, turning the *Jet* athwart the channel. Yet it is contended by defendant's witnesses that it had no effect whatever on the *Norwalk* except to scrape a little paint off her bows. Here was a tow, consisting of two barges lashed together making one complete whole, both heavily laden. The *Winnipeg* was almost as large as the *Norwalk*. Her gross tonnage was over 1200 tons. The tonnage of the *Jet* was about 700 tons; and in addition to this there was the tug with two new seven inch hawsers pulling on its tow. So that we have practically a single vessel coming down with the momentum of the tug and those two barges together. They are coming down at five miles an hour, and collide with the *Norwalk*, which is coming up, more or less against the current, at a speed of almost three miles an hour. All this shows that the collision was a violent one; and I cannot conceive that it had no effect whatever on the *Norwalk*.

The *Norwalk* was a large steamer of about 881 tons register, heavily laden and proceeding on a voyage to Detroit. It has been proved that after she left Lachine on the evening in question, about 6.30 p.m., she twice touched bottom. Plaintiffs contend that this indicated she steered badly, while defendant says that this was owing to the unusual lowness of the water at that time. However, the fact remains that she did twice touch bottom shortly before the collision in question occurred.

It must be remembered in deciding this case that a tow of two heavy barges with a hawser of 125 feet in length would make it impossible for the tug and tow to stop or

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slow up more than would be safe in accordance with the necessity of controlling the tow, while there was nothing to have prevented the *Norwalk* stopping in the reaches below Lightship No. 2.

I am of opinion that the defendant made a mistake in assuming that the Lightship No. 2 lies east and west, and in assuming that the channel was only 440 feet wide at the place where the collision occurred. All the witnesses say that a tug with a tow descending Lake St. Louis, always hugs closely Lightship No. 2, so as to straighten out the tow when going down the channel; and that very often the tow sheers off.

Now in the present case, if the tow did sheer off a little so as to encroach on the northern half of the channel to the extent of 10 feet, as contended by some of defendant's witnesses, this would not in my opinion relieve the *Norwalk* from fault; for there was no occasion for her to pass the lightship so close as she did, as no matter whether the collision occured 50, 75 or 125 feet east of or below the Lightship No. 2, there was plenty of water in the north channel for the *Norwalk* to have kept out of the way; and if she had done what she alleges she did in her preliminary act and defence, there would have been, in my opinion, no collision; and it has been established that the channel was much wider at the place where the collision occurred, as I have stated above.

The authorities are clear that even if there had been some initial fault on the part of the tug and tow, which I do not find proved in the present case, yet the tug and tow, would not be responsible for the collision, if by the exercise of reasonable skill on the part of the master, officers and crew of the *Norwalk* the collision could have been avoided; and in my opinion such reasonable skill on the part of the master, officers and crew was not exercised at and before the collision. There was no occasion to have kept the *Norwalk* so close to Lightship No. 2 and

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there was nothing to have prevented her keeping farther to the north, where there was plenty of water.

Defendant contends strongly that the *Norwalk* was properly navigated, according to the evidence of the expert Macdonald, a witness examined on behalf of the plaintiff; but it must be remarked that this witness did not say that the *Norwalk* under the conditions existing at and previous to the collision, was properly navigated. On the contrary he states he should have remained below until the tug and tow had passed down, or kept well to the north side of Lightship No. 2. He was interrogated as to this, and answered as follows:—

"Q. If you were coming up the lake with one of the "steamers, such as you have described—that is a canal "size steamer—and you met a tow coming down, under "such conditions, when you would come abreast of her "about the light. What would your duty be under those "circumstances? That is if you had no signals from her "whatever?

"A. Well, if I met a tow anywhere near the light "coming down there, I would take the other side.

"Q. The north side of the lightship?

"A. The north side of the light.

"Q. Did you ever do that?

"A. Yes, sir.

"Q. More than once?

"A. Yes, sir, more than once.

"Q. And, if you were not going to take the north side "of the lightship, would you have any other course open "to you?

"A. Well, if I saw him coming into me in time, I would check down and wait below altogether. In order "to give him time to get out. I could go to the other side "if I wished"..... and further on he says:

"Q. If you did not know the north channel as well as "the south one?

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"A. I would not go.

"Q. What would you do then?

"A. I would wait below, outside. There is lots of "room there?

The lookouts, both on the *Norwalk* and on the tug and tow, may not have been as efficient as they should have been, but I do not think that this contributed at all to the collision.

Plaintiffs contend that the *Norwalk* should have stopped after the collision, and offered to render assistance which certainly was required as regards the barge *Jet*, which drifted down and stranded some distance above the Lachine Rapids. And part of her crew was afterwards rescued by a boat being sent after the tug had returned from towing the *Winnipeg* to a place of safety. But as the crew of the *Norwalk* say they did not hear any cries for assistance though it is proved that assistance was called for, as the tug was there, and the barges were near shore, I think under the circumstances as disclosed by the evidence, they were not in fault in going on as they did. I am of opinion that there would have been no collision if the *Norwalk* had stopped shortly after she recognized that the *Glide* and her tow were coming down; and she recognized that when they were about 3,500 feet away, as testified by Captain Goodrow.

I am further of opinion there would have been no collision if the *Norwalk* had kept further to the north, where she would have had ample water to have passed the tug and tow in safety.

The channel was that part of the lake which either naturally or dredged had a depth of 14 feet, as shown on the chart produced.

Now, even if, in the first instance, the tug and tow were in fault, which I do not find, yet if the collision could have been avoided by reasonable care on the part

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of the master, officers and crew of the *Norwalk*, the tug and tow would not be responsible for the accident.

Now on this point I might refer to a recent Admiralty case of the *Etna* (1) where Bucknill, J., referring to the management of the torpedo boat *Wear* which had been in collision with the steamer *Etna*, said: "He failed to "act [referring to the officer in charge of the torpedo "boat] until too late, and just failed to clear the *Etna* by "40 feet. It was agreed that on the authority of H.M S "*Sans Pareil* (2) the rules of common law as to negligence "applied, and that if the *Etna* was initially negligent "she might escape if by reasonable care and skill the *Wear* "could have avoided her; this, however, had not been "made out to his satisfaction, as the *Etna* was not only "negligent in getting in between the two lines of the "flotilla, but there had evidently been a bad lookout on "board, for she did not see the starboard division of the "flotilla at all." And the Judge, having regard to the negligent navigation of the *Wear* also, held both vessels to blame.

The decision in the torpedo case above cited shows that the *Sans Pareil* case is a binding authority on the Admiralty Court in England, and there, notwithstanding that the nautical assessors in the first court held that there was no negligence in the *East Lothian* in passing across the bows of the *Sans Pareil*, the court held as the *Sans Pareil* might with ordinary care have avoided the collision, she was alone to blame for the collision. This case was taken to appeal on the ground that there was improper navigation on the part of the *East Lothian*, and the damage sustained should have been in any event divided. Different assessors assisted the Court of Appeal, which confirmed the judgment of the court below, and which asked the assessors the following questions as mentioned at page 282 of the Probate Reports 1900 :—

(1) 24 T. L. R. 270. (2) (1900) P. 267.

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"Q. Was the *East Lothian* under the circumstances of "this case guilty of negligence in passing across the bows "of the *Sans Pareil?* And they answered 'it was improper navigation,'" which the Court of Appeal took to mean that the assessors did not advise them in the same way as the elder brethren in the court below, and accepted their advice so given.

Lord Justice Smith in giving judgment, at page 283 of the Probate Reports, 1900, said:—

"The well-known law of contributory negligence laid "down by Lord Penzance in the House of Lords in "*Radley* v. *The London and North Western Railway Co.* "(1) is 'that the plaintiff in an action for negligence "cannot succeed if it is found by the jury that he has "himself been guilty of any negligence or want of "ordinary care which contributed to cause the accident;' "but there is this qualification equally well established, "namely, that though the plaintiff may have been guilty "of negligence and although that negligence may in fact "have contributed to the accident, yet if the defendant "could, in the result, by the exercise of ordinary care and "diligence, have avoided the mischief which happened, "the plaintiff's negligence will not excuse him.' The case "of the *Margaret* (*Cayzer* v. *Carron Co.* (2), shows that "the common law doctrine is applicable to such a case "as that now before us."

Reference might also be made to the remarks of Lord Justice Williams who, at page 287, said:—

"The only remaining question is whether, applying "the common law rules to this matter, there is evidence "of such a state of circumstances that the plaintiff is "disentitled to recover. That there was negligence by "the plaintiff there can, to my mind, be no doubt. If "the advice of our assessors is right, there obviously "was, and, speaking for myself, I entirely agree with

(1) L. R. 1 A. C. 754. (2) L. R. 9 A. C. 873.

