REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

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

REPORTER.

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JUDGE

OF THE

EXCHEQUER COURT OF CANADA.

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Appointed on the 1st day of October, 1887.

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During the period of these Reports.

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THE HONOURABLE SIR CHARLES HIBBERT TUPPER, K.C.M.G.; P.C.; Q.C.

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ERRATA.

Page 187, line 22, read "contracts" for "contract."

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

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OF THE

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IN THIS VOLUME.

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A.

B.

GENERAL ORDER.

In pursuance of the provisions contained in the 56th section of "The Exchequer Court Act" (50-51 Vict., ch. 16, and 52 Vict., ch. 38) it is ordered that the following rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada :—

1. Any consent in writing signed by the parties, or their attorneys, may, by permission of the Registrar, be filed and shall thereupon become an order of Court.

2. Whenever a claim is referred to the Court by the Head of any Department of the Government of Canada, a consent in writing signed by the parties, or their attorneys, that such claim shall be heard without pleadings, may be filed with the Registrar, and shall thereupon become an order of Court.

3. The Court may, on the application of any party, order that any such claim shall be heard without pleadings.

4. Every such claim shall be ripe for hearing as soon as such order is taken out.

5. Rule 111 of the Exchequer Court of Canada is hereby repealed and the following substituted therefor :—

RULE 111.

Special case may be stated for opinion of Court.

The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties

shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at trial.

Dated at Ottawa, this 8th day of February, A.D. 1894.

GEO. W. BURBIDGE,
J.E.C.

CASES 1839

DETERMINED IN THE

EXCHEQUER COURT OF CANADA.

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

1893
Dec. 14.

AND

HENRY MARTIN FOWLDS, WILLIAM JOHN FOWLDS, AND FREDERICK WILLIAM F. FOWLDS, CARRYING ON BUSINESS UNDER THE NAME, STYLE AND FIRM OF JAS. S. FOWLDS & BROS..... DEFENDANTS.

Expropriation — Navigable stream—Public easement—Riparian rights—Damages.

The public easement of passage in a navigable stream is so far in derogation of the rights of riparian owners as to enable the Crown to make any use of the water or bed of the stream which the legislature deems expedient for improving the navigation thereof.

2. Defendants, who were prosecuting a milling business on certain waters forming part of the Trent Valley Canal, asserted a claim against the Crown for a quantity of land taken for the improvement of the navigation of such waters, and also claimed a large sum for damages alleged to have been sustained by them (1) as riparian owners by reason of the taking of the land on both sides of a head-race preventing any future enlargement of the width of such head-race, and (2) from the fact that they would not be able in the future to use to the full extent all the power which the mill-pond contained because they could not cut race-ways from the pond into the river through the expropriated part.

Held, that while the defendants were entitled to compensation for the quantity of land taken by the Crown they could not recover for

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any injury to the remaining land arising from the utilization of the waters of the stream for the purpose of improving navigation.

Semble, that where no particular estate was sought to be expropriated in a *Notice and Tender* to claimants under sec. 10 of 50-51 Vict. c. 17 (repealed by 52 Vict. c. 13), it is to be presumed that the Crown intended to take whatever estate, &c., claimants had in the lands expropriated.

Statement of Facts.

THIS was a case arising out of a claim for compensation for certain lands taken for the purposes of the Trent Valley Canal, and for damages sustained by the defendants as riparian owners.

The facts of the case are stated in the judgment.

The case was tried before Mr. Justice Falconbridge, Judge *pro hâc vice*, on November 17th and 18th, 1892.

McCarthy, Q. C. (with whom was *H. S. Osler*) for the defendants: The rights of the parties have to be determined by the notice and tender which the Minister of Railways and Canals has served upon the defendants. Under the statute the Minister has the power to take any estate he pleases, but whatever estate he so takes must appear in the notice. In the notice here the Minister purports to take the fee simple from the defendants. No mention or exception is made of any easement the Crown pretended to have in the lands, and it should not be considered by the court in assessing compensation. When the Crown takes the lands under the statute (50-51 Vict. c. 17) and does what the statute directs in order to acquire title from the owner, then the question to be determined by the court is one of compensation, not title. This notice may be likened to the notice to treat which prevails in matters of railway expropriation between subject and subject in England. [Cites *Cripps on Compensation* (1).]

(1) Pp. 56, 61 and 63.

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Argument of Counsel.

Then, in assessing compensation the capabilities as well as the present use of the property have to be considered. [Cites *Lewis on Eminent Domain* (1); *Boom Company* v. *Patterson* (2).]

Robinson, Q. C., for the plaintiff, contended that the defendants' ownership of the land did not give them any riparian rights because they had been enjoyed by the Crown in derogation of rights of the defendants' predecessor in title.

Secondly, any claim that might have existed for interference with these rights was barred by the acts of the defendants' predecessor in title.

Thirdly, the Crown had a perfect right under 6 Wm. IV. c. 35, secs. 6, 8, 10 and 12; 7 Wm. IV. c. 53 and R. S. C. c. 36 s. 7, to make the river improvements complained of. [Cites *Lewis on Eminent Domain* (3).]

Fourthly, the rule is that you are to compensate people for property of this kind upon what its market value, for any reasonably immediate use, was at the very moment of taking. I submit that the English and American authorities are all in that direction. [Cites *Lewis on Eminent Domain* (4); *Re Macklem and Niagara Falls Park* (5).]

Hogg, Q. C., followed for the plaintiff, and dealt with the evidence.

McCarthy, Q. C., in reply, cited *Ripley* v. *G. N. Railway Co.* (6); *Morgan* v. *Metropolitan Ry Co.* (7); *R.* v. *Corporation of Mersey, &c., Navigation Co.* (8); *Parson Water Co.* v. *Knapp* (9); *Kane* v. *Baltimore* (10); *Varick* v. *Smith* (11); 6 Wm. IV c. 35 s. 6.

(1) Sec. 478, 479.
(2) 98 U.S. R. 403.
(3) Sec. 71.
(4) Secs. 478, 479. 480.
(5) 14 Ont. App. 20.
(6) L. R. 10 Ch. 435.
(7) L. R. 3 C. P. 553.
(8) 9 B. & C. 95.
(9) 33 Kan. 752, 755, 756.
(10) 15 Md. 240.
(11) 5 Paige (N. Y. Ch.) 137, 146, 147.

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Reasons for Judgment.

FALCONBRIDGE, J. now (December 14th, 1893) delivered judgment.

The case of Her Majesty is presented with great fulness and particularity in the information.

The issues tendered by the answer are as follows:

(1). Paragraph 4.—The defendants deny that the Commissioners appointed to carry out works on the Trent River, under 6 Wm. 4 c. 35, & 7 Wm. 4 c. 58, entered on property now belonging to defendants; or caused any survey to be made of that portion of the land hereinbefore referred to as in the 3rd paragraph of the information alleged.

(2). Paragraph 5.—They deny that any reservation of any part of the lands acquired by them from Hon. James Crooks was made or marked for Her Majesty by Her Surveyor-General of Woods within the condition in the 7th paragraph of the information set forth and referred to.

(3). Paragraph 6.—They say that the claim of said James Crooks for compensation for injury done to his said mills upon the said property which is referred to in the 9th paragraph of the said information was wholly with reference to the water-power as affected by the construction of the Public Works referred to, and the immediate injury caused by the construction of the said Public Works and that such claim and the award of the arbitrators had no relation whatever to the expropriation of any part of said property, nor did it award or purport to award any compensation for or in respect of the lands herein sought to be expropriated.

(4). Paragraphs 7 & 8.—They deny having been guilty of laches, acquiescence or delay.

(5). Paragraph 9.—They deny that Her Majesty has been in possession or that she is entitled to claim the benefit of the Statute of Limitations.

It is admitted that the $2,000 offered by the Crown is a sufficient amount of compensation for the land alone; but the defendants claim a very much larger sum besides for damages alleged to be sustained by them, 1st, as riparian owners by reason of appropriation of land on both sides of the head-race, preventing any enlargement of the present width of the head-race, and 2ndly, that they will not be able to use to the full extent all the power which the pond

contains, because they cannot cut race-ways from the pond into the river through the expropriated part and must utilize their power entirely on the land to the east of the expropriation. And the defendants submit that it is reasonable to ask that one-half of the power be assigned to the expropriated part and one-half to the rest of the land to the east, and that they should be indemnified, therefore, for the loss of the use to which they say they could have put that property in the future.

With reference to the first item, it was suggested by one of the defendants in giving evidence that the Government owning the land might at any time exclude the water from going through the head-race; but Mr. Hogg, of Counsel for the Crown, stated that the Government did not intend to expropriate land under water where the bridge is over the race-way. This can be put in some binding form if desired, and I shall exclude that particular from consideration.

I do not give effect to the contention that if any easement already existed in the Crown, it must necessarily be excepted from the notice.

I am of the opinion that the works having been constructed not earlier than 1837,—after the passing of the Act 6 Wm. IV. c. 35, Mr. Crooks' right to claim compensation accrued as against the Crown for any damage sustained by him in consequence thereof, and that the defendants are bound by the acts of their predecessor in title.

And it seems to me that the rule laid down in *Lewis on Eminent Domain* (1), and in the cases there cited, is against the defendants' contention as to the water-power or in any other view of their alleged rights as riparian proprietors.

Even if the law were in favour of the defendants,

(1) S. 71.

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Reasons for Judgment.

they would still be confronted with a serious practical question, viz., the value at the time of taking.

No doubt, there are enormous capabilities for leasing or selling water-power, but the same capabilities have existed there and elsewhere along the river for all time, and they have been only sparsely and intermittently sold or used.

The demand has been, to use the language of the learned Chief Justice of Ontario in *re Macklem* v. *Niagara Falls Park* (1), "most languid if not wholly non-existent."

The rule as to the value of property for particular uses is very well put by the Supreme Court of United States in *Boom Co.* v. *Patterson* (2), where it is said "the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

Judged by this standard and by what defendants can do with the land that remains to them, I find that it would require a more sanguine view of the situation than that which I take, to give damages beyond the value of the land.

There will be judgment for Her Majesty The Queen in terms of the claim appended to the information, with costs.

Judgment accordingly,

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

Solicitors for defendants: *McCarthy, Osler, Hoskin & Creelman.*

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(1) 14 Ont. App. at p. 27. (2) 98 U. S. R. 408.

TORONTO ADMIRALTY DISTRICT.

1893
Oct. 20.

THE SHIP "W. J. AIKENS."

Maritime law—Seamen's wages—Action for—Jurisdiction of Exchequer Court—R.S.C. c. 75, s. 34—Costs.

A seaman, the engineer of a tug, took proceedings in the Exchequer Court, Admiralty side, on a claim for $136 wages, and arrested the ship. On the trial it was contended that the court had no jurisdiction to try a claim for less than $200, the owner not being insolvent, the ship not being under arrest, and the case not referred to the court by a judge, magistrate, or justice pursuant to R.S.C. c. 75 s. 34, *The Inland Waters Seamen's Act.*

Held, that *The Admiralty Act*, 1891, conferred upon the Exchequer Court all the jurisdiction possessed by the High Court, Admiralty Division, in England as it stood on the 25th July, 1890, the date of the passing of *The Colonial Courts of Admiralty Act*, 1890, and that the Admiralty Court in Canada could now try any claim for seamen's wages, including claims below $200; and that s. 34 of R.S.C. c. 75 was repealed by implication (not having been expressly preserved) to the extent, at any rate, that it curtailed the jurisdiction of the Admiralty Court to entertain claims for seamen's wages below $200 in amount.