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"the view they take. But, according to the rule laid "down in *Radley* v. *London & North Western Railway* "*Co.*, that is not sufficient; you must show that the negli- "gence was of such a character that the defendant could "not with ordinary skill and care have avoided the acci- "dent. That rule applies equally in the Court of Admi- "ralty, where the practice is that if both ships are to "blame, the damage is to be divided; (See the *Margaret* "(*Cayzer* v. *The Carron Co.*). In that case Lord "Blackburn and Lord Watson made it clear that the "common law principle governs the Admiralty rule, "and that if the consequences of the neglect of plaintiffs "could have been avoided by ordinary care and prudence "on the part of defendants, the negligence of plaintiffs "would be no answer to the action."

In the case of the *Hamburgh Packet Co.* v. *Desrochers* (1) Burbidge, J., in rendering judgment, said :—

"The effect of the statute (referring to the English "statute) is to impose on a vessel that has infringed a "regulation, which is *primâ facie* applicable to a case, "the burden of proving not only that such infringement "did not, but that it could not by possibility have con- "tributed to the accident. That is the rule for which "the appellants contend, and it is no doubt the rule to "to be followed in Canadian courts in cases of collisions "occurring on the high seas, but it is not applicable "where the collision occurs in Canadian waters."

This must always be borne in mind when considering the English authorities, and such authorities prior to 1873 are only applicable, the English law having been then changed. Previous to that time the law was the same as the present Canadian law.

The case of the *Khedive* (2) is referred to at pp. 303 of 8 Exchequer Court Reports, as follows :—

(1) 8 Ex. C. R. 304. (2) L. R. 5 A. C. 876.

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"The alteration of the law in 1873 was an important "one. The occasion of it, and its effect, will be seen by "reference to the following cases. In *Tuff* v. *Warman* (1) "the defendant was charged with having so negligently "navigated a steam vessel in the river Thames as to run "against and damage the plaintiff's barge. The case "came before the Exchequer Chamber in 1858. The "effect of the decision cannot, I think, be better stated "than it was by Lord Blackburn in the case of the *Khedive*, "decided by the House of Lords in 1880 (2) : 'On the con- "struction of this and similarly worded enactments, it "has been held, in *Tuff* v. *Warman*, that though the "plaintiff had infringed the rules, and by his neglect "of duty brought the vessel into danger, yet if defendant "could by reasonable care have avoided the consequences "of plaintiff's neglect, but did not, and so caused the "injury, the plaintiff could recover, as under such circum- "stances the collision was not occasioned by the non- "observance of the rule'. This he adds 'prevented the "statute from producing the effect that those who framed "it wished ; but nothing was done until attention being "apparently called to the subject by the case of the ""*Fenham*," (3) section 17 of *The Merchant Shipping Act* "was enacted."

This was evidently one of the earlier cases referred to in the judgment of the Exchequer Court where the presiding judge said : (p. 305.)

"Where that happens [referring to the collisions in Canadian waters] "the rule to be followed is that estab- "lished by the earlier cases. It is necessary, then, in "considering the English authorities to distinguish "between cases decided before and those decided after "1873, when the Act was passed."

With reference to the jurisprudence bearing particularly on this case, it is well known that from the Victoria bridge

(1) 2 C. B. N. S. 740 ; 5 C. B. N. S. 573. (2) L. R. A. C. 892.
(3) L. R. 3 P. C. 212.

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down we are practically under the International Rules of the Road, that is to say, the Canadian Government has made the Imperial rules applicable in their entirety from the Victoria bridge down stream, but from the Victoria bridge upstream we are under the regulations as prescribed by Canadian Order-in-Council of the 20th April, 1905. These rules are printed in the first part of the volume of the Dominion Statutes 4 & 5 Edward VII., page lx. Art. 25b of these regulations is important, and reads:

"In all narrow channels where there is a current, and "in the rivers St. Mary, St. Clair, Detroit, Niagara and "St. Lawrence, when two steamers are meeting, the "descending steamer shall have the right of way and "shall, before the vessels shall have arrived within the "distance of half a mile of each other, give the signal "necessary to indicate which side she elects to take".

This was done by the *Glide* by giving the one blast of her whistle, indicating that she was keeping to starboard.

I would also refer to the case of the *Independence* decided by the Privy Council in 1861 (1). In that case the ship that met the tug and tow was in a much more favourable position than the *Norwalk* is in this case, because she was a sailing ship. This is what the Privy Council said when they held the sailing ship in fault [Per Lord Kingsdown:]

"A steamer unencumbered is nearly independent of "the wind. She can turn out of her course and turn into "it again with little difficulty or inconvenience. She can "slacken or increase her speed; stop or reverse her "engines, and can move in one direction or the other "with the utmost facility. But a steamer with a ship in "tow is in a very different situation. She is not in any-"thing like the same degree mistress of her own motions: "she is under the control of and has to consider the ship "to which she is attached. She cannot by stopping or

(1) 14 Moo. P. C. 103 at p. 115.

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"reversing her engines, at once stop or back the ship "which is following her. By slipping aside out of the "way of an approaching vessel, she cannot at once and "with the same rapidity draw out of the way the ship "to which she is attached, it may be by a hawser of con- "siderable length, and the very movement which sends "the tug out of danger may bring the ship to which she "is attached into it."

I would also refer to the case of the *American* and the *Syria* (1). This was a judgment of the Privy Council in 1874. In that case the *American* was found to blame; she was towing the *Syria* and both struck a sailing ship. Sir Robert Collier in delivering the judgment of the court commented upon the decision and the passage above quoted in the *Independence*, and the effect upon that decision of the promulgation of the new regulations for preventing collisions at sea. His words, at page 130, are as follows:

"It is true that this case [referring to the *Independence*] "was decided before the promulgation of the present "regulations for preventing collisions at sea, which in "terms direct that where the courses of two vessels "involve risk of collision, the steamship shall keep out of "the way of the sailing ship, and the sailing ship shall "keep her course, subject to due regard to dangers of "navigation and to special circumstances rendering a "departure from the rule necessary in order to avoid "immediate danger." He goes on to say:—

"But the rule of navigation though formulated, can "scarcely be said to have been altered by the regulations, "and the distinction taken between the relations of an "encumbered and unencumbered steamer is manifestly a "just one and still applicable."

Marsden on Collisions at Sea (2) thus summarizes the English jurisprudence:—

(1) L.R. 6 P.C. 127.

(2) 5th ed. p. 166 *et seq.*

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"It is obvious that a tug with a ship in tow has not "the same facility of movement as if she were unencum- "bered. She is not, in anything like the same degree, "mistress of her own movements. She cannot, by stop- "ping or reversing her engines, at once stop or back the "ship in tow".....He continues:

"In taking measures to avoid a third vessel she has to "continue her tow, and a step that would be right and "take her clear, if she were unencumbered, may bring "about a collision between her tow and the ship she her- "self has avoided. Although, therefore, it is the duty "of a tug with a ship in tow to comply, so far as is pos- "sible, with the regulations for preventing collisions, it is "also the duty of a third ship to make allowances for the "encumbered and comparatively disabled state of the "tug, and to take additional care in approaching her".

And at page 344 this author, referring to the require- ments for lights, states:

"The distinguishing lights of the tug are 'for the pur- "'pose of warning all approaching vessels that she is not "'in all respects mistress of her movements', and to show "that she is encumbered."

and at page 487 states:

"The Supreme Court in America has held that a vessel "undertaking to pass another in a narrow channel, or "navigating such a channel in weather that makes it "dangerous, does so at her own risk;"

and at page 444:

"In determining, therefore, what are the proper steps "for a ship to take in order to avoid another approaching "her in a winding river, the sinuosities of the river, and "also the usual course of vessels in the river, must be "taken into consideration;"

and at page 445:

"It has recently been held in the Admiralty Division "that it is a prudent rule in a winding tidal river, in the

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"absence of special regulations, for a steamship about to "round a point against the tide to wait until a vessel "coming in the opposite direction has passed clear, and "a steamship was held in fault for disregarding this pre-"caution;"

and at page 331:

"A vessel is not justified in delaying to take precau-"tions until the last moment, or in trusting to be able to "'shave' clear of the other. If by doing so she frightens "the other into taking a wrong step and a collision "occurs, she will be responsible for the entire loss."

Here, again, it may be said that even if it were true, which I do not admit, that the tug and tow were ten feet north of the line of the lightship, and if being there, considering the direction of the current and other attendant circumstances, constituted a fault, I am of opinion that under the principles laid down in the above cited authorities, the tug and tow could not be held responsible for the collision brought about by the *Norwalk*.

I would refer also to the case of the *Hibernian* (1).

The judgment was rendered in 1870, and the Privy Council judgment will be found in L. R. 4 P. C. p. 511: also to the case of the *Earl of Lonsdale*, (2) a judgment of the late Mr. Justice Stuart, where it was held:—

"Where a steamship ascending a river, before entering "a narrow and difficult channel, observed a tug approach-"ing with a train of vessels behind her, and did not stop "or slacken speed, and where she subsequently collided "with the tug and her tow, the steamer was held to blame "for not stopping when entering the channel."

This judgment was confirmed in the Privy Council; and the judgment of the Privy Council is reported in the same volume of Cook, page 163.

The American jurisprudence is to the same effect, and it is unnecessary to quote the cases at length, as a great

(1) 2 Stu. 148.

(2) Cook's Adm. Rep. 153.

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many of the more important decisions are cited in plaintiff's written argument.

I might also state that Malette's evidence has been referred to, in which he stated it would not be proper navigation to go north of the line of Lightship No. 2; and this has been strongly urged against the plaintiffs on the assumption that the line of Lightship Number 2 runs east and west. But the line does not run east and west as shown by the charts, and as explained by Mr. Leger, but in a north-easterly and south-westerly direction. So that when the line of the lightship is properly laid, Captain Malette's evidence is perfectly explainable and seems to support plaintiffs' contentions; and this has been satisfactorily explained by Mr. Howard, one of plaintiff's counsel in his argument.

Having carefully examined the able arguments of the counsel, the authorities cited on both sides, and carefully examined the jurisprudence bearing on this question, and the evidence of record, I am of opinion that the defendant is solely to blame for the collision in question, and is responsible for the result in damages.

I am further of opinion that the collision in question could have been avoided if reasonable care and skill had been exercised by the master, officers and crew of the steamship *Norwalk*.

I am consequently of opinion that the said steamship *Norwalk* is solely responsible for all damages caused by the said collision; and I consequently find in favour of plaintiffs, and allow the plaintiffs' action. I condemn the defendant, the ship *Norwalk*, her owners and bail in the amount to be found due on plaintiffs' claim, together with costs of the principal action; and do further adjudge and order that an account be taken, and refer the same to the Deputy Registrar, assisted by merchants, to report the amount due. I further order that all accounts and vouchers, with reports in support thereof, be filed within

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six months after date of the present judgment; and that any amount to be found due by the defendant for damage to the cargo of the barge *Jet*, said barge being owned by the plaintiffs, be paid over in due course by plaintiffs to the said intervenant, who has been proved to have been the owner of the cargo of the said barge *Jet* when the collision in question occurred; and that defendant pay the intervenant the costs of his said intervention up to the date of its allowance.

Judgment accordingly.

Solicitors for plaintiffs: *McLennan, Howard & Aylmer.*

Solicitors for ship: *Clarke, Bartlett & Bartlett.*

Solicitors for intervening plaintiff: *Geoffrion, Geoffrion & Cusson.*

APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

BETWEEN

THE SHIP *NORWALK* (DEFENDANT).... APPELLANT; 1909 Nov. 23.

AND

THE MONTREAL TRANSPORTATION COMPANY (PLAINTIFFS)..... } RESPONDENTS.

ALEXANDER D. THOMSON..INTERVENING PLAINTIFF.

Costs of interlocutory motion—Doubt as to disposal of same in judgment below on the whole case—Any necessary amendment of judgment in that behalf left to trial judge.

In this case it was not quite clear as to what disposition the learned trial judge had made of the costs of an interlocutory motion for an intervention order, and the court was asked to vary the judgment, *pro tanto*, ordering the defendant to pay such costs. The court intimated that upon a fair construction of the judgment below such costs were to be paid by defendant, but left it to the trial judge to amend the judgment if it was not intended to order the defendant to pay the costs in question.

APPEAL from a judgment of the Deputy Local Judge of the Quebec Admiralty District

The facts are stated in the reasons of the trial Judge.*

A. H. Clarke, K.C., for the appellant;

E. E. Howard for the respondent.

CASSELS J., now (November 23rd, 1909,) delivered judgment.

The appeal in this case is on behalf of the ship *Norwalk* from a judgment of Mr. Justice Dunlop, Deputy Local Judge in Admiralty for the Admiralty District of Quebec, delivered on the 12th May, 1909.

* Reported *ante* p. 434.

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The appeal was argued before me on the 14th of September last.

Counsel for both the appellant and respondents, after shortly stating their points, requested that I should read the arguments of counsel before the local Judge and consider them as addressed to me.

These arguments had been taken by the stenographer and extended. Mr. Holden, K.C., and Mr. Howard had argued the case for the plaintiffs, and Mr. Clarke, K.C., and Mr. Angers, K.C., for the defendant.

Since the argument I have read and re-read these arguments.

Each of the counsel presented the case for his respective client in a very able way, sifting the conflicting testimony and urging the respective views, and also dealing with the legal questions.

If the learned trial Judge has erred in his conclusion it is not because of want of assistance of counsel.

I have carefully read the evidence given at the trial, and I am of opinion that the learned Judge has arrived at a correct conclusion.

The question at issue in the main turns upon disputed questions of fact, and I would be loth to overrule the trial Judge who had the benefit of seeing and hearing the witnesses, and was in a much better position to judge of their credibility than I can be sitting in appeal.

I wish to state, however, that after a minute perusal of the evidence with the contentions of counsel before me, I am of opinion that the learned Judge arrived at a proper conclusion, and I agree with him in all his findings.

The learned trial Judge has dealt with the evidence and law in a very exhaustive opinion, and it would be mere repetition on my part to add anything to his opinion.

It was proved conclusively at the trial that the tug *Glide* on two occasions blew three short blasts, the customary signal in those waters, to notify up-coming vessels to

check down. It is said that these blasts were not heard by those on board the *Norwalk*. Mr. Angers, K.C., during his argument stated that it was fortunate they were not heard, as since 1905 three short blasts mean : "My engines are going full speed astern". This, however, is only east of the Victoria bridge, and is not a rule applicable to the waters in question.

The *Norwalk* was aware that the tug *Glide* had a tow. It is proved that the beam of the *Winnipeg* is 37½ feet and the beam of the *Jet* 30 feet. The beam of the tug *Glide* is 16 feet.

The *Winnipeg* was on the starboard side and carried the regulation green light. The *Jet* was on the port side, carrying the regulation red light. It is said that those on board the *Norwalk* did not see these lights, giving as a reason that they were apparently obscured by the Lightship No. 2. This lightship is about 35 feet long and 10 to 12 feet beam.

Had the *Norwalk* been in that part of the channel northerly of the lightship, with the lightship on her port bow and the tow in the channel northerly of the lightship, it is difficult to understand how the lights, or one of them, would be obscured. It is quite evident to my mind that the pilot of the *Norwalk* deliberately intended to pass the lightship on the southerly side.

I think, as the learned Judge finds, the *Norwalk* is solely to blame.

A minor point was raised by Mr. Clarke as to that part of the judgment ordering the defendants to pay the costs of the intervenant up to the time of the allowance of the intervention. It was stated that no opposition was made to the intervention, and that in the previous part of the learned Judge's reasons it was stated that it has been admitted by the parties that the intervenant was the owner of the cargo, and "the foregoing motion is consequently granted but without costs". The learned

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Judge, however, when using this language, was dealing with an application on behalf of the plaintiffs for leave to amend the statement of claim. The motion on behalf of the intervenant had been previously dealt with, and an order made on October 21st, 1908, and the costs were reserved. No doubt the learned Judge would amend the judgment if it was not intended to order the defendant to pay these costs.

The appeal is dismissed with costs. I think there should be no costs of the appeal to or against the intervenant.

Judgment accordingly.

Solicitors for the appellant: *Clarke, Bartlett & Bartlett.*

Sollicitors for the respondent: *McLennan, Howard & Aylmer.*

IN THE MATTER of the Petition of Right of

JAMES W. BROWN.....SUPPLIANT; 1909

AND Dec. 30.

HIS MAJESTY THE KING .....RESPONDENT.

HIS MAJESTY THE KING.. .....PLAINTIFF;

AND

JAMES W. BROWN.....DEFENDANT.

Public work—Damage to lands—Proceedings by petition of right supplemented by expropriation proceedings—Hay lands flooded by construction of Government dam—Damage to Owner's business as cattle rancher and dealer in hay—Basis of valuation.

B., a cattle rancher and hay dealer, had filed a petition of right seeking damages for the flooding of a large portion of his hay lands in the Qu'Appelle valley caused by the construction by the Crown of a dam on the Qu'Appelle river, for the purpose of improving the navigation of Last Mountain Lake. At the trial of the petition counsel for the Crown stated that expropriation proceedings had been instituted by the Crown to expropriate the 1,037 acres of the suppliant's land affected by the dam, together with an additional area of some 240 acres, and it was agreed between the parties that the evidence adduced under the petition of right should be treated as if also adduced in the expropriation proceedings, which practically superseded the petition. The dam was erected in 1906. By his defence in the expropriation proceedings, *B.* claimed $50,000 for loss of hay during two years before the erection of the dam and since to the time of trial; and a sum of $131,840 for damages arising from the expropriation and depreciation to remaining lands arising from the severance.

Held, that *B.* was not entitled to damages for the loss of the hay.