Held, as to the costs of any such action, that they were in the discretion of the judge trying the cause under Rule 132 of the Admiralty Rules of the Exchequer Court of Canada.

This was the practice and rule in England on July 25th, 1890, and since. *Tenant* v. *Ellis* 6 Q.B.D. 46; *Rockett* v. *Clippingdale*, (1891) 2 Q.B. 293; *The Saltburn*, (1892), Prob. 333 referred to.

THIS was an action brought to recover an amount claimed for wages by the plaintiff as engineer of the tug *W. J. Aikens*. The total original claim was $149.33, reduced by an admitted cash payment of $12.50, leaving the net balance sued for, $136.83.

The case was tried before His Honour Judge McDougall, Local Judge for the Toronto Admiralty District, at Collingwood, on the 20th October, 1893.

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THE SHIP W. J. AIKENS.

Reasons for Judgment.

Moberly for the plaintiff;

G. W. Bruce for the ship.

After hearing all parties the learned judge adjusted the account as follows:—

The original claim should be—

Three months' wages as engineer at $40 per month	$120
Some extra labour pumping in the tug in Spring	10
Total	$130

He also found that various payments prior to action had been made, amounting in all, to $100; leaving a balance due plaintiff of $30.

McDOUGALL, L.J.—The principal question raised upon the whole case was that of jurisdiction. It was contended that the present action could not be brought in the Exchequer Court, as the amount claimed and found to be due was below the sum of $200, and ss. 34 and 35 of *The Inland Waters Seamen's Act*, R.S.C. c. 75, were relied upon.

These sections are as follows:—

Sec. 34. "No suit or proceedings for the recovery of wages under "the sum of $200 shall be instituted by or on behalf of any seaman or "apprentice belonging to any ship subject to the provisions of this Act, "in any Court of Vice-Admiralty, or in the Maritime Court of Ontario, "or in any Superior Court, unless the owner of the ship is insolvent "within the meaning of any Act respecting insolvency, for the time "being in force in Canada, or unless the ship is under arrest or is sold "by the authority of any such court as aforesaid, or unless any judge, "magistrate, or justices acting under the authority of this Act, refer "the case to be adjudged by such court, or unless neither the owner "nor the master is or resides within twenty miles of the place where "the seaman or apprentice is discharged or put ashore."

Sec. 35. "If any suit for the recovery of a seaman's wages is insti- "tuted against any ship, or the master or owner thereof, in any Court "of Vice-Admiralty, or in the Maritime Court of Ontario, or in any "Superior Court in Canada, and it appears to the court, in the course

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Reasons for Judgment.

"of such suit, that the plaintiff might have had as effectual a remedy "for the recovery of his wages by complaint to a judge, magistrate or "two Justices of the Peace under this Act, then the judge shall certify "to that effect, and thereupon no costs shall be awarded to the "plaintiff."

No doubt that prior to the passage of *The Admiralty Act*, 1891, these sections of *The Inland Waters Seamen's Act* prevailed, and no action for the recovery of an amount less than $200 for seamen's wages could have been properly brought in the Maritime Court of Ontario, unless the case came within some one of the exceptions named in section 34. Has the passage of *The Admiralty Act*, 1891, altered the law? Section 3 of that Act declares that, "in pursuance of the powers given by *The Colonial Courts of Admiralty Act*, 1890, aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by *The Colonial Courts af Admiralty Act*, or by *The Admiralty Act*, 1891.

Section 4 declares that: "Such jurisdiction shall be exercised by the Exchequer Court throughout Canada and the waters thereof, whether tidal or non-tidal," etc.

Now, let us see what is the jurisdiction conferred by *The Colonial Courts of Admiralty Act*, 1890. Section 2, sub-section 2, states: "The jurisdiction of a Colonial Court of Admiralty is to be (subject to the provisions of this Act) over the like places, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction, in like manner and to as full an extent, as the High Court in England," etc., etc.

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THE SHIP W. J. AIKENS.

Reasons for Judgment.

Section 3 enacts that the legislature of a British Possession may, by any Colonial law, declare any court of unlimited civil jurisdiction, whether original or appellate, in that Possession, to be a Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit, territorially or otherwise, the extent of such jurisdiction.

Now, our statute, *The Admiralty Act*, 1891, in its preamble, recites the powers conferred by the English Act of 1890, and that the Exchequer Court of Canada is a court of law in Canada, with unlimited civil jurisdiction, and then proceeds, by virtue of the powers conferred by the English Act, to declare the Exchequer Court to be a Court of Admiralty. It defines the extent of the jurisdiction by section 3, as we have seen, to be all the powers conferred by the English Colonial Courts of Admiralty Act, 1890, as well as by *The Admiralty Act*, 1891, itself.

It limits the jurisdiction territorially by section 13, by making the action to be in the local territorial court:—

(*a.*) Where the ship, the subject of the suit, is within the local district;

(*b.*) When the owner, or owners, of the largest part of the shares reside in the district;

(*c.*) The port or registry of the ship is in the district; or

(*d.*) Where the parties agree, in writing, that it shall be tried in the district.

Section 9 enacts that every local judge shall have and exercise all the jurisdiction, and all the powers and authority relating thereto, within his district, that the Judge of the Exchequer Court could have or exercise in respect of the admiralty jurisdiction of the court.

Section 20 gives the judge of the Maritime Court of Ontario all the powers of a local judge in the Toronto Admiralty District.

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Reasons for Judgment.

Section 23 abolished the Maritime Court, saving all pending actions, and preserved the existing rules and practice till new rules were made.

The 189th section of *The Merchants' Shipping Act*, 1854, was in terms precisely the same as section 34 of *The Inland Waters Seamen's Act*, and doubtless the section in the latter Act was taken from it.

Section 10 of *The Admiralty Court Act*, 1861, reads as follows: "The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, etc., etc. Provided always, that if in any such cause the plaintiff do not recover £50 he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court."

The 9th section of *The County Courts Admiralty Jurisdiction Act*, 1868, conferred upon the Court of Admiralty power to order proceedings which might without agreement have been taken in a County Court having admiralty jurisdiction to be taken in a Court of Admiralty, and this power was transferred and vested in the Admiralty Division of the High Court of Justice. It has been held that the effect of this section was to restore to the Court of Admiralty its inherent jurisdiction over the actions therein mentioned, whenever such jurisdiction had been taken away by previous legislation; and consequently in England, at the date when *The Colonial Courts of Admiralty Act*, 1890, was passed and became law, the Admiralty Division had admiralty jurisdiction in all actions of wages, irrespective of the smallness of the plaintiff's claim (1).

Upon the question as to the right of the plaintiff to recover costs where he brought his action in the Court of Admiralty for an amount which he could have re-

(1) The *Empress* L.R. 3 A. & E. 502.

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Reasons for Judgment.

covered in a County Court having admiralty jurisdiction, it has been expressly held that the provisions of Order 55 of the English Judicature Act has impliedly repealed all the restrictions imposed by section 9 of *The County Courts Admiralty Jurisdiction Act*, 1868, in reference to costs, and that therefore no judge's certificate is required; but that the costs in each case rest in the judge's discretion. This was expressly decided, first, by the Queen's Bench Division in 1880, in the case of *Tenant* v. *Ellis* (1), approved by the Court of Appeal in *Rockett* v. *Clippingdale* (2), and also affirmed in *The Saltburn* (3).

Upon turning to the rules of practice adopted under *The Admiralty Act*, 1891, and approved by an order of Her Majesty in Council, we find by Rule 132 that costs are left in the discretion of the judge. Rule 224 directs that, where the sum in dispute does not exceed $200, one-half only of the fees (other than disbursements) set forth in the table annexed to the rules shall be charged or allowed. Rule 228 directs "That in all cases not provided for by these rules the practice for the time being in force in respect to admiralty proceedings in the High Court of Justice in England shall be followed."

From the foregoing I conclude that it is quite clear that in England, at the date of the passage of *The Colonial Courts of Admiralty Act*, 1890, the Court of Admiralty had jurisdiction in all cases of wages, salvage, or otherwise, regardless of the amount involved; that with reference to clauses in previous statutes purporting to limit that jurisdiction, such clauses had been repealed by implication by the latter statutes enlarging the jurisdiction of the Court of Admiralty; and that clauses in statutes which purported to have for their

(1). 6 Q.B.D. 46. (2). (1891) 2 Q.B. 293.
(3) (1892) Prob. 333.

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Reasons for Judgment.

aim the compelling of suitors claiming small amounts to proceed in inferior courts having admiralty jurisdiction, and depriving them of costs if they brought their action in the Court of Admiralty, were also to be treated as repealed, and costs in such cases, though brought in the Court of Admiralty, were, nevertheless, in the discretion of the judge.

I also conclude that this jurisdiction, with all the foregoing consequences, was conferred upon the Exchequer Court by our Admiralty Act, 1891, and a wider jurisdiction was conferred by this latter Act upon the Exchequer Court than that existing in the Vice-Admiralty Courts of the Dominion or the Maritime Court of Ontario prior to the passage of the Admiralty Act. That sections 34 and 35 of *The Inland Waters Seamen's Act* (1), and the limitations therein contained not having been expressly preserved have been impliedly repealed, so far at any rate as they affect the jurisdiction of the Exchequer Court to entertain an action for wages under $200.

In my opinion, therefore, the Exchequer Court of Canada, in the exercise of its admiralty jurisdiction, can entertain a claim for seaman's wages without any limit as to amount, and that in every such case the determination of the question of costs rests in the discretion of the judge trying the case.

In the present case I find a verdict for the plaintiff for $30, being for the balance of wages due him, and under Rule 133 I fix the costs of the plaintiff at the lump sum of $30 in lieu of taxed costs.

Judgment accordingly.

Solicitors for plaintiffs: *Moberley & Gannon.*

Solicitors for the ship: *Bruce & Fair.*

(1). R.S.C. c. 75.

1894
Jan. 9.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AND

PERMELIE LA FORCE.....DEFENDANT.

Patent of Invention—Sci. Fa. to repeal same—Prior foreign invention unknown to Canadian inventor—Specification, interpretation of by reference to drawings—Practice—Right to begin.

The pneumatic tire as applied to bicycles came into use in 1890. It consisted of an inflatable rubber tube with an outer covering or sheath, which was cemented to the under surface of a U-shaped rim similar to that which had been used for the solid and cushion rubber tires which preceded it. This tube was liable, in use, to be punctured, and as the sheath was cemented to the rim of the wheel it was not readily removable for the purpose of being repaired. La Force's invention met that difficulty by providing for the use of a rim with the edges turned inward so as to form on each side a lip or flange, and of an outer covering or sheath to the edges of which were attached strips made of rubber or other suitable material, which fitted under such lips or flanges and filled up the recess between them. When the rubber tube is not inflated, this tire may readily be attached to or removed from the rim of the wheel; but when inflated the covering or sheath is expanded and the outer edges of the strips attached thereto are forced under the flanges of the rim, and the whole securely held in position by the pressure of the inflated tube upon such strips.