2. That in assessing compensation the whole of the property should be considered as comprising 2,080 acres suitable for ranching purposes, and the market value (an element of which was its potential value) together with that of the house and barn thereon, ascertained as of the date of the expropriation, viz.: January, 1906; then by ascertaining the market value of what was left and deducting the same from the value of the part expropriated, the difference would represent *B's* loss.

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THESE cases arose, respectively, upon a Petition of Right for damages arising out of injury to land caused by the construction of a public work, and proceedings, subsequently taken, for the expropriation of the land injured as alleged in the petition of right.

The facts are fully stated in the reasons for judgment.

H. A. Robson, *K.C.*, and *J. F. Frame* for Brown;

J. A. Allan for the Crown.

CASSELS, J., now (December 30th, 1909,) delivered judgment.

In the case of *Brown* v. *The King* the suppliant filed his petition on the 29th April, 1909. The petition is dated the 4th September, 1908.

The suppliant sets out that he was the owner and in possession of certain lands in 1904, and is still the owner thereof. The lands comprise an area of 2,080 acres.

The suppliant alleges,—

"That the said lands, or the greater portion thereof, are situated in a valley which extends from the foot of the said lake to the Qu'Appelle river, a distance of about four miles, and the natural and only outlet and drainage for the waters of the said lake and the waters in the said valley and on the said lands is by and through a natural water course leading from the said lake to the Qu'Appelle river. The said lands are ordinarily and naturally of great value as hay lands and for the feeding of cattle, and were of great value prior to the construction of the public work hereinafter referred to."

The suppliant further alleges,—

"That during the latter part of the year 1904, His Majesty the King (represented in that behalf by the Honourable the Minister of Public Works for the Dominion of Canada) through his engineers, servants and workmen, constructed a public work, to wit, a certain dam which was erected or constructed, and has

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since been maintained across the said Qu'Appelle river at a point below or down stream from the place where the said river naturally receives the said waters, flowing there through the said natural water course, and the said dam has ever since been maintained and is still maintained as a public work."

"That by reason of the construction of the said public work, to wit, the said dam, the waters of the said lake and the waters in the said Qu'Appelle river and in the said natural water course, which is the natural outlet of the said lake, have been obstructed, and since the said year 1904 have been prevented from escaping and have continuously been, and still are, retained to a depth of upwards of six feet above the natural level of the said lake and river and water course, thereby wholly submerging the larger portion of the suppliant's said lands, to the extent of at least 1,077 acres thereof, thereby rendering the same wholly unproductive, and also rendering to a large extent useless and unprofitable the remainder of your suppliant's said lands, which were being used by him in connection with the said submerged lands in his business of raising and feeding cattle and raising hay for sale."

The petition came on for trial before me at Regina on the 11th and 12th days of October, 1909.

At the trial Mr. Allan, counsel for the Crown, stated that expropriation proceedings had been commenced on behalf of the Crown to expropriate the 1,077 acres (really 1,037) referred to in the suppliant's petition, together with an additional portion of the 2,080 acres.

It was then agreed between counsel for the Crown and counsel for the suppliant that an information on behalf of the Crown should be filed and served, a defence filed, and the information brought to issue. It was also agreed that the evidence adduced in the petition of the suppliant Brown should be treated as if also adduced in

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the information proceedings in the case of *The King* v. *Brown*; that such further evidence as the parties desired to adduce should be taken before C. H. Bell, Esq., Clerk of the Supreme Court of Saskatchewan, and I agreed to remain over at Winnipeg on my return from the west and hear further evidence and the argument of counsel.

The two cases were argued before me in Winnipeg on the 4th day of November, 1909. Counsel for the suppliant Brown asked leave to amend his petition by striking out paragraph 5 thereof, which reads as follows :—

" 5. Your suppliant further says that by reason of the construction of the said public work, to wit, the said dam, that his said lands have been injuriously affected as aforesaid, and that by reason thereof he has suffered damage, amounting to the sum of at least $50,000,"

and substituting therefor the following :—

" Your suppliant further says that by reason of the construction of the said public work, to wit, the said dam, that he has been prevented from carrying on his said business of raising and feeding cattle and raising hay for sale, and has lost all the annual product of the said land and that his loss, up to the time of the institution of this petition, irrespective of permanent injury to the land, amounts to the sum of $50,000, and your suppliant further says that his said lands so submerged and his lands adjoining the same have been permanently injuriously affected, so that he has suffered further loss amounting to $131,840 additional."

Counsel for the Crown consented to this amendment.

As the institution of the expropriation proceedings practically supersedes the petition, and Brown in his answer to the information can set up the same defence, I allow the amendment as asked.

The information filed on the 4th November, 1909, alleges in paragraph 1 as follows :—

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"1. The lands hereinafter described were taken under the provisions and authority of section 3 of The Expropriation Act, chapter 143 of the Revised Statutes of Canada, 1906, by his Majesty the King for the purposes of a public work of Canada to wit: a dam at Craven below the junction of the Qu'Appelle river and the outlet of Long Lake or Last Mountain Lake, by depositing of record, under the provisions of section 8 thereof, a plan and description or such lands in the office of the Registrar of Deeds for the Assiniboia Land Registration District in the Province of Saskatchewan, in which Registration Division the said lands are situate whereby the said lands have become and now remain vested in His Majesty the King."

Then follows a description of the lands, in all comprising 1277.38 acres. The Crown offers $12,660.28 in full compensation for all the lands expropriated and for all damage and loss of every kind.

In his defence to the information Brown sets up as follows:—

"5. That further as to paragraph 3 thereof he says that he has suffered loss and damage by reason of the construction of the said dam and says that a portion of his loss and damage by reason thereof consists in the total destruction of the hay which, but for the said dam, would have grown on the said lands during the years 1905, 1906, 1907, 1908 and 1909 and which hay would during the said years have aggregated in net value at least $50,000.00, and he further says that in respect of this particular loss, namely, the loss of said hay for said years he is now proceeding in this Honourable Court against His Majesty the King upon a fiat granted by His Majesty and by a Petition of Right, which proceeding he says was begun long prior to the expropriation proceedings referred to in paragraph 1 of the information, and which

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proceedings he says are still pending and undetermined in this Honourable Court."

"6. That as to paragraph 5 and generally as to the whole of the said information this defendant says that his business is that of a cattle raiser and dealer in hay, and that he has carried on and operated such business since about the year 1889 and up to the year of the construction of the dam which was put in the Qu'Appelle river at or near Craven on or about the year 1905 by His Majesty the King. He further says that he acquirred the lands now being expropriated and about eight hundred and three acres more of contiguous upper and hill lands especially for the purposes of the said business and because of their peculiar adaptability for his said purposes. The lands mentioned in the information consist of twelve hundred and seventy-seven and thirty-eight hundredths acres, and the same are meadow lands and are situate in a valley at the foot of the lake known as Last Mountain Lake or Long Lake in the Province of Saskatchewan. There is a natural water course or channel extending from the foot of the said lake to the Qu'Appelle river, which is of such a character and of such levels that in the spring of each year water from the Qu'Appelle river flows north or up stream in the same and irrigates the said meadow lands now expropriated, and in due time recedes and escapes by the said natural water course or channel down into the Qu'Appelle river. The result of this natural irrigation is in each season (except in cases of extreme floods out of the course of nature) to insure the natural growth upon the said meadow of very large crops of superior hay. Up to the time of the erection of the said dam this defendant had yearly cut the said hay and derived great profits from the same both from feeding the same to his cattle and by selling the same to other parties aud in exporting the same to town and city markets in Saskatchewan. This defendant has for the pur-

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pose of carrying on his said cattle raising and hay business erected large buildings on his said lands, purchased expensive personal chattels necessary to carry on such a business and permanently established himself thereon in order to prosecute his said interests and to take advantage of the great benefits from his said lands and property. The natural advantages of said lands and their proximity to market, and particularly the said natural irrigation, rendered the same of an unique character and of great and exceptional value and by the aforesaid act of His Majesty the King in building and maintaining said dam and flooding said lands this defendant has wholly lost the benefit of all his said lands, and his said business has by reason thereof been put an end to and his said buildings rendered useless and his said business and property destroyed."

The defendant claims $50,000 damage for the loss of hay during the years 1905, 1906, 1907, 1908 and 1909, and claims the further sum of $131,840 for the value of the lands sought to be expropriated and the depreciation of the balance of the 2,080 acres of the land, a part of which, namely, the 1,277·38acres, have been expropriated.

Before dealing with the evidence in detail, I may state that in my opinion the defendant Brown is not entitled to the damages claimed for loss of hay as above mentioned. If he were so entitled the claim made is an exorbitant one. The first dam was only erected in January of 1906. It did not withstand the spring freshets of the Qu'Appelle river in 1906, and a new dam holding the waters at the same height was constructed a little lower down the river Qu'Appelle in December, 1906. The dam complained of could not possibly have affected the lands in question in 1905, and could hardly have affected them in 1906. In the spring of 1904 there was a freshet exceeding in magnitude the freshet of 1883. All the lands as far as Craven, including the meadow lands in question, were flooded, and remained flooded all through that

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season, and a large portion of the meadow lands, especially Section 5, would not, according to the evidence, have been drained so as to be capable of producing hay during the years 1905 and 1906.