The defendant's assignor hit upon this idea in April, 1891, and in company with his brother made a section of a rim and tire on this principle in May following. On the 3rd of August in the same year a patent therefor was applied for in Canada and on the 2nd December following the defendant obtained it. In March, 1891, Jeffery, at Chicago in the United States, conceived substantially the same device and confidentially communicated the nature thereof to his partner and patent solicitor. On the 27th of July, he applied for a United States patent, and on the 12th day of January, 1892, such patent was granted to him. On the 5th of February, 1892, he applied for a Canadian patent which was granted to him on the first of June in the same year.

When in May, 1891, La Force's conception of the invention was well defined there had been no use of the invention anywhere, and

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Statement of Facts.

the public had not anywhere any knowledge or means of knowledge thereof.

Held, that the fact that prior to the invention of anything by an independent Canadian inventor, to whom a patent therefor is subsequently granted in Canada, a foreign inventor had conceived the same thing but had not used it or in any way disclosed it to the public, is not sufficient under the patent laws of Canada to defeat the Canadian patent.

2. That the drawings annexed to a patent may be looked at to explain or illustrate the specification.

3. Under the General Order of the Exchequer Court of Canada bearing date the 5th December, 1892, and the provisions of sec. 41 of 15-16 Vict. (U.K.) c. 83, the defendant in an action of *Scire Facias* to repeal a patent for invention is entitled to begin and give evidence in support of his patent, and, if the plaintiff produces evidence to impeach the same, the defendant is entitled to reply.

THIS was an action of *scire facias* to repeal letters-patent for an invention.

The facts of the case are stated in the judgment.

After the writ of *scire facias* was served and appearance entered by the defendant the following pleadings were delivered between the parties :

Declaration.

[TITLE OF CAUSE.]

"DOMINION OF CANADA, }
"To Wit: }

"Our Lady the Queen sent to Her Sheriff of the County of Carleton, or any other of Her Sheriffs in the Dominion of Canada, Her Writ clothed in these words :—

Writ of Scire Facias.

[TITLE OF CAUSE.]

"VICTORIA by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

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THE QUEEN v. LA FORCE.

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"To the Sheriff of the County of Carleton or any other of Our Sheriffs in the Dominion of Canada, Greeting:

"Whereas We lately by Our letters-patent sealed with the Seal of Our Patent Office in the City of Ottawa, in Our Dominion of Canada, and signed by the Honourable John Carling, Our Commissioner of Patents and one of Our Privy Council for Canada, and bearing date the second day of December, A.D. 1891, and registered in Our said Patent Office at Ottawa aforesaid as No. 37890, reciting that whereas Hippolyte Joseph La Force, of the City of Toronto, Ontario, shoemaker, had petitioned the Commissioner of Patents praying for the grant of a patent for an alleged new and useful improvement in pneumatic tires (he having assigned to the said Permelie La Force, of the said City of Toronto, all his right, title and interest in and to the said invention) a description of which invention is contained in the specification of which a duplicate is thereunto attached and made an essential part thereof, and had elected his domicile at the said City of Toronto, in Canada, and had also complied with the other requirements of *The Patent Act*, chapter 61, *Revised Statutes of Canada*, did by Our said letters-patent grant to the said Permelie La Force, her executors, administrators, legal representatives and assigns for the period of fifteen years from the date thereof the exclusive right, privilege and liberty of making constructing and using and vending to others to be used in Our Dominion of Canada the said invention, and in which said letters-patent, amongst other provisoes and conditions therein expressed, it was and is provided that the grant thereby made should be subject to adjudication before any court of competent jurisdiction and should be subject to the conditions contained in

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the thirty-seventh and other sections of the Act aforesaid.

"And whereas We lately by Our letters-patent sealed and signed as aforesaid and bearing date the first day of June A.D. 1892, and registered in Our said Patent Office at Ottawa as No. 39035, reciting, amongst other things, that whereas Thomas B. Jeffery, of the City of Chicago, in the State of Illinois, in the United States of America, Cycle manufacturer, had petitioned the said Commissioner of Patents praying for the grant of a patent for alleged new and useful improvements in pneumatic tires, a description of which invention is contained in the specification of which a duplicate is thereunto attached and made an essential part thereof and had elected his domicile at Ottawa, Ontario, and had also complied with the other provisions of the said patent Act, did by our said last mentioned letters-patent grant to the said Thomas B. Jeffery, his executors, administrators, legal representatives and assigns for the period of fifteen years from the date thereof the exclusive right, privilege and liberty of making, constructing and using and vending to others to be used in the Dominion of Canada the said invention of him the said Thomas B. Jeffery.

"And whereas the said Thomas B. Jeffery, being desirous for the reasons hereinafter mentioned to impeach the first recited letters-patent bearing date the second day of December, A.D. 1891, granted to the said Permelie La Force as aforesaid, has obtained a sealed and certified copy thereof, and of the petition, affidavit, specification and drawings relating thereto, and has in accordance with the provisions in that behalf contained in the said Act and the Acts amending the same filed the said sealed and certified copies of said letters-patent, petition, affidavit, specification and drawings in the office of the Registrar of Our Exchequer Court of

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Canada and the said letters-patent and documents aforesaid are now as of record in the said Court.

"And whereas We are given to understand that Our said letters-patent bearing date the second day of December, A.D. 1891, and numbered 37890 issued to the said Permelie La Force as aforesaid, were and are contrary to law in this that whereas the said Hippolyte Joseph La Force did in the said petition state that he had invented a certain new and useful improvement in pneumatic tires not known or used by others before his invention thereof, as set forth in the said specification and drawings accompanying said petition (being the specification and drawings attached to said letters-patent No. 37890).

"And whereas the said Hippolyte Joseph La Force in the said affidavit did swear that he verily believed that he was the inventor of the alleged new and useful improvement in pneumatic tires described and claimed in the said specification and did swear that the several allegations contained in the said petition were respectively true and correct.

"And whereas We are given to understand and be informed that the said Hippolyte Joseph La Force did not invent the said alleged invention in the said petition and letters-patent No. 37890 mentioned and claimed.

"And also that the said Hippolyte Joseph La Force was not the true and first inventor of the said alleged invention of an improvement in pneumatic tires in said letters-patent No. 37890 mentioned and claimed, but that the said Thomas B. Jeffery was the true and first inventor.

"And also that the specification to said letters-patent No. 37890 granted to the said Permelie La Force as aforesaid does not correctly and fully des-

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cribe the nature of the invention claimed to be patented thereby.

"And also that the specification to said letters-patent No. 37890 granted to the said Permelie La Force as aforesaid does not correctly describe the mode or modes of operating the said alleged invention in said letters-patent No. 37890 mentioned and claimed.

"And also that no person from the reading of said specification or from perusing and studying the same would be able to manufacture and construct the said alleged invention so as to make the same useful, and that with the sole aid of the said specification and without assistance from the patentee and directions and information other than that contained in the said letters-patent the article attempted to be patented could not be manufactured.

"And also that the said specification does not fully explain the principle and the several modes in which it is intended to apply and work out the said alleged invention.

"And also that said specification does not state clearly and distinctly the contrivances and things which are thereby claimed as new and for the use of which the said Permelie La Force claims an exclusive property and privilege.

"By reason and means of which said several premises the said letters-patent so granted as aforesaid to the said Permelie La Force were, are and ought to be void and of no force and effect in law.

"And We, being willing that what is just in the premises should be done, command you Our sheriff of Our said county of Carleton or other Our said sheriffs that by good and lawful men of your bailiwick you give notice to the said Permelie La Force that before Us, in Our said Exchequer Court of Canada, she be and appear within ten days from the service upon her of such

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notice and of a copy of this writ, inclusive of the day of such service, to show if she has or knows anything to say for herself why the said letters-patent No 37890 as aforesaid so granted to her ought not, for the reasons aforesaid, be adjudged to be void, vacated, cancelled and disallowed, and further to do and receive those things which Our said court shall consider right in that behalf, and that you then return and have there the names of those persons by whom you shall have caused such notice to be given to the said Permelie La Force, of this writ, together with this writ immediately after the execution thereof.

"Witness the Honourable George W. Burbidge, Judge of the Exchequer Court of Canada, at Ottawa, the twenty-fourth day of January in the year of Our Lord one thousand eight hundred and ninety-three and in the fifty-sixth year of Our reign.

(Sgd.) L. A. AUDETTE,
Registrar.

"Whereupon on this present day, that is to say on the eleventh day of February, A.D. 1893, the sheriff of the city of Toronto returned to Our said Lady the Queen in Her Exchequer Court of Canada that by Alfred Wright Harris and James Dilworth, good and lawful men of his bailiwick, he had given notice to the said Permelie La Force as he the said sheriff was by the said writ commanded and thereupon the said Permelie La Force, by Messrs. Rowan and Ross her solicitors, comes, whereupon Sir John Sparrow David Thompson, Knight Commander of the most Honourable Order of St. Michæl and St. George, Attorney-General of the Dominion of Canada, Solicitor of Our said Lady the Queen, who for Our said Lady the Queen prosecutes in this behalf, being present here in Court in his own proper person, prays that the said letters-patent No. 37890 may be adjudged to be void,

vacated, cancelled, and disallowed upon the grounds in said writ mentioned and also upon the further ground that the said invention, as comprised in said letters-patent No. 37890 as patented, was not, at the time of the alleged invention thereof and is not, of any use, benefit or advantage to the public.

Delivered, &c.

Particulars of Objections.

[TITLE OF CAUSE.]

"The following are the particulars of the objections upon which the plaintiff will rely at the trial of this action with respect to the validity of the letters-patent No. 37890, granted to the defendant and in question herein:—

"1. That Hippolyte Joseph La Force did not invent the said alleged invention comprised in said letters-patent No. 37890, inasmuch as the said alleged invention had been invented by others prior to his invention thereof, particularly by said Thomas B. Jeffery in the writ of *scire facias* herein mentioned.

"2. That the said Hippolyte Joseph La Force was not the true and first inventor of the alleged invention comprised in letters-patent No. 37890, inasmuch as the said alleged invention had been invented prior to his invention thereof, by the said Thomas B. Jeffery, who was and is the true and first inventor thereof.

"3. That the said alleged invention comprised in said letters-patent No. 37890, as patented, was not at the time of the alleged invention thereof and is not of any use, benefit or advantage to the public.

"4. That the specifications and drawings annexed to said letters-patent and dated the 30th of August, 1891, do not correctly and fully describe the nature of the said alleged invention, or the mode or modes of operating the same, inasmuch as the said specifications do

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not describe in what manner or by what means the strips mentioned therein are to be attached to the said covering mentioned therein, or whether the said strips are to meet in the centre of the felloe or otherwise, or whether the inflatable rubber tube is required to be larger or smaller in diameter than the said outer covering, or how or in what manner the said rubber tube is to be inflated, and in other respects the said specifications are insufficient, ambiguous and misleading, so that an ordinary skilled artisan reading the said specification could not, with the sole aid thereof, and without directions and information other than that contained in the said patent, manufacture the said alleged invention; and further, that the said specifications do not state clearly and distinctly the contrivances and things claimed as new, and for the use of which the patentee claims an exclusive property and privilege in the said alleged invention.

" Delivered, &c.

Pleas.

[TITLE OF CAUSE.]

" The eighteenth day of February, in the year of Our Lord one thousand eight hundred and ninety-three.

" 1. And the said Permelie La Force, by her solicitors, Rowan & Ross, as to the first suggestion in the writ of *scire facias* issued, herein contained, whereby it is suggested and alleged that Hippolyte Joseph La Force, in the said writ named, did not invent the said invention in the said writ mentioned, says that the said Hippolyte Joseph La Force did invent the said invention, and that the several allegations contained in the petition and affidavit filed by the said Hippolyte Joseph La Force, referred to in the said writ, were respectively true and correct.

" 2. And as to the second suggestion in the said writ contained, whereby it is suggested and alleged that the

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said Hippolyte Joseph La Force was not the true and first inventor of the said alleged invention, but that one Thomas B. Jeffery was the true and first inventor thereof, the defendant, Permelie La Force, says that the said Hippolyte Joseph La Force was the true and first inventor of the said invention, and that the said Thomas B. Jeffery was not the true and first inventor thereof.

" 3. And as to the third suggestion in the said writ contained, whereby it is suggested and alleged that the specification to the said letters-patent granted to the said Permelie La Force does not correctly and fully describe the nature of the invention claimed to be patented thereby, the defendant, Permelie La Force, says that the said specification does correctly and fully describe the nature of the said invention.

" 4. And as to the fourth suggestion in the said writ contained, whereby it is suggested and alleged that the specification does not correctly describe the mode or modes of operating the said invention in the said letters-patent mentioned and claimed, the defendant, Permelie La Force, says that the said specification does correctly describe the mode or modes of operating the said invention.

" 5. And as to the fifth suggestion in the said writ contained, whereby it is suggested and alleged that no person, from reading the said specification and from perusing and studying the same, would be able to construct the said invention so as to make the same useful, and that with the sole aid of the said specification and without assistance from the patentee, and instruction and information other than that contained in the said letters-patent, the article attempted to be patented could not be manufactured, the said Permelie La Force says that any person, with the sole aid of the said specification and without assistance from the patentee, and without instruction and information other than that

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contained in the said letters-patent, could easily manufacture the article thereby patented.

" 6. And as to the sixth suggestion in the said writ contained, whereby it is suggested and alleged that the said specification does not fully explain the principle and the several modes in which it is intended to apply and work out the said invention, the said Permelie La Force says that the said specification fully explains the principle and the several modes in which it is intended to apply and work out the said invention.

" 7. And as to the seventh suggestion in the said writ contained, whereby it is suggested and alleged that the said specification does not clearly and distinctly state the contrivances and things which are thereby claimed as new, and for the use of which the said Permelie La Force claims an exclusive privilege and property, the said Permelie La Force says that the said specification does clearly and distinctly state the contrivances and things which are thereby claimed as new, and for the use of which she claims such exclusive privilege and property."

Delivered, &c.

Joinder of issue.

[TITLE OF CAUSE.]

The 21st day of February in the year of Our Lord one thousand eight hundred and ninety-three.

And the said Sir John Sparrow David Thompson, who for Our said Lady the Queen prosecutes as aforesaid, for Our said Lady the Queen joins issue upon the defendant's pleas and every of them.

Delivered, &c.

Evidence was taken at Toronto on the 20th and 21st October, 1893, and, by agreement, the argument on the questions of law was submitted on written factums.

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Upon the opening of the case Mr. *Ritchie*, Q.C. for the defendant, stated that, under the practice applicable to this case, the defendant had the right to begin and reply on the issues raised in the proceedings. This happened by reason of the General Order of the Exchequer Court dated the 5th December, 1892, and sec. 41 of 15 & 16 Vict. [U.K.] c. 83, whereby it is enacted that the defendant in such a proceeding as this is entitled to begin and give evidence in support of his patent, and if the plaintiff produce evidence to impeach the same, the defendant is entitled to reply (1).

The following contentions were submitted by *Ritchie Q.C.* and *Ross* for the defendant:—

1. There is nothing in any of the Canadian Patent Acts to displace the rule of law that, where there are two conflicting grants of letters-patent for a novel invention that which is first sealed is alone valid, and that subsequently sealed is of no force or effect whatever. [Cites *Hindmarch on Patents* (2); *Frost on Patents* (3); *Ex parte Dyer*, (4); *Foster on Scire Facias* (5); *Saxby* v. *Hennett* (6); *Barter* v. *Howland* (7).]

If a patent is actually sealed, no subsequent valid patent for the same invention can be issued unless *mala fides* is brought home to the first patentee. *Mala fides* being shown, the second patent in England was given an earlier date than the date of the patent first sealed, so absolute was the rule that a patent *prior tempore* was *potior jure*. [Cites 15 & 16 Vict., cap. 83 sec. 23; *Edmunds on Patents* (8); *The Patent Act* 1883

(1) This course of procedure is still followed in England in a proceeding by petition to repeal a patent. *See* as to that, and the burden of proof, *Terrell on Letters-Patent*, 2nd ed. p. 254, *et seq.*

(2) (Eng. ed.) P. 32.
(3) P. 287.
(4) Holroyd on Patents 59.
(5) Pp. 246, 247.
(6) L. R. 8 Exch. p. 210.
(7) 26 Gr. 135.
(8) P. 655, 685.

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sec. 13; *Ex parte Bates & Redgate* (1); *Saxby* v. *Hennett* (2).]

In England if two applications are made on the same day, patents are issued to both applicants. [*Re Dering's Patent* (3).]

2. The Canadian Patent Acts, unlike the American, afford a rival and earlier inventor no remedy against a patentee. Sec. 19 R.S.C. c. 61 provides only for cases of conflicting applications. The corresponding section of the American Act goes further and provides for an interference between an application and a conflicting unexpired patent, and it is made clear that priority of invention is to determine the rights of the parties. [Cf. sec. 19 R. S. C. c. 61 with sec. 4904 of the American Act in the Revised Statutes of the United States. See sec. 4918 of the latter as to interfering patents.]

If the inventor does not file an application and take issue with his rival in the Patent Office under sec. 19, but allows a patent to issue to the rival inventor, he is without remedy under our Patent Acts.

There is nothing in any of our Patent Acts to show that a rival inventor, even if he has a subsequent patent, is in any better position in attacking a prior patent than any third person who simply desires to make the invention public property. Sec. 34 of R.S.C. c. 61 says "Any person who desires to impeach..... may." The words "any person" mean "any British subject resident in Canada." [Cites *Macleod* v. *Attorney-General N.S. Wales* (4); *Jefferys* v. *Boosey* (5).] Jeffery is not entitled to the writ merely because he holds a subsequent patent. [Cites *Foster on Scire Facias* (6).]

3. If Jeffery has any remedy it is not by *scire facias*, which is a Crown action to repeal and cancel a patent

(1) L. R. 4 Ch. 577.
(2) L. R. 8 Exch. 210.
(3) 13 Ch. D. 393.
(4) (1891) A.C. 458.
(5) 4 H. L. C. p. 926.
(6) P. 256.

respecting which Her Majesty has been deceived or by which the public, her subjects, are prejudiced. [Cites *Hindmarch on Patents* (1).]

The cases in which *scire facias* will lie, are set forth in *Hindmarch on Patents* (2). Jeffery being an alien is not entitled to the writ.

4. The words "first inventor," "true and first inventor," "novelty," "known" and "used," are all words familiar in English law, with a well defined signification. Their signification is a relative and not an absolute signification. The courts in England have never lost sight of the main consideration for the grant of letters-patent—the benefit to be derived by the British public from the right to construct, use and vend the invention on the expiration of the monopoly. They consider the public benefit rather than the merits of the inventor. Novelty within the realm only was required and the first introducer was considered the true and first inventor.

[Cites *Lewis* v. *Marling* (3), *Ex parte Scott and Young* (4), *Smith* v. *Davidson* (5).]

The words in the Statute of Monopolies "new manufactures within this realm" were seized upon as a reason for this interpretation. The section reads ".....grants of privilege.....of the sole working or making of any manner of new manufactures within this realm." The words therefore relate clearly to the territorial extent of the grant.

The real ground for simply requiring novelty within the realm is the policy of the law.

The policy of our patent law, as declared in the title and preamble of the first Patent Act of the Province of Ontario, 7 Geo. IV., c. 5, is the same as that of Eng-

(1) Eng. ed. p. 384.
(2) Eng. ed. 378, 384.
(3) 1 W.P.C., 496
(4) L.R. 6 Chy. 274.
(5) 19 C. of S. Cases, p. 695.

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land. The Act is entitled "An Act to encourage the progress of useful arts within this Province." The preamble recites the expediency of encouraging genius and arts within this Province. There has been no change in the policy of our law, and the phraseology of our Patent Acts is to be interpreted so as to further the declared object of the enactments.

The words "true and first inventor" appear in the statute of James I., secs. 5 and 6; in the Patent Law Amendment Act, 1852, sec. 10, *et seq.*; in the Act of 1883, secs. 34, 35, *et seq.*, and have been uniformly held to mean—not the first inventor in point of time but any true inventor or introducer of a manufacture, new to that portion of the public with whose welfare Parliament is concerned—the British public.

[Cites *Dollond's case* (1); *Hill* v. *Thompson* (2); *Ex parte Henry* (3).]

The words "first inventor" which occur in two minor sections only of R.S.C. c. 61, viz., secs. 16 and 24, mean any true inventor of a thing "not known or used by any other person before his invention thereof."

[Cites *Hindmarch on Patents* (4); *Lewis* v. *Marling* (5); *Higgins's P. C.* (6); *Gibson* v. *Brand* (7); *Pennock* v. *Dialogue* (8); *Shaw* v. *Cooper* (9); *Bedford* v. *Hunt* (10); *Merwin on Patents* (11); *Curtis on Patents* (12); *Reed* v. *Cutter* (13); *Robinson on Patents* (14).]

The American cases on prior invention are inapplicable under our Patent Act. Canadian legislatures have carefully avoided incorporating into our Patent Acts any of the phraseology of the American Acts, on

(1) 1 W.P.C. 43; 2 H.B. 1, 470, 480.
(2) 1 W.P.C. p. 244.
(3) L.R. 8. Chy. 170.
(4) Eng. ed. pp. 33, 127.
(5) 1 W.P.C. 496.
(6) P. 261.
(7) 4 M. & G. at p. 205.
(8) 2 Pet. p. 17.
(9) 7 Pet. 318, 319.
(10) 1 Mason 302.
(11) Pp. 621 and 687.
(12) P. 680.
(13) (1841) 1 Story p. 590.
(14) Vol. 1 p. 559 par. 391.

which the doctrine of the race of diligence, interferences between conflicting patents, &c., are founded. The drift of our legislation has a contrary direction. The applicant for a Canadian patent need not now, as was formerly required, swear that he is the first inventor. In England from the statute of James I. to the present day the applicant must declare himself to be the "true and first inventor."

[Cites *Edmunds on Patents* (1); *Pennock* v. *Dialogue* (2).]

6. Section 7 of R.S.C. c. 61 is the governing section of the Act. If La Force is within that section and a true inventor the patent issued to the defendant must stand. "Not known or used" means not known or used by the public. Now comes the question—what degree of public knowledge or use will defeat a patent? The sufficiency of such public knowldge or use is a question of fact or of inference from the facts of each case. The question is, does the evidence show that the public have become possessed of a knowledge of the invention or does it show such facts from which a public knowledge or use can be presumed or inferred?