The object of the dam at Craven was to retain the waters of the Qu'Appelle river and to force them up the outlet which, during low water in the Qu'Appelle river, carried off the waters from Last Mountain Lake until the level of the lake was lowered to a point where the water ceased to flow through the outlet. The intention is to hold back the water so as to improve the navigation of Last Mountain Lake. Brown, the suppliant, complains that the effect of this work is to destroy his meadow lands comprising the 1,037 acres, and that practically the whole value of these 1,037 acres have been lost to him.

The Crown by instituting the expropriation proceedings and expropriating these 1,037 acres, together with the additional land, admits that the defendant Brown is entitled to be paid the value of the lands.

The questions for decision are:

1. Is the suppliant Brown entitled to any damages for the years claimed other than interest on the amount found due; and

2. The method of arriving at the value and damages;

3. The amount that should be allowed.

In my opinion the true method of approaching the consideration of the case is as follows:

The Crown in January, 1906, proceeded in the public interest to erect the dam. The necessary effect of such a dam would be to hold back the waters and maintain the level of the lake and injuriously affect the meadow lands of the suppliant and defendant Brown. It is true the first dam was not constructed in such a way as to withstand the freshet, and accordingly the new dam was constructed in December, 1906.

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The effect of this dam was to expropriate an easement over the meadow lands (1,037 acres) of flooding. It is clear that such an easement was practically equivalent to a destruction of the lands for hay purposes, the only use to which they could be put. Brown puts his case in this way in his petition. The dam has been maintained ever since, and the information filed. In my view in 1906 when the dam was first constructed the Crown was erecting a public work which necessarily prevented the draining of the meadow lands, and were claiming an easement of flooding the meadow lands, equivalent to taking the fee in the lands. This was followed up by the expropriation proceedings. I do not think the evidence adduced before the special examiner as to conversations with ministers and others about the removal of the dam was admissible. If it were a question of laches it might have some bearing, but not on the question of possession.

I think that so far as the 1,037 acres of meadow lands are in question the title to the easement vested in 1906. By *The Expropriation Act*, Cap. 143, R. S. C. 1906, the definition of lands is as follows:—

"(*f*) 'land' includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act."

Section 22 of the same Act reads as follows:—

"22. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects His Majesty, be converted into

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a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in His Majesty."

Also section 47 of *The Exchequer Court Act*, Cap. 140, R.S.C., 1906, has to be considered. It reads as follows :—

"47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned."

In the Ontario Courts a case of *Ruttan* v. *Dreifus and Canadian Northern R. W. Co.*, (1) may be looked at as containing a summary of authorities on similar statutes.

I therefore take January, 1906, as the starting point. The difference of dates of expropriation between the 1037 acres of meadow lands and 1,277·38 expropriated, or 240·38 acres, need not in my view be considered. These 240·38 acres were not taken possession of in 1906, and were expropriated in October or November, 1909, but when expropriated, by reason of their depreciation by the withdrawal of the hay lands, their value had so decreased according to the witnesses of Brown that they would be of small value. Viewing the case as I do the whole question of the value of the 1,277.38 acres may be considered together as of January, 1906.

I do not think there is any real dispute between counsel for the Crown, Mr. Allan, and counsel for the suppliant and the defendant Brown as to the manner in which compensation should be awarded. The defendant Brown is entitled to receive full compensation for his loss. The use to which he put the lands and the loss to him

(1) 12 Ont. L.R. 187.

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should be considered. See *Bailey* v. *The Isle of Thanet Ry. Co.*, (1) *Bourne* v. *Mayor of Liverpool* (2) *Stebbing* v. *Metropolitan Board of Works*, (3) cases cited by Mr. Frame.

I have had occasion to consider these cases and a great many others in cases decided by me; for instance, *The King* v. *Condon*, (4) where the property expropriated was an inn, and allowance was made for good-will or loss of business. See also *The King* v. *Dodge* (5) and cases cited.

I propose to consider the case in the manner claimed by Mr. Frame, namely, treating the whole of the property as a ranch comprising 2,080 acres suitable for ranching purposes. The question is what in January, 1906, was the marketable value of the 2,080 acres as a ranch, together with the barn costing $5,000 and the house. The potential value at this time must be considered, not however arguing back from matters as they stood at the trial in October, 1909, as claimed by Mr. Frame, but as such potential value was considered to be in 1906. The question is in reality, what was the market value in 1906? The potential value would be an element in increasing the market value. Then the market value of what is left should be ascertained and deducted therefrom, and the difference would be Brown's loss. Viewing the case in this way, the further question arises: Is there any additional sum that should be allowed to the defendant for the present use to him of the ranch and consequent loss? If the marketable value of the property as a ranch is taken as the basis of compensation it is difficult to conclude that any loss of this nature has been proved. No evidence has been adduced, although the attention of counsel was called to the point at the trial, of any loss of profits to the defendant. For all I know he may have been operating the ranch at a loss, trusting to the future to recompense him.

(1) L. R. 1900, 1 Q. B. D. 722.
(2) 33 L. J. Q. B. 15.
(3) L. R. 6 Q. B. 37.
(4) 12 Ex. C. R.
(5) 38 S. C. R. 149.

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I propose therefore to consider the case from the standpoint I have indicated.

The evidence of the numerous witnesses is mainly opinion evidence. It is not suggested that the witnesses other than the suppliant did not honestly intend to give their views. Their views differ as widely as the offer of the Crown differs from the claim of the defendant.

James W. Brown, the defendant, states that up to 1904 the meadow lands were free from water except in the spring freshets when they were overflowed, but the water went off. He is asked: "What did you do about the "harvest of those years?" His answer was: "Well, I "harvested all I needed."

"Q. Was it all capable of being harvested? A. It "was all capable of being harvested, yes."

If this statement be accepted it is difficult to understand why, if the value of the hay crop be as claimed, a shrewd business man should allow the greater part of the crop to be wasted.

He makes no claim for damage in 1904, attributing the flooding to the great freshet.

Referring to the dam he is asked:—

"Q. Now what, if anything, was done in the way of "retaining these waters in the fall of 1904? A. Well, "this dam was constructed at Craven.

"Q. What year was it put in? A. As near as I can "tell it would be built in December, 1904.

"Q. Now, since 1904, since that dam was put in, at "what level has the water been standing on your lands "as regards uniformity? A. They have been in the fall "of 1904, and probably a little higher, because the water "has been standing on section 21."

The meadow land of section 21, it may be remarked, is the southerly part and further away from Last Mountain Lake than the meadow lands on sections 5, 32 and 28. These meadow lands on section 21 are considerably

higher than the meadow lands of section 5 adjoining the lake. Brown states in his subsequent evidence that he disposed of part of his cattle in 1904. That he reduced his stock about one-half and that he had about 100 head left.

Brown is unable to place any value on the lands. Being asked, he answered :—"The value of the lands—well I "don't know, I never offered it for sale."

He is asked :—

"Q. Now after this flood came on and the dam was "constructed, what, if any thing, did you do with respect "to the stock you had? A. I disposed of the most of it.

"Q. How many head of stock were you running at the "time the dam was put in? A. I had about 350 head "that year.

"Q. And had you been running it at that? A. Yes, "I had run as high as 450 head."

On cross-examination he is asked :—

"Q. Well now, will you tell me how you figure up "your damage at $50,000? A. Well, the season of 1904 "I don't claim any damages due to flood; in 1905 I claim "that the lands on 21, 28 and 32 would have uncovered "so that I would have cut hay.

"Q. And what do you estimate as your damage for "1905? A. Well take the number of acres at 2½ tons "per acre."

And he places the profit at $6 to $6.50 a ton.

His claim for 1906 is for the same lands and about half of section 5.

As I have stated before, the dam was not erected until January 1906, and was not effective until 1907. I quote thus fully from the suppliant's evidence to show how exaggerated his claim is. That part of his evidence which refers to the season of 1905 is also important as it shows the lands were flooded in 1905 although there was no dam; and it tends to confirm what is stated by one or

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two of the Crown's witnesses, that judging from the length of time it took for the waters to recede after the great flood of 1883 it would have taken a considerable period for the flood waters of 1904 to have receded even had the dam not been erected.

Edwin Carss, a rancher, states that in 1905 the meadow lands were flooded pretty much as they are now.

William Henry Mulligan cannot place any value on these lands.

John Albert Graham only refers to the value of the hay, and generally as to the manner of running a ranch.

Hugh Armour, a butcher, residing in Regina, places the value of the hillside lands, the meadow lands being withdrawn, at about $2 to $3 an acre. With the meadow lands he would value these hillside lands to a rancher at from $8 to $10 an acre. In his re-examination he places the meadow lands at $100 an acre from a rancher's point of view.