[Cites *Harris* v. *Rothwell* (3); *Ex parte Henry* (4); *Carpenter* v. *Smith* (5); *Lewis* v. *Marling* (6); *Cornish* v. *Keene* (7); *Galloway* v. *Breaden* (8); *Bentley* v. *Fleming* (9); *Jones* v. *Pearce* (10); *Newall* v. *Elliott* (11); *Hills* v. *London Gas Co.* (12); *Morgan* v. *Seaward* (13); *Useful Patents Co.* v. *Rylands* (14); *Carpenter* v. *Smith* (15); *Curtis on Patents* (16); *Robinson on Patents* (17); *Walker*

(1) Pp. 665, 737.
(2) 5 Pet. 17.
(3) Griffin's Pat.C. 109, and cases there cited.
(4) L.R. 8 Chy. 170.
(5) 1 W.P.C. 534.
(6) 1 W.P.C. 492.
(7) 1 W.P.C. 508, 511, 512.
(8) 1 W.P.C. 529.
(9) 1 Car. & K. 587.
(10) 1 W.P.C. 124.
(11) 4 C.B.N.S. 266.
(12) 5 H. & N. 356, 364.
(13) 2 M. & W. 544.
(14) 2 P.O.R. 255.
(15) 1 W.P.C. 530.
(16) 4th Edition sec. 87a.
(17) Vol. 1 p. 427 note (2).

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on Patents (1); *Ellithorpe* v. *Robertson* (2); *Winans* v. *N. Y. & Haarlem Ry. Co.* (3); *Walker on Patents* (4); *Lyman Refrigerator Co.* v. *Lalor* (5); *Corn Planter Patent* (6); *Cahoon* v. *Ring* (7); *Johnson* v. *McCullough* (8); *Parker* v. *Hulme* (9); *Merwin on Patentability of Inventions* (10); *Putnam* v. *Hollender* (11); *Hall* v. *Bird* (12); *Brush* v. *Condit* (13); *Bonathan* v. *Bowmanville* (14); *Smith* v. *Goldie* (15); *MacLeod* v. *Atty. Gen. N. S. Wales* (16); *Jefferys* v. *Boosey* (17); *Metropolitan Board of Works v. L. & N. W. Ry.* (18); *Vanorman* v. *Leonard* (19).]

W. Cassels, Q.C., (with whom was *Gormully*, Q.C.) for the plaintiff contended as follows:—

The Canadian statute law relating to patents is derived from American rather than from English sources. The Canadian statutes themselves must be interpreted by the court, and in such interpretation changes in the language used in the various Patent Acts become very important as indicating the policy of the legislature.

The word "inventor" under section 7 of the Canadian Patent Act means first inventor. This has been the universal construction and is also made clear by secs. 16, 24 and 32 in each of which the expression "First Inventor" is used.

The "first inventor" under Canadian law is he who "first invents" whether in Canada or elsewhere. See Cons. S. of C. c. 34 s. 3 (1859) where the words used are "not known or used by others in this Province."

(1) P. 40, 41.
(2) 2 Fish. p. 83.
(3) 4 Fish. 1.
(4) P. 39.
(5) 1 Bann. & A. 403; 12 Blatch. 303.
(6) 23 Wallace 181.
(7) 1 Fish. 397, 410, 411.
(8) 4 Fish. p. 175.
(9) 1 Fish. 45.
(10) P. 643.
(11) 19 Blatch. 48.
(12) 6 Blatch. p. 439.
(13) 9 Brodix p. 594.
(14) 31 U.C. Q. B. 413.
(15) 9 Can. S.C.R. 46.
(16) A.C. [1891] p. 458.
(17) 4 H.L.C. p. 926.
(18) 14 Ch. D. pp. 527, 528.
(19) 2 U.C. Q. B. p. 72..

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[Cites *Smith* v. *Goldie* (1).]

In *Smith* v. *Goldie* the action had been dismissed in the Court of Chancery at the hearing before the Chancellor. On appeal, the Court of Appeal for Ontario confirmed this judgment on the ground that Smith's invention was not patentable. So that when on further appeal the Supreme Court of Canada gave judgment in favor of Smith it had to decide necessarily, 1st, that the invention was patentable and 2ndly., that Smith was the first inventor. Now Smith's Canadian and United States patents were both later in point of date than the Canadian patents of Lacroix and Sherman under which the defendants justified their infringements (2); so that the Supreme Court had necessarily to travel behind all these patents in order to determine that Smith was the first inventor, and to give his patent priority over the prior dated patents of Lacroix and Sherman.

The case of *Barter* v. *Howland* (3), if opposed to this view, is not law.

The meaning given to the words "True and First Inventor" in the English statutes is a very strained one. It would not be followed now if *res integra* in England; see the observations of Jessel, M. R. in *Plimpton* v. *Malcolmson* (4).

Secondly. "Any person" under section 7 includes "Foreigners"; in other words Foreigners and Canadians are placed exactly on the same footing. This appears clear from the previous legislation, and the whole scope of the Act, and the universal practice of the Patent Office.

[Cites Cons. S. of C. c. 34 s. 3; 32 and 33 Vict. c. 11 s. 6; 35 Vict. c. 26 s. 6; *Routledge* v. *Low* (5).]

(1) 7 Ont. App. at p. 641, and 9 Can. S.C.R. 46.
(2) See page 634 of 7 Ont. App.
(3) 26 Gr. 135.
(4) L.R. 3 Ch. D. p. 555.
(5) L.R. 3 H. L. 117.

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Thirdly. "Not known or used by any person," quoting from sec. 6 of *The Patent Act.*

This language is taken from the United States statutes. The courts have always recognized the distinction between a case where it is sought to avoid a patent on the ground of anticipation and a case where the contest is between "rival inventors" who have each been granted patents as in this case.

[Cites *Merwin on the Patentability of Inventions* (1). *Walker on Patents* (2).]

Fourthly. In a contest for priority between two rival inventors each of whom has obtained a patent, who is the first inventor is a question of fact. When the invention may be exhibited in a drawing or in a model, such invention will date from the completion of such a drawing or model as is sufficiently plain to enable those skilled in the art to understand it.

[Cites *Loom Company* v. *Higgins* (3); *Robinson on Patents* (4).]

The communications made by Mr. Jeffery to Mr. Gormully and to the patent solicitor are facts corroborative of the statement of Jeffery that he invented the invention on the 15th or 16th March, 1891, and are quite sufficient for that purpose.

In order to make out a case of publication to defeat a patent there must be a communication to the public or in public, but the cases on this point have no application to the facts and circumstances of this case.

Fifthly. As to the construction of the specification and drawing, he cites *The Patent Act*, secs. 13 and 28.

Sixthly. A patent is void if any material allegation in the petition is "untrue." (Cites *The Patent Act* sec. 28.)

(1) C. 8 p. 621 and c. 9 p. 689.
(2) Secs. 315 to 320.
(3) 105 U.S.R. 594.
(4) Sec. 132.

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BURBIDGE, J. now (January 9th, 1894) delivered judgment.

The main question to be determined in this case is, whether under the patent law of Canada a prior foreign invention of which the public had no means of knowledge is sufficient to defeat a patent issued to an independent Canadian inventor. The question arises upon issues joined in a proceeding wherein Thomas B. Jeffery, of the city of Chicago in the United States of America, Cycle Manufacturer, has sued out a writ of *scire facias* to repeal letters-patent, numbered 37890, for an improvement in pneumatic tires granted to the defendant as assignee of her husband Hippolyte Joseph La Force, of the city of Toronto, Shoemaker.

The pneumatic tire for bicycles came into use in 1890. It consisted of an inflatable rubber tube with an outer covering or sheath which was cemented to the under surface of a U shaped rim similar to that which had been used for the solid and cushion rubber tires that preceded it. In use, this tube was liable to be punctured, and as the sheath was cemented to the rim of the wheel it was not readily removed for the purpose of being repaired. The defendant's invention met that difficulty by providing for the use of a rim with the edges turned inward so as to form on each side a lip or flange, and of an outer covering or sheath to the edges of which were attached strips made of rubber or other suitable material which fitted under such lips or flanges, and filled up the recess between them. When the rubber tube is not inflated, such a tire may readily and without any special skill be attached to or removed from the rim of the wheel; but when inflated the covering or sheath is expanded and the outer edges of the strips attached thereto are forced under the flanges of the rim, and the whole is securely held in position by the pressure of the inflated tube upon such

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strips. It is not essential, it is said, that the latter should meet and fill up the space or recess between the flanges of the rim, but it is better that they should do so, and they are so represented in the drawing attached to the defendant's patent.

La Force, who in the course of his business had had occasion to repair pneumatic tires says that he hit upon this idea in the latter part of April, 1891, and that during the week preceding the 25th of May, following, he communicated his invention to his brother. On that day with the latter's assistance, he made, as an experiment, a section of such a rim and tire, and within two weeks thereafter, a rim and tire complete. In July he consulted Mr. Ridout, his patent solicitor, who on or about the 3rd of August applied for a patent for the improvement he had invented, and which is described in his specification and drawings attached thereto, and for which a patent was granted to the defendant, on the 2nd of December, 1891.

In 1888, Mr. Jeffery, the prosecutor, had taken out in the United States a patent for an "improvement in vehicle wheels" in which was described a method of attaching a solid rubber tire to the rim of the wheel more easily and quickly than was possible by the ordinary method when cement alone was used. The means described involved a rim with the edges turned in to form flanges, and lateral projections attached by cement to the solid rubber tire and "engaging under and between such flanges." This invention Jeffery did not make any use of in his business as the solid tire was going out. But when the pneumatic tires came in, it occurred to him that they could be secured to the rim of the wheel by means of edges or projections similar to those described in the patent of 1888. About the 9th of March, 1891, he made some cloth and tin models, and, on the 15th of the same month, a drawing,

showing three ways in which he thought his conception could be given effect to, one of which clearly involved the device or improvement covered by the patents subsequently issued to La Force and to himself. The drawing was shown to his partner, Mr. Gormully, on the same day, and the models to his patent solicitor, Mr. Burton, a few days thereafter. The fundamental idea, Burton says, of the invention indicated by Jeffery's partial models and sketches, that ran through all the several forms of the device which he indicated, was, that the tire and the rim should be provided with interlocking hooks or projections and recesses, so that the tire might be said to be hooked to the rim by the engagement of the hooks of the one with the hooks of the other, or the recesses of the other. For this idea, Burton, on the 26th of March, filed in the United States Patent Office, Jeffery's application for a patent, which was granted to him on the 16th of June, 1891. In the section of tire and rim shown in the drawing attached to the letters-patent, we see the strips of the sheath and the flanges of the rim engaging each other as hooks, and, as described in the specification, such strips and flanges form, what I may perhaps call, continuous interlocking hooks. But that was all; while in respect to the improvement for which the La Force patent issued, and for which Jeffery also subsequently obtained patents in the United States and in Canada, the strips attached to the sheath or outer covering of the tire, not only engage the flanges of the rim, but rest upon it, and receiving the pressure of the rubber tube when inflated, assist to hold the whole securely in position. This device was, as I have said, indicated on the drawing that Jeffery showed to Gormully on the 15th of March, 1891. About the last of that month he made a model of a section of a tire that illustrated part of it. On the 4th of July he made a sketch and

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description of the device which he explained to Burton on the 13th, and the latter on the 27th of the same month filed in the United States Patent Office an application for a patent therefor. The patent was granted on the 12th of January, 1892. On the 5th of February following, Jeffery applied for a Canadian patent for the same improvement, and obtained letters-patent therefor on the 1st of June, 1892.