George W. Brown, brother of the suppliant, and a barrister-at-law practising at Regina was heard. This witness, the suppliant and two other brothers were partners farming, and acquired the lands in question originally for the farm, each having a fourth interest. The partnership was dissolved, the suppliant retaining the ranch in question. On the dissolution this witness took as his share "farm lands down on the plain and other considerations".

Considering the difficulty in arriving at the value of the property in question for the reasons given by some of the witnesses, it might have been of use had the lands taken by this witness been described and their value given. Being "plain lands" the value could have been arrived at by reference to other lands of a similar character.

He values the meadow land, 1,037 acres, at $100 per acre. He values the side hill lands with the meadow at

about $10 an acre; without the meadow at from $2 to $3 an acre. The barn, he states cost $5,000.

Francis N. Darke, another witness, lives in Regina and is the owner of a ranch in the Qu'Appelle valley. He estimates the market value of the meadow lands at from $50 to $60 an acre. The side hill lands in conjunction with the meadow lands and the balance of the ranch at from $10 to $12 an acre; and with the meadow lands withdrawn at from $2.50 to $3 an acre.

This witness is asked:

"Q. What would you say is the value of that 2,080 "acres as it stands there, taking the whole thing, build- "ings, meadow and everything, to a man going into that "business?

"A. You mean the market value, the value it would "be likely to sell at?

"Q. I mean a fair value not a forced sale—a sacrifice "value at all, mind you—a fair value and an honest "transaction? A. Well, I think that property would be "very reasonable at from $35 to $40 an acre; for the "whole property, that is the land.

"Q. For the whole 2,080 acres? A. Yes, that would "not include the buildings".

He adds for the buildings $8,000. His value for the lands across the valley he puts at about $2 to $3 an acre. For the balance of the farm comprising the farm lands — side hill lands including the buildings—$6, $10 or $12 an acre. The witness in giving his evidence as to value is referring to present values (October, 1909).

Henry C. Lawson, another witness, lives in Regina, and for a number of years owned a ranch in the Qu'Appelle valley. His ranch was situate down the Qu'Appelle river fourteen or fifteen miles from the suppliant Brown's lands and below the dam in question. He values the 2,080 acres, the whole thing as a going concern, at about $40 an acre, without the dam. His value for the farm lands,

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280 acres, with the meadow lands withdrawn, is $12 to $14 an acre; and the side hills at $3 to $4 an acre. Then he would add $2,000 for the buildings.

His valuation of the 2,080 acres at $40 an acre would equal		$ 83,200 00
Less 280 acres of farm lands at $14 an acre	$3,920 00	
Buildings	2,000 00	
523 acres of side hill lands at $4 an acre	2,092 00	
	$8,012 00	8,012 00
Leaving as damages		$75,188 00

This witness, on cross-examination, describes the ranch he owned. He sold it in July 1909. His ranch comprised 800 acres. Of this from 350 to 400 acres were meadow lands; 250 acres of hill side lands; and the balance rough bottom lands, etc. He sold his ranch for $20 an acre. He had been asking $25 an acre prior to the dam. In placing the value of the 2,080 acres at $40 an acre he says it is only a guess and the value is as of the present time (October 1909). During the last five years there would probably be a general rise in values of twenty per cent, he states. Comparing his ranch with that of the suppliant Brown, he is asked:

"Q. How does the Brown property compare with "yours and other properties east on the Qu'Appelle "river?

"A. Well, the Brown property it is more dead level, "the meadow there, and the meadow land, that is, their "meadow land, is first class; down our way there is good "and bad in meadow land, and it varies, it isn't on such "a deal level and it is at the outlet of the lake.

"Q. Would you say that per acre your land in Qu'Ap- "pelle was worth as much as the Brown's? A. The best "of ours is as good as his, but there is probably more

"good land up his way than there is down ours, ours is "more broken.

"Q. So that per acre his is worth more than yours, "because of uniformity? A. Yes, it is".

The witnesses for the Crown gave their evidence as to value.

Zéphirin Malhiot, an engineer in the Public Works Department was called by the Crown. He proves (what is corroborated by other evidence) the fact beyond reasonable dispute that the first dam was erected in January, 1906. According to his evidence the dam had no effect so far as flooding of the meadow lands is concerned. It is hard to understand why if the Public Works Department did no injury to the suppliant's lands they should commence proceedings to expropriate 1,277 acres. At one part of his evidence he states the difference in level between the dam and the bridge at the trail on section 5; the lake is a foot higher than the top of the dam. He corrected himself and answered: "Yes than the waste wear". He proceeds to argue that water must run down hill. He places the top of the dam at 1,586 (referring to sea level). The level of the lake he places at 1,587, 10 namely, a foot higher than the level of the top of the dam. I am inclined to think he was leading me to understand the dam had no effect in retaining the waters, referring to the height of the dam without the second "stoplog".

On his plan filed as exhibit No. 1, which is supposed to give the levels, I find that the height of the level of the top of the second stoplog is given as 1,588 feet. However this may be, the Crown by expropriating the lands seems to view the matter in a different light. I pass over the evidence of this witness, but with the remark that the report referred to of Coutlee cannot be received as proof of the facts therein stated.

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Leslie Hoskins, another witness on behalf of the Crown, lives at Craven. He has been familiar with the lands in question for a great number of years. His evidence shows that it would be unreasonable to take the whole area of the meadow lands and assume that each acre produces so many tons per acre. It has to be averaged. For instance, when the southern portion of the meadow lands is yielding a good hay crop the northern lands, section 5 particularly, yield nothing. The southern portion requires water, and when the freshets are sufficient to supply the requisite irrigation, the lands on section 5 are drowned lands. He explains that it took twelve years to drain these lands after the flood of 1883. He also testifies to the fact that the first dam constructed in January, 1906, was not effective. He further states that the meadow lands in 1906 were still flooded from the freshet of 1904. He places the value, taking into account the uncertainty of the hay crops, etc., at $20 an acre. The buildings on the lands this witness values at $2,200.

John W. Silverthorn, another witness called by the Crown, lives at Lumsden, not far from Brown's. He places the value of the meadow lands at about $20 an acre. He places the value of the 280 acres of farm lands at about from $20 to $25 an acre. He places the value of the hillside lands at about $10 an acre. This witness points out that these hillside lands are good pasture land —grazing land. This view is corroborated by the fact that while Brown was running the ranch cattle during the summer never grazed over the meadow lands. Their pasture was from the hillside lands and neighbouring lands not owned by Brown.

William Pearson, another witness called by the Crown, lives in Winnipeg, and is the President and Manager of the William Pearson Co., Ltd. It is argued that his evidence should be received with considerable caution, as he is interested in maintaining the lake level. I fail to

see how this fact should bias him as the expropriation is an accomplished fact. This witness is a man of large experience. He gives his evidence, as far as I can judge, not having seen him, fairly. He values the meadow lands on section 5, taking into account the fluctuating and uncertain returns, at about $7 an acre. He values the meadow lands on section 32 at $16 an acre; the meadow lands on section 28 at $16 an acre; the meadow lands on section 21 at from $13 to $14 an acre; and the southeast quarter of section 22 at $13 an acre. He also states that the value of these lands without the dam would, in 1906, be a great deal less. He places the value of the hillside lands, apart from the meadow, at about $10 an acre. In conjunction with the meadow lands he would place an additional $3 an acre on these hillside lands. Referring to the top lands, 230 acres, he considers their value to be $25 per acre without the buildings. He values the house, the meadow lands withdrawn, at $1,500. The barn which cost $5,000 he would value to a purchaser at $1,668.

Charles O. Benjafield, another witness heard on behalf of the Crown, is familiar with the property in question. He estimates the natural increase in the class of land in question between 1906 and time of trial at from $5 to $8 an acre. He places the value of the top lands (280 acres) without the buildings, at about $22 an acre; and the value of the hillside lands at $10 to $12 an acre for grazing purposes. His view is that the top lands—the farm lands—would not be depreciated by the withdrawal of the meadow lands. The grazing land would be depreciated one half.

Charles Benjafield, another witness for the Crown, has been familiar with the property for years. He places no value on section 5 for hay purposes. The hillside lands he values at $8 an acre. Adding the hillside lands to the top lands and selling them together, he would add

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$2 an acre, or $10 per acre. The top lands (280 acres) without the buildings, he values at from $25 to $30 an acre. In 1906 he would place the value of the top lands at $20 an acre, the hillside lands at $7 per acre.

On this evidence I have the difficult task presented to me of arriving at the amount Brown should be allowed.

I am of opinion that the claim put forward, when viewed as of January, 1906, is exaggerated.