The case, under the facts to which I have alluded, presents, it will be observed, a controversy between rival inventors in which the public have no special interest. If La Force's letters-patent are set aside the monopoly goes over to Jeffery. The latter does not in this case rely upon his 1888 patent as an anticipation of La Force's invention. That is an objection, which if maintained, would, I take it, be equally fatal to his own patent, and that is not the conclusion that he desires to reach in the present proceeding. He makes no admissions that might at some other time and place be invoked against him, but, with that qualification, I understand him to have introduced the evidence as to the 1888 patent to corroborate and strengthen his account of his invention of the improvement in pneumatic tires in question, not to show that in 1891 there was no novelty in such improvement. So far as my own view goes I am of opinion that La Force's invention was not anticipated by the Jeffery patent of 1888, but I do not understand the prosecutor to desire to raise that issue now. The novelty in 1891 and the utility of the invention are alike parts of his case, and of the defendant's. The simple question is, must La Force's patent be set aside in favour of Jeffery because the latter, an American citizen, residing at Chicago, had, two months earlier than La Force, invented and disclosed in confidence to his partner and to his patent solicitor, the improvement for which the patent issued,

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although his application for a Canadian patent was not made until after La Force's had been granted. But before discussing that question I wish to refer briefly to the seventh section of *The Patent Act* (1), within the terms of which it was necessary for La Force to bring himself before he was entitled to a patent.

By that section it is provided that any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement therein, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof for more than one year prior to his application in Canada, may on certain prescribed conditions obtain a patent granting to him an exclusive property in such invention. By the tenth section of the Act it is further provided that every inventor shall, before a patent can be obtained, make oath or affirmation that he verily believes that he is the inventor of the invention for which the patent is asked, and that the several allegations in the petition contained are respectively true and correct.

Now La Force, being an inventor of the improvement for which in August, 1891, he solicited a patent, and having no knowledge or means of knowledge of Jeffery's invention in March, 1891, of the same device, was, it will be seen, in a position to make the affirmation required by the Act. Prior to his application the invention had not been "in public use or on sale" in Canada, or for that matter elsewhere; and prior to his invention, which, regarded as a conception, may be taken to have been complete as early as the last of May, 1891, it was "not known or used by any other

(1) R. S. C. c. 61 s. 7.

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person" within the true meaning of these words, which have reference not to a secret use or the knowledge of an earlier inventor or of those to whom in confidence he may have disclosed it, but to such a publication or use as affords the public the means of information or knowledge of the invention. The improvement had not been used in public—had not in fact been used at all, and any knowledge there was of it, was not in any way open or accessible to the public. Jeffery knew of it, of course, for he had in March preceding invented it, and he had communicated his knowledge to Gormully and Burton, both of whom, however, stood in a confidential relation to him, and were interested, the one as a partner and the other as a solicitor, in keeping such knowledge from the public. In addition, Burton had on the 26th of March filed, in the United States Patent Office, Jeffery's application for the patent of June 16th, 1891, and if the latter should be taken to include the improvement for which La Force's patent was granted, the application contained a description of such improvement. I do not think that Jeffery's patent of June 16th covers La Force's invention, in which another and important element or feature comes into action; but whether it does or not is not important in this connection, for, at Washington, pending applications are preserved in secrecy until a patent has issued, and a description of an invention in an application for a patent filed in the Patent Office there is not a publication of such invention (1). In May, 1891, La Force's invention was new so far as the public was concerned, or had any means of information, and there is nothing in the circumstances to which I have referred to defeat his patent for want of novelty in the invention, or for any false allegation or suggestion in his petition.

(1) Robinson on Patents, ss. 552, 326 and note; Rules 15 and 16 of the Practice of the United States Patent Office.

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It being clear, then, that La Force, when it was granted, was entitled to the patent sought to be impeached, we come back to the question to which I have alluded, and to an examination of the contention on which the prosecutor mainly relies—that under *The Patent Act of Canada*, he who, the world over, first invents anything, is entitled to a patent therefor, and to have set aside in his favour any letters-patent for the same thing that may, prior to his application, have been granted to a subsequent independent inventor. That contention is rested upon the following provisions of the Act. By the seventh section it is, as we have seen, enacted that any person who has invented any new and useful thing, may have a patent therefor; by the sixteenth section, the Commissioner may grant a patent for an invention already patented, if he has doubts as to whether the patentee or the applicant is the first inventor; by the twenty-fourth section, it is provided that if by any mistake, accident or inadvertence, and without wilful intent to defraud or mislead the public, a patentee has made his specification too broad, claiming more than that of which he or the person through whom he claims was the first inventor, or has in the specification claimed that he or any person through whom he claims was the first inventor of any material or substantive part of the invention patented, of which he was not the first inventor, and to which he had no lawful right, he may make disclaimer of such parts as he does not hold by virtue of the patent; and by the thirty-second section, whenever a plaintiff in any action of infringement fails to sustain his action, because his specification and claim embrace more than that of which he was the first inventor, and it appears that the defendant used or infringed any part of the invention justly and truly specified and claimed as new, the court may discriminate, and the judgment may be

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rendered accordingly. And it is said that the words of the seventh section, "any person who has invented," read with the other provisions to which I have referred, mean absolutely and without qualification the person who anywhere has first invented a new and useful thing. It is not denied that the law of England and of the United States is different. Although the words "true and first inventor, and inventors" occur in the Statute of Monopolies (1), one may, by the law of England, be "a first and true inventor," although he has in fact invented nothing. It is sufficient, if he be the first importer or introducer from abroad of a manufacture which up to the date of his importation had not been known within the realm. And as between rival inventors within the Kingdom, he is the true and first inventor who first discloses the invention to the public. In *The Household Company* v. *Neilson* (2), Lord Chancellor Lyndhurst said that—

> If the invention is in use at the time that the grant is granted, the man cannot have a patent, although he is the original inventor; if it is not in use, he cannot obtain a patent if he is not the original inventor. He is not called the inventor who has in his closet invented it, but who does not communicate it; the first person who discloses that invention to the public is considered as the inventor. The party must be an inventor, you need not say the inventor, because another may have invented it and concealed it; but in addition to his being an inventor, others must not use the invention at the time of the patent.

And in *ex-parte Henry* (3), Lord Selborne, L. C. said that, in the absence of fraud or communication, it would be no answer to an applicant for a patent, who had himself, by his own ingenuity, made a useful invention, and had applied for a patent before any one else claiming to have made the same invention, to allege that experiments had been going on, or even

(1) 21 Jac. 1 c. 3. (2) 1 Web. P.C. 719.
(3) L.R. 8 Ch. 167.

drawings made, by another inventor. If such applicant were the true inventor, the circumstance of something having taken place somewhere else which was not disclosed to the world, and as to which no prior application had been made, would be no answer to him, even if it were shown that the two inventors were travelling very much upon the same lines, and that their minds were going very much to the same point at the same time.

Neither in the patent laws of the United States do the words "original and first inventor" mean absolutely the person who first invents. For no prior invention in a foreign country stands in the way of an independent inventor within the United States unless the result of the foreign invention has been published in a patent or printed book. If the foreign inventor of something which has not been so patented or published goes to the United States or entrusts his secret to an agent whom he sends there upon business connected with the invention, the date of his arrival there or that of his agent will be taken to be the date of his conception or invention. In the case of an invention within the United States the date of the conception is, in a contest between rival inventors, carried back to the first instant when the inventor can be shown to have first clearly apprehended his idea of the means; but in the case of a foreign invention to the date when it was patented or published in a printed book, or if not patented or published, to the moment when some person to whom the conception was familiar came within the limits of the United States (1). And as between two independent inventors within that country he who was the second to invent will become the original and first inventor within the meaning of the patent laws, if he is the first to reduce

(1) Robinson on Patents, s. 382.

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the invention to practical form by embodying it in a machine capable of useful operation, and if the first inventor fails to use reasonable diligence in reducing the invention to practice (1). And one may, by the laws of the United States (2), be the first inventor of a lost art.

On the 20th of March, 1883, an International convention for the protection of industrial property was signed at Paris, to which eleven states, Belgium, Brazil, Spain, France, Guatemala, Italy, Holland, Portugal, Salvador, Servia, and Switzerland were parties. Great Britain was not one of the original signatories, but in 1884, Her Majesty's Government acceded to the convention so far as Great Britain and Ireland are concerned, and with the understanding that Her Majesty might accede thereto on behalf of any of her possessions on due notice being given through Her Government. No such notice has, I believe, been given in respect of Canada. The convention is not in force here, and I mention it only to show how far other countries have, where reciprocal advantages were obtained, thought it politic to go into the matter of giving a right of priority to foreign inventors. By the fourth Article of the convention it is provided that any person who has duly applied for a patent in one of the contracting states shall enjoy, as regards registration in the other states, reserving the rights of third parties, a right of priority for a period of six, or in case of countries beyond the seas, of seven months from the date of his first application. The subsequent application is antedated to the date of the first application and consequently is not defeated, as otherwise it would be, by prior publication or user in the protected interval (3).

(1) Robinson on Patents, s. 870 and note.

(2) Robinson on Patents, ss. 322 323.

(3) Edmunds on Patents, pp. 412, 600, 618.

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I shall mention the laws of but one other country. By the law of Austria an invention is new if it is not known within the Empire either in practice or in a printed book or document accessible to the public; and from the date of his application the priority of right to the invention belongs to the applicant (1).

It is clear then, I think, that the Canadian patent law is exceptionally liberal to the foreign inventor, if in a contest of priority with an independent Canadian inventor the former may, without any limit of time, or question of publication or application for a patent in his own country, carry back the date of his invention to the period when there his conception of it was clear and well defined. What the applicant for a patent of invention offers to the public for the grant thereof is the knowledge of his invention. But the public have no means of knowledge until he publishes or discloses the invention, and publication, therefore, forms an essential part of the consideration. If the invention is not new there is nothing to communicate to the public, and there is no consideration for the grant. Take the case under discussion. When La Force, in August, 1891, applied to the Commissioner of Patents for a patent for his invention, it was, as we have seen, new. He was in a position to and did communicate it to the public. His application when filed in the Patent Office was open to the inspection of the world (2). He had invented something. It was new, it was useful, and he published it. The consideration which he offered the Canadian public for the grant he solicited lacked in nothing, and it was justly given to him. What on the other hand had

(1) See Reports by Her Majesty's Secretaries of Embassy and Legation respecting the Law and Practice in Foreign Countries with regard to Inventions, presented to Parliament in 1873, pp. 4 and 5 Imp. Sess. Papers, Vol. LXVI.

(2) R.S.C. c. 61 s. 47.