I would place the value of the ranch as a whole (2,080 acres) exclusive of buildings, at $25 an acre. This would amount to $52,000. I would add to this $8,000 for the barn and house and sheds. This would make the total value $60,000, and I think this amount would be full compensation. From this $60,000 I would deduct 280

acres of farm lands at $20 an acre..	$ 5,600 00
Value of buildings to a purchaser...	3,000 00
Value of hillside lands left, 523 acres at $8 an acre.....	4,184 00
	$ 12,784 00

If this $12,784 be deducted from $60,000, it would leave the suppliant Brown, the defendant in the case of *The King* v. *Brown*, entitled to $47,216, together with interest from the date of the expropriation, and this sum I think fully compensates him.

The supplliant is entitled to the costs of his petition and of the expropriation proceedings.

Judgment accordingly.

Solicitors for Suppliant: *McKenzie, Brown, Thom & Frame;*

Solicitor for Crown: *J. A. Allan.*

TORONTO ADMIRALTY DISTRICT.

BETWEEN

THE LAKE ONTARIO AND BAY OF QUINTE STEAMBOAT COMPANY, LIMITED ..... } PLAINTIFFS;

1909
May 8.

AND

MARY WILDER FULFORD.....DEFENDANT.

Shipping—Collision—Rules of navigation—"Special Circumstances"—Claim for profits.

Where the captain of a ship neglects, in the "special circumstances" of the peril then imminent, to observe the dictates of the highest prudence, and especially the just and peremptory measures of precaution which the Rules of Navigation enforce, the ship is liable for damages arising from a collision.

2. *Held*, that the profits that would have been made if the collision had not taken place are recoverable as part of the damages, and are not too remote.

THIS was an action brought by the plaintiff company against the defendant Mary Wilder Fulford, the life tenant of the steam yacht *Magedoma*, for damages arising from collision.

The trial of the case took place at Kingston before the Local Judge of the Toronto Admiralty District on the 5th, 6th and 7th days of April, A.D. 1909.

Written arguments were subsequently put in, on which judgment was reserved. The facts of the case are set out in the reasons for judgment.

HODGINS, L. J., now (May 8th, 1909) delivered judgment.

This is an action brought by the plaintiff company against Mrs. Fulford, the life-tenant of the steam yacht *Magedoma*, for damages caused by the collision of the

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Magedoma with the steamship *Caspian* in Kingston harbour during the afternoon of Saturday, the 27th June, 1908.

The evidence proves that the steamer *Caspian*, which had been moored stem inwards on the north east side of Swift's dock, steamed stern outward on a semi-circular course from the dock about five o'clock that afternoon, and after steaming a certain distance out, commenced her voyage towards Lake Ontario, taking a semi-circular course under helm hard-a-starboard on a course to port so as to pass clear of the dock. That about the same time the steamer *Kingston* which had been moored at the other side of the dock also steamed stern outwards taking a more direct course out, and then started on her voyage towards Lake Ontario on the port side of the *Caspian*. The yatcht *Magedoma* had been moored bow inwards at the same side of the dock and between the *Kingston* and the shore.

After the two steamers *Caspian* and *Kingston* had left the dock, and were backing out preliminary to commencing their respective voyages, the master in charge of the *Caspian* noticed that the *Magedoma* was commencing to back out from the dock, and thereupon the *Caspian* gave two whistles to warn the yacht that he was directing his course to port, which was the proper course to enable him to clear the dock; but no notice was taken of the warning or any responsive whistle given by the *Magedoma*.

When nearing the dock the *Caspian* was steaming at about ten miles an hour, and the master of the *Caspian* seeing that the *Magedoma* was coming on towards a course intersecting that which the *Caspian* was taking, ordered the helm first amidship and then hard-a-port, so as to steady her and prevent the *Caspian's* stern swinging on to the *Magedoma*.

That the *Magedoma* continued backing and impinging on the course of the *Caspian* is shown from the evidence

of Captain Mills of the *Caspian*; and this fact is proved by Captain Johnston of the *Magedoma* who said that he gave the yacht two kicks astern to back her from the dock so as to turn the bow of the yacht; and both he and the seaman Soderstrom of the *Magedoma* would not deny that there may have been stern-way on the *Magedoma* from these "kicks astern" when the boats came together.

Both the preliminary act of the defendant, and the statement of defence, allege that the collision was occasioned by the fault of the *Caspian*:—the preliminary act stating that: "Shortly before the accident, the master of the *Caspian* blew two whistles, which, to the master of the *Magedoma*, indicated that the master of the *Caspian* was to starboard his helm and keep to port. The master of the *Caspian* did not carry out this signal, but acted opposite thereto and sent his helm to port, and kept to the right." The fifth paragraph of the statement of defence is substantially to the same effect. These whistles of the *Caspian* were not answered by the *Magedoma* as they ought to have been; for the rule is that the duty to answer a signal is as imperative as is the duty to give one.

In answer to my questions on this charge, the master of the *Caspian* gave the following evidence:

"Q. You said while you were going full speed ahead "on the semi-circular course you kept your helm hard-a-"starboard? A. Kept the helm hard-a-starboard, yes.

"Q. Then when you saw the collision imminent you "steadied the *Caspian*? A. Yes.

"Q. How did you do that? A. Putting the wheel to "port. The helm had to go amidships and then I told "him to port.

"Q. Which did you do? A. I told him to steady, "and the wheel was a-starboard, and he put the wheel "to port to steady her.

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"Q. As far as you can estimate, what was your rate of "speed when you came to the dock to pass it on the semi-"circular course you were taking, when you got abreast "of the dock? A. I don't suppose she could have been "going over ten miles anyway, because she hadn't got "under headway yet.

"Q. When you were going this ten miles an hour how "far was the yacht from your course? A. She probably "might have been 50 or 60 feet in from where I would "have gone.

"Q. If instead of steadying the *Caspian* by putting "her helm to port you had kept it hard-a-starboard, and "on the semi-circular course, would you have kept away "from the yacht? A. No sir, her stern would have "swung in on the yacht; her stern was coming in all the "time on the yacht.

"Q. Now when you saw the collision imminent, was "the stern of the yacht across or nearing the course you "were steering? A. Well, she was coming pretty near "the line that I was steering on.

"Q. Was she moving? A. Yes, sir, she was moving.

"Q. Did her stern, when she was backing out, move "towards the course you were steering on? A. Yes."

And this is confirmed by the evidence of the customs officer, Mr. Comer, the agent Mr. Horsey, who were on the dock, and the chief engineer Leslie on the *Caspian*; all of whom said that the *Magedoma* had not stopped up to the time of the collision; and that she was still going backwards; two of them adding that the *Magedoma* was moving to cross the bow of the *Caspian*. And it is proved that the captain of the *Magedoma* waved his hand to the *Caspian* and towards the lake.

This evidence that the *Magedoma* was moving has not been contradicted but is confirmed by the evidence of the captain of the *Magedoma*, and one of the crew, both of whom said they would not swear that the *Magedoma* had

no stern way on her when the boats came together; and the force of the blow on the *Caspian*, which made a breach in her side aft of the paddle wheel of about 3 or 4 feet and back about 10 or 12 feet, confirms this.

The statement of defence further states: "Those in charge of the *Caspian* disregarded the provisions of the Navigation Rules adopted by Order-in-Council on the 25th April, 1905, and amended on the 18th of May, 1906, and particularly Articles 19, 27, 28 and 29."

Before considering these rules, it may be proper to cite here the view expressed by the Supreme Court of the United States on the right of a backing steamer as against a steamer on her regular course in mid-river. In giving judgment in *The Servia*, (1) the Court said "*The Noordland* [the backing steamer] was at no time before the collision, on a definite course as contemplated by the statute and rules of navigation; and on the facts found she cannot claim she had the right of way against the *Servia*. The statutory and steering and sailing rules have little application to a vessel backing out of a slip before taking her course; but the case is one of 'special circumstances' under Rule 24 [Canadian Rules 27 and 29] requiring each vessel to watch and be guided by the movements of the other." See further as to "special circumstances" *The Tweedsdale*, (2) *The Prince Leopold de Belgique*. (3)

This view of the rule as to "special circumstances" did not appear to have been entertained by the captain of the *Magedoma*, who claimed before me that it was not his duty to go ahead and get out of the way of the *Caspian*, and so he allowed his yacht to continue her stern-way in backing towards the course the *Caspian* was taking at the speed proved, instead of making her engine move her ahead, and away from that course, and so giving the

(1) 149 U. S. at p. 156. (2) (1889) P. 164.
(3) (1909) P. 108.

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Caspian the right of way which his wave of the hand to her seems to have indicated. And as to the duty to exercise reasonable skill in such an emergency, see the *Sunlight*, (1). And as to the duty where there is a "chance of escape from a collision", and an "actual necessity" for escape, it is admitted that a captain is justified in taking the benefit of the chance, although it necessitates a departure from the rules, see *The Benares*, (2).

And in *The Rockaway*, (3) the Court said in another backing out case: "The collision in this case was caused by the fault of the tug backing directly under the bows of the steamboat then approaching in plain sight, without any signal having been given to the steamboat to show an intention on the part of the tug to back across her bow. I see no fault on the part of the steamboat. There was no time after the intention of the tug to cross the bow of the steamboat was manifest, for the steamboat to do more than she did." See also *The Koning Willem I*, (4).