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Jeffery to offer to the public, when in February, 1892, he came to the Commissioner with his application? Not the knowledge of the invention for which he asked a patent, for the public of Canada had been in possession of the information for six months. They had already bought it and paid for it with the grant made to the first applicant. What he had to offer was the affirmation that in a foreign country he knew of the thing two months before La Force knew of it, and that he had not in the interval anywhere given the invention to the public. With what in that allegation has the public of Canada the slightest concern? Of what moment is it to them, that in a foreign city a person knows of an invention that he is carefully keeping from the public? With what object would the patent law of Canada have regard to such a person? And why in his favour should it defeat an honest bargain that it had made with a Canadian inventor, destroy his property and work him a great wrong and injustice? One can understand how the Parliament of Canada, going farther, it is true, in that direction than the Parliament of the United Kingdom, or the Congress of the United States has as yet gone, has, in what it deemed to be the interests of the general public of the Dominion, made prior public knowledge or use of an invention anywhere, a bar to a Canadian patent therefor. But one fails, I think, to apprehend why it should in favour of a foreigner, on the ground only of his earlier conception of the invention, make void a patent issued for good cause and consideration to an independent Canadian inventor, for an invention that prior thereto had not been used in public anywhere, and of which the public in no part of the world had any means of knowledge. If that be the law it ought not to concern the judge whose duty it is to declare, obey and enforce it, that in its enforcement great

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wrongs will be done. He is not the author of the injury and is free from responsibility for it. But he is, I think, in such a case, to be well satisfied that the intention and will of the legislature has been clearly expressed by itself, or declared by some authority whose decisions are binding upon him. We shall see, I think, that the words "inventor" and "first inventor" used in our patent laws have not always meant, absolutely and without qualification, the person who the world over first invented some new thing, and if they have that meaning now we should be able, it seems to me, to lay our hands upon some enactment of the legislature, or decision of the courts, whereby they acquired that signification, and by force of which so important a change was made in our laws.

By the common law of England which lies at the foundation of the laws of the Dominion, other than the civil law of Lower Canada, the King might in consideration of the good done to the commonwealth, grant a monopoly for a reasonable time to any one who by his own wit or ingenuity had made a new and useful discovery, or by his own charge or industry had brought any new trade or manufacture into the realm. In 1624 the Statute of Monopolies (1) was passed, by which the King's authority at common law to grant letters-patent for inventions was recognized and defined. By the sixth section of that famous statute, upon which letters-patent for inventions in England still depend, it was declared and enacted that no declaration thereinbefore mentioned should extend to any letters-patent and grants of privileges, for the term of fourteen years or under, thereafter to be made, of the sole working or making of any manner of new manufactures within the realm to the true and first inventor and inventors of such manu-

(1) 21 Jac. 1 c. 3.

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factures, which others, at the time of making such letters-patent and grants, shall not use, so as also they be not contrary to the law or mischievous to the state, by raising prices of commodities at home or hurt of trade, or generally inconvenient. I am not aware of any decision that this statute was ever in force in any Province of Canada. In *Vanorman* v. *Leonard* (1), Chief Justice Robinson, expressing the view that an importer of an invention was not entitled to a patent under the Statute of Upper Canada, 7 Geo. IV. c. 5, referred to the decisions to the contrary upon the English statute, 21 Jac. 1, c. 3; but as there was a provincial statute, the question as to whether prior thereto the English statute had been in force, did not arise. It has, it appears, been held that for the purposes of the statute, Scotland is within the realm; but there can, I think, be no question that Her Majesty's dominions abroad are not (2), and the use of these words in the statute affords an argument, though it has never seemed to me a conclusive argument, against holding the statute to be in force in a settled colony. After England commenced to establish colonies or plantations, the use of the word realm in an Act would of course show an intention on the part of Parliament that it should not apply to the colonies or plantations. But with reference to earlier statutes of a general character applicable to the condition and circumstances of the people of a colony, and especially where such statutes were declaratory of the common law, I have never seen any difficulty in applying them to the colonies, although in terms they were limited to the realm. But the question is not of present importance, for whether the statute has ever been in force in any part of Canada or not, it is equally true

(1) 2 U. C. Q. B. 74.

(2) Per Jessel, M.R. in *Plimpton* v. *Malcolmson*, 3 Ch. D. 555. *See also* Chal. Op. 213; *Brown* v. *Annandale*, 1 Web. P.C. 444; *Robinson's Patent*, 5 Moo. P. C. 65; *Rolls* v. *Isaac*, 19 Ch. D. 268.

that tried by the law of England, which the Provinces of Canada, other than Quebec, received or adopted from the mother country, the contention of the prosecutor in this case cannot be maintained.

The earliest statute on the subject of patents to be found in the legislation of the provinces constituting the Dominion, is the Act of Lower Canada 4 Geo. IV. c. 25, entitled: *An Act to promote the progress of useful arts in the Province.* By this statute, which was derived from the Act of the United States of 1793, it was recited that it was expedient, for the encouragement of genius and arts in the Province, to secure an exclusive right to the inventor of any new and useful art, machine, manufacture or composition of matter; and it was provided that, under prescribed conditions, letters-patent for any such invention might be granted to any subject of His Majesty who was an inhabitant of the Province. One of these conditions was that the invention should not be known or used at the time of the application, and another that the inventor should swear or affirm that he verily believed himself to be the true inventor or discoverer of that for which he solicited a patent (1). By the fifth section the inventor was given the right, in an action of infringement, to recover treble damages against the infringer, and by the sixth it was provided that in such an action the judgment should be for the defendant, with costs, and the patent should be declared void if it should be made apparent to the satisfaction of the court, the same having been specially pleaded, that the specification was insufficient (the concealment or addition having been made for the purpose of deceiving the public), or that the thing secured by the patent had not been originally discovered by the patentee, but had been in use or had been described in some public work anterior

(1) S. 3.

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to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person. By the seventh section provision was made, in the case of interfering applications, for an arbitration to determine to whom the grant should be made. And by the eighth section it was enacted that, on certain proceedings taken in the Court of King's Bench, the court might repeal any patent that had been obtained surreptitiously or upon false suggestion, or if it should appear that the patentee was not the true inventor or discoverer. I have referred to the American origin of this statute, and it will be found that other provisions of provincial statutes, which it will be necessary to mention, have been derived from a like source. That gives rise to the argument that where English and American decisions do not run on the same lines, as in controversies between rival inventors they do not, the latter rather than the former should, in the construction of Canadian patent law, be followed. I shall have occasion to refer to one or two incidents that make against that argument and tend to show that it was the intention of the legislatures of the several provinces of Canada, while adopting in a general way the language of the patent laws of the United States, to adhere, in respect of this question, to the principles and doctrines of the English law ; but for the present I shall limit my examination of this statute, and the others to which I shall refer, to the words of the statutes themselves, and ascertain, if I can, what they mean in the connection in which I find them.

Now it will be observed that the seventh section of 4 Geo. IV. c. 25, respecting interfering applications, gives us no suggestion or hint as to whether in the case of rival inventors within the Province the one who first clearly conceived the invention or the one

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who reduced it to practice and communicated it to the public was to be preferred. The enactments of later statutes on the same subject are equally silent and the question is to be determined by the other provisions of the statute. The applicant for a patent was not required to show that he was the first inventor, but that he was an original and true inventor or discoverer, and that the thing patented was new, that it was not known or used at the time of his application. Having shown these facts he got his patent, which once granted was certainly good against any knowledge or use of the invention outside of the Province and not accessible or open to the public, and, it seems to me, as well against any such knowledge or use on the part of a rival inventor within the Province. In 1829 the Act 4 Geo. IV. c. 25 was continued by 9 Geo. IV. c. 47 and its benefits extended to any subject of His Majesty, being an inhabitant of the Province, who should in his travels in a foreign country have discovered or obtained a knowledge of, and be desirous of introducing into the Province, any new and useful invention not known or used in the Province before his application. In 1831 inventions in the United States and in His Majesty's dominions in America (1), and in 1851 inventions in Her Majesty's dominions in Europe (2), were withdrawn from the operation of this enactment. With this limitation it re-appears in the tenth section of the Consolidated Statutes of the Province of Canada respecting patents for inventions (3), and continued in force in that Province until 1869, when it was repealed. Neither the courts of the United States nor Congress have ever recognized in any similar way the introduction or importation of any invention from a foreign country, and the enactment

(1) 1 Wm. IV (L. C.) c. 24. (2) 14 and 15 Vict. (Pro. Can.) c. 79.
(3) C.S.C. c. 34, secs. 10 and 11.

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of this provision in 1831 by the legislature of Lower Canada, and in 1851, by the legislature of the Province of Canada, indicates, so far as it goes, an intention on their part in adopting the law of the United States as to patents to make it conform to English views and precedents.

The Act of Upper Canada 7 Geo. IV. c. 5, passed in 1826, follows closely the statute of Lower Canada 4 Geo. IV. c. 25 to which I have referred. In 1836 the latter Act, and 1 Wm. IV. c. 24 were repealed and their provisions re-enacted in 6 Wm. IV. c. 34, Lower Canada. Until after the union of the two Provinces there was no further change in the patent law of either Province.

By the first section of the Act of the Province of Canada 12 Vict. c. 24, passed to assimilate and modify the laws of Lower Canada and Upper Canada respecting patents of invention, it was provided that letters-patent might be issued to any person who was a subject of Her Majesty, and resident in the Province and who had invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter or the principle thereof, the same not being known or used in the Province by others before his discovery or invention thereof, and not at the time of the application for a patent in public use or on sale in the Province with his consent or allowance. By the second section it was, amongst other things, enacted that whenever in an action for infringement it should satisfactorily appear that the patentee at the time of making his application for the patent believed himself to be the first inventor or discoverer of the thing patented, the same should not be held void on account of the invention or discovery, or part thereof, having

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been before known or used in a foreign country, it not appearing that the same or any material or substantial part thereof had before been patented or described in any printed publication: and also that whenever the plaintiff should fail to sustain his action on the ground that in his specification of claim was embraced more than that of which he was the first inventor or discoverer, or if it should appear that the defendant had used or violated any part of the invention justly and truly specified and claimed as new, the court might exercise a discretion as to costs. By the eighth section of the Act it was declared that the patentee might make a disclaimer whenever by mistake, accident or inadvertence, and without any wilful default or intent to defraud or mislead the public, he had made his specification too broad, claiming more than that of which he was the original and first inventor, some material or substantial part of the thing patented being truly and justly his own, or had in his specification claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and had no legal or just right to claim the same. In these sections we have the origin of the 32nd and 24th sections of *The Patent Act* upon which the prosecutor relies; and as it is here that for the first time, in the Acts of any of the Provinces of Canada, we meet with the words "first inventor," and as there is no reason to think that these words have since acquired a signification different from that with which they were then used, it is important to ascertain, if possible, what that signification was.