Before the note to rule 21 and the rules 27 and 29 were adopted, Dr. Lushington in the *John Buddle* (5) said: "All rules are framed for the benefit of ships navigating the seas; and no doubt circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule however wisely framed. It is at the same time of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances which are alleged to have rendered such a deviation necessary, are most distinctly proved and established; otherwise vessels would always be in doubt, and doing wrong."

(1) (1904) P. 100.
(2) 9 Pro. D. 16.
(3) 25 Fed. R. 775.
(4) (1903) P. 114.
(5) 5 No. Cas. 387.

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And in considering any "special circumstances" warranting a departure from the rules, it must be remembered that these rules were not intended to prevent collisions but to prevent a situation so fixed as to involve "the risk," or "the probability of the risk," of a collision.

Since Dr. Lushington's judgment amendments have been made, and some new rules have been added, so as to provide for special emergencies which suddenly arise and which had not been otherwise provided for. Thus in the note to rule 21, if the risk of collision is so close that it cannot be avoided by the action of the giving way vessel alone, the other vessel "shall take such action as will best aid to avert the collision." Rule 27 provides that, "in obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any "*special circumstances*" which may render a departure from the above necessary in order to avoid immediate danger. And rule 29 is more far reaching by providing that "nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences * * * of the neglect of any *precaution* which may be required by the ordinary practice of seamen, or by the *special circumstances* of the case." And this rule is in harmony with the observations of the court in the *Santiago de Cuba* (1). "They demand that in circumstances of peril the dictates of the highest prudence, and especially all just and peremptory rules of precaution shall be observed."

In this case I find that when the possibility of a risk of collision was imminent, the *Caspian* was on her regular course steaming at the rate of ten miles an hour, that she promptly steadied her course to prevent the swing of her stern causing her to strike the *Magedoma*, that after the *Magedoma's* engine had been given two kicks to give her stern-way and to back out from the dock, it was not

(1) [1873] 10 Blatch. at p. 455.

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reversed so as to give her headway, and out of the course intersecting that on which the *Caspian* was steaming at the rate mentioned, and that she neglected in the special circumstances of the peril then imminent, to observe the dictates of the highest prudence, and "especially the just and peremptory rules of precaution" which the regulations enforce; and that it was her duty to cause her engine to move her ahead so as to keep her out of the course the *Caspian* was taking, as would clearly have best averted the collision.

The defence contends that the damages claimed by the *Caspian* cannot include the loss of profits that might have been made had the *Caspian* been able to continue her voyage on the Saturday afternoon of the collision; the proposed voyage was from Kingston to Charlotte or Rochester, then to Coburg and Port Hope and return to Charlotte, and then back to Kingston. The Sunday continuation of the voyage is objected to by the defendants as being an "excursion." But this objection is not sustained by the Lord's Day Act for it allows "the continuation to their destination of trains and vessels in transit when the Lord's Day begins, and work incidental thereto."

And as to estimated profits lost by the cancellation of the proposed voyage then just begun, I think they are allowable under the case of *The Argentino* (1) as the profits the *Caspian* might ordinarily and fairly be expected to earn on her advertised voyage, and which but for the collision might have been realized by the plaintiff company.

And in giving judgment in the House of Lords, Lord Herschell said, "I think the damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel, and of the earnings which would

(1) 13 P. D. 61 and 191; and in appeal, 14 A. C. 519.

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ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. .... And if at the time of the collision the damaged vessel had obtained an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequences of the collision."

I therefore assess the damages to which the plaintiffs are entitled against the defendant at $460.76, costs to follow the event. The claim of the defendant for damages against the *Caspian* is dismissed.

Solicitors for plaintiffs: *Smythe, King & Smythe;*

Solicitor for defendant: *H. A. Stewart.*

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mission of revision in 1886 omitted a heading to sec. 12 of such Act as originally passed, which was held per Strong J. in the case of *Scwell* v. *The British Columbia Towing and Transportation Company (supra)*, to restrict the apparent generality of the terms of that section. *Held*, assuming that the omission of the heading was legislating so as to make the law in Canada harmonize with the English law, that the action of the revisors in omitting such heading from the statute was validated by the provisions of Chap. 4 of 49 Vict. 1886 respecting the Revised Statutes. WALDIE *v.* FULLUM, ET AL. — — — 325.

6——*Collision—Steamer and sailing ship—Regulations—Arts. 20 and 21—Right of sailing ship to go about when not compelled to*—Art. 20 of the Regulations for Preventing Collisions at Sea provides that where a steam vessel and a sailing vessel are proceeding in such direction as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel. Art. 21 provides that where by any of the rules one of two vessels is to keep out of the way, the other shall keep her course and speed. *Held*, that under the latter rule, a sailing ship when she is compelled to go about cannot do so close ahead of a steamer, so as to embarrass the latter and make it difficult for her to keep out of the way. 2. In this case a sailing ship and a steamer were so close together as to involve risk of collision. The sailing ship undertook to go about without being compelled to and without any good reason to justify the manœuvre, and by so doing embarrassed the steamer and rendered her unable to avoid a collision. *Held*, that the sailing vessel had violated Art. 21, and was responsible for the collision. WATTS, ET AL *v.* SS. *John Irwin*. — 374.

7——*Contract of towage—Principal and agent—Damages*—In cases of towage where the tow is damaged by the unskilful navigation of the tug, quite apart from the contract of towage the duty is imposed on the part of the tug to observe such ordinary care and skill in the towage as will avoid any possible damage or injury. In a continuous contract for towage where part of the work is performed by a tug not the property of the contractor, and where damage is caused to the tow by the unskilful navigation of the tug, the owners of the tug are responsible to the tow, and not the original contractor. MONTREAL TRANSPORTATION CO., LTD., *v.* THE SHIP *Buckeye State*. — 419.

8——*Admiralty Practice—Joinder of actions in rem and in personam—Irregularity—Pleading over without objection taken—Judgment—Appeal—Judgment varied.* In this case the plaintiffs had joined a personal action for the breach of a contract of towage against the towage contractor with one against the owner of a tug for damages arising from the negligent towing of a barge. No objection was taken by the defendants, who pleaded over, and the case proceeded to judgment; the trial judge finding that the owner of the tug performing the towage service was solely responsible for the damage, and dismissing the action as against the towage contractors who had

hired the tug for the service. On appeal, the court, while expressing the opinion that the two actions were improperly joined under the practice in Admiralty cases, did not interfere with the proceedings below in that respect as no objection had been taken thereto; but intimated that the proper course would have been to complete the proceedings *in rem* and if it appeared that the amount of the damages fixed by the judgment was not recovered against the tug, then, if the towage contractors were legally liable, to bring an action against them *in personam* for the difference between the amount recovered and the damages fixed by the judgment. 2. The court directed that the judgment should be varied by reserving the question of costs of the trial, and the question of the liability of the towage contractors, as well as for the costs of the appeals, until it was ascertained if the amount of the damages fixed by the judgment below could be realized against the tug. ATLANTIC COAST STEAMSHIP CO. *v.* MONTREAL TRANSPORTATION CO. ET AL. — — 429.

9——*Collision—Inland Waters Regulations, 1905—Narrow channel—Negligence—Liability.*—For vessels using the St. Lawrence River, the Imperial rules of the road apply from the Victoria Bridge down; above that point such vessels are regulated by the rules passed by the Governor-General in Council on the 20th April, 1905. (See Statutes of Canada 4 & 5 Edw. VIII. p. lx.) 2. The steamer *Norwalk* was proceeding after dark up the St. Lawrence River, and at a point in Lake St. Louis, east of Lightship No. 2, she observed the lights of the tug *Glide* with a tow of barges coming down, and about three thousand five hundred feet distant. Just about this point the channel becomes comparatively narrow and the current swift, making navigation difficult. Under Art. 25 (b) of the above last mentioned rules the descending steamer has the right of way, but must signal the approaching steamer what side of the channel she elects to take. The *Glide* signalled that she was going on the southern side. Under the circumstances it would have been prudent for the *Norwalk* to stop, but she took the risk of keeping on her course and was swung by a cross-current toward the southern side of the channel, which brought her into collision with one of the barges of the tow. It was shown that the *Norwalk* did not keep as far to the northward as she might have done. *Held*, that the *Norwalk* was guilty of negligence, and was solely to blame for the collision. MONTREAL TRANSPORTATION COMPANY *v.* THE SHIP *Norwalk*. — — 434

10——*Rules of navigation—"Special Circumstances"—Claim for profits.*—Where the captain of a ship neglects, in the "special circumstances" of the peril then imminent, to observe the dictates of the highest prudence and especially the just and peremptory measures of precaution which the Rules of Navigation enforce, the ship is liable for damages arising from a collision. 2. *Held*, that the profits that would have been made if the collision had not taken place are recoverable as part of the damages, and are not too remote. LAKE