Under the earlier Acts, and at the time when 12 Vict. c. 24 was enacted, the fact that a patentee was not absolutely the first inventor of the thing patented was not of itself, in either Lower or Upper Canada, fatal

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to his patent. If he were truly an inventor, and the invention new and useful, that was sufficient, and it would be none the less new because some one had a knowledge of it that he kept from the public, or because he had used it secretly. What would defeat his patent and prevent him from being in the eyes of the law the first inventor was the prior knowledge or use of the invention in public. Against such knowledge or use in a foreign country, except in the two cases mentioned of the invention being patented there, or described in a printed publication, the second section of the Act proposed to protect him, if at the time of his application he believed himself to be the first inventor or discoverer: that is if at the time he was an honest inventor and no pirate. The word "first" is here used, it seems to me, to express the idea of novelty, and does not indicate, and is not incident to any controversy of priority of conception between rival inventors. So too in the succeeding clause of the section, where the court was given a discretion as to costs when the plaintiff failed because in his specification of claim he had embraced more than that of which he was the first inventor or discoverer, or the defendant had used a part of the invention justly and truly specified and claimed as new, what is meant is evidently that the discretion might be exercised where the plaintiff failed because some part of that which he had claimed was not new, but on the contrary was at the time of his invention known to, or used by, the public, and which he could not therefore communicate to them. And that appears to me to be the sense in which the words "first and original inventor" were used in the eighth section of the Act. If the patentee being an inventor were the first to publish or make known the invention to the public, there was no occasion for him to disclaim anything. It was "truly and justly his own", and he

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" had a legal and just right to claim the same". He was in fact within the meaning of the section " the " original and first inventor " thereof. The provisions of the 2nd section of 12 Vict. c. 24 occur in the 15th section of the Act of the United States of 1836, to promote the progress of useful arts, and the provisions of the 8th section in the 9th section of the Act of Congress of 1837. There is, however, one important clause of the 15th section of the Act of 1836 which has never found a place in any Act of any Province of Canada. Dealing with the subject of defences to actions for infringement it was there provided, *inter alia*, that the defendant might set up as a defence and prove that the plaintiff had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another who was using reasonable diligence in adapting and perfecting the same. Here we have what has been thought to be a distinct recognition of the doctrine that a patent issued to one who was an independent inventor might be defeated by a prior undisclosed invention by another who was using reasonable diligence in adapting and perfecting the same. But there is no such provision in any Canadian Act. The corresponding defence as described in the statutes of the Provinces of Canada was that the patent should be void if the patentee had surreptitiously obtained it for the invention and discovery of another person (1). If, under the Provincial statutes, the patentee had not obtained the patent surreptitiously or on some false suggestion, that was an end of the matter so far as that defence was concerned. There

(1) See Statutes of Lower Canada 4 Geo. IV. c. 25 s. 6 ; 6 Wm. IV. c. 34 s. 6 ; Upper Canada 7 Geo. IV. c. 5 s. 6 ; Province of Canada 14 & 15 Vict. c. 79 s. 8 ; C.S.C. c. 34 s. 27 ; Nova Scotia 3 Wm. IV. c. 45 s. 10 ; R. S. 1st. S. c. 120, s. 11, 2nd S. c. 120 s. 11, 3rd S. c. 117 s. 11 ; New Brunswick 4 Wm. IV. c. 27 s. 9 ; Prince Edward Island 7 Wm. IV. c. 21 s. 9.

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was no question as to whether some other person had not first conceived the invention which he was keeping to himself and proceeding with reasonable diligence to adapt and perfect. The omission of this provision from all the pre-confederation statutes, which in many respects were copied from the Acts of the Congress of the United States, affords, it seems to me, a strong argument against the view that the legislatures of the several Provinces intended, in adopting such Acts, to incorporate therewith the construction as to rival inventors which the courts of that country had placed thereon.

It is clear, of course, that the words "first inventor" do not, in the Act 12 Vict. c. 24 mean absolutely the first inventor the world over, because its advantages were limited to British subjects resident in the Province, and the provincial inventor was not affected by any foreign invention that had not, in the foreign country, been patented or described in a printed publication. But that does not entirely dispose of the prosecutor's contention, for if these words had reference to a contest as to priority of conception of the invention between rival independent inventors within the Province, it would be open for him to contend that when in 1872 foreigners were admitted to the benefits of the patent laws of Canada, they came in on equal terms with Canadians: and that anything which prior thereto, happening in Canada, afforded sufficient grounds for setting aside a Canadian patent in favour of an earlier inventor in Canada, would thereafter, occurring anywhere, afford grounds for setting aside such patent in favour of an inventor anywhere. I am not prepared to admit that the argument would be good. I think there is something to be said against it, and I should desire, before committing myself to it, to see clearly that Parliament intended to work such radical changes in

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our patent laws. But, in the view I take of the statutes that I am discussing, that question is not reached. In my opinion the words "first inventor", used in the Statute 12 Vict. c. 24, had reference to questions of novelty and the publication and disclosure of inventions, and not to any controversy as to prior undisclosed invention.

The Act 12 Vict. c. 24 was followed two years later by 14 and 15 Vict. c. 79, and in 1859 the two Acts were embodied in the 34th Chapter of the Consolidated Statutes of the Province of Canada, which, with an unimportant amendment in 1866, continued in force until 1869.

The first Act respecting patents for inventions enacted in the Province of Nova Scotia was passed in 1833 (1). Its benefits were limited to inhabitants of the Province who had resided there one year prior to the application for a patent. In later Acts the word "residents" is used instead of inhabitants. The applicant for a patent was called upon to declare that he was the true inventor or discoverer of the thing for which he solicited a patent, and that the invention had not to his knowledge been known or used in Nova Scotia or any other country. If it turned out that the invention had not been originally discovered by him but had been in use or described in some public work anterior to his supposed invention, the letters-patent were void. The law passed through several revisions but without material changes (2), and there is no occasion to follow its history, or to refer to a number of special Acts and exceptional provisions to be found on this subjects in the statutes of the Province (3). It is clear, I think, that the law

(1) 3 Wm. IV. c. 45.

(2) R.S.N.S. 1st S. (1851) c. 120, 2nd S. (1859) c. 120, 3rd S. (1864) c. 117.

(3) 15 Vict. c. 29; 16 Vict. c. 21; 20 Vict. cc. 72, 73; 23 Vict. c. 85; 24 Vict. c. 79; 25 Vict. c. 27 and 28 Vict. c. 4.

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of that Province did not demand of a patentee at the peril of his grant that he be absolutely the first inventor, but that he should be a true inventor, and that the invention should be one that had not been in use or described in some public work prior to his invention thereof. But once obtained, his patent was in no danger from any prior undisclosed invention. And the law of the Provinces of New Brunswick and Prince Edward Island was, it seems to me, on this subject the same (1). New Brunswick, I may state in passing, was the only Province in which, prior to the Union, foreigners were admitted to the advantages of the patent laws of the Province (2). We find in the statutes of this Province the provision as to disclaimer that we found in the Act of the Province of Canada of 1849, in which in the same way and connection, and I think with the same meaning, the words "first inventor" occur (3).

Coming then to the Patent Act of 1869 passed by the Parliament of Canada, we find its benefits limited to persons who had been resident in Canada for at least one year before the application for a patent. The provisions of the Act of 1849 respecting disclaimers, and the court's discretion as to costs where the specification was too broad, are to be found in the 20th and 25th sections of the Act; and invite the same observations as to the occurrence of the words "first inventor" therein. In both instances the words have reference to cases in which the patentee had claimed in his specification more than was new. That, in the Act of 1869, is made still clearer by reference to the 19th section (4), by which it was provided that whenever

(1) N.B. 4 Wm. IV. c. 27; 6 Vict. c. 34; 14 Vict. c. 35; 16 Vict. c. 32; R. S. N. B. cc. 118, 163; 19 Vict. c. 21; 23 Vict. c. 41; 25 Vict. c. 33; and P. E. I., 7 Wm. IV. c. 21.

(2) 14 Vict. c. 35.

(3) 16 Vict. c. 32 ss. 20, 21; R. S. N. B. c. 118 ss. 10 and 11.

(4) See also 22nd section of the New Brunswick statute, 16 Vict. c. 32.

any patent should be deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a right to claim as new, but the error arose from inadvertence, accident or mistake and without any fraudulent or deceptive intention, the patent could be surrendered and a new one issued. In the 20th section the specification is described as being too broad because the patentee had claimed more than that of which he was the first inventor, and in the 19th section because he had claimed more than he had a right to claim as new. The defect in each case is the same, though differently described, and the question is equally in both cases one of want of novelty and not a controversy as to who, apart from any publication of the invention, was the first inventor.

In the Act of 1869, the expression "first inventor" occurs in another connection and for the first time. By the 40th section of the Act, it was, amongst other things, provided that the Commissioner might grant a patent to an applicant, although the invention had already been patented, if he had doubts as to whether the patentee or applicant was the first inventor or discoverer. The same provision occurs in the 40th section of the Act of 1872, and the 16th section of chapter 62 of *The Revised Statutes of Canada*. Has the expression, used in this connection, a meaning differing from that which attached to it in the earlier statutes? Again, it is clear that the words are not used without qualification or limitation, and that they do not mean the "first inventor" the world over; for the Act of 1869, in which they first occur, was, as we have seen, limited to residents of Canada, and an independent Canadian inventor's patent was not liable to attack because of any knowledge or use of the invention abroad not accessible

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or open to the public. Did the words, as used in the Act of 1869, mean more than that the Commissioner might issue the second patent where he had doubts as to whether the patentee or applicant was entitled thereto, and was that not a question of prior application or disclosure, rather than of prior conception of the invention? Is there any reason for making a new departure and inferring that Parliament intended to reward the person who first conceived, rather than the person who first disclosed, an invention to the public? For my part I see none, and there does not appear to me to be any difficulty in the way of holding that the words "first inventor," occurring in the 40th section of the Act of 1869, and in the corresponding sections of the later Acts, mean, as they did in the English Act, and in the pre-confederation statutes to which I have referred, the person who being a true inventor of some useful thing first discloses his invention to the public.

There is no occasion to go through the Acts of 1872 or 1887, and to dwell upon provisions that we have examined at their source and origin. In 1872 foreigners were, as we have seen, admitted to the advantages and privileges of the patent laws of Canada; but I see in the Act of that year no indication of any intention on the part of Parliament to confer upon them any special privileges. Up to that time the Canadian patentee was in no danger from the subsequent disclosure of any prior knowledge or use of the invention in any other country not accessible or open to the public thereof, and as I read the earlier statutes, he had nothing to fear because of such secret knowledge or use anywhere, and there is nothing in the Act of that year, or in any later statute, that requires any different construction to be put upon the patent law of Canada.

In *Barter* v. *Howland*, decided in 1878 (1), the facts were that the plaintiff, Barter, and one Smith, the

(1) 26 Grant 135.

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assignor of the defendants, were independent inventors of a combination or improvement in a machine for dressing flour. Smith had constructed such a machine at Minneapolis in April, 1871. Barter swore that he had perfected his invention several months earlier at Faribault, Minnesota, but the evidence on that point was conflicting. Smith's Canadian patent was dated in April, 1873, Barter's on the 20th of January, 1874, on an application filed in the patent office in September, 1873. In dismissing the plaintiff's bill, Vice-Chancellor Blake said :—

> Smith, the assignor of the defendants, invented that which is covered by the two Canadian patents in question. He had a right, on the evidence before me, to apply for a patent, and he did so, and obtained his patent before any application was made by the plaintiff. Of the two inventors, the assignor of the defendants first obtained a patent. This being so, I do not see on what principle I can deprive them of the right of manufacturing and vending the articles, the subject-matter of their patent.

But it is said that this case is in conflict with *Smith* v. *Goldie* (1), and cannot now be supported. With that view I do not agree. In the latter case, as Mr. Ritchie pointed out, Mr. Justice Henry, with whom Mr. Justice Fournier and Mr. Justice Taschereau agreed, stated that the evidence left no doubt on his mind that Smith was the first and only inventor of the combination he claimed in his specification, and that he felt as little doubt that the other parties who had obtained the two contesting patents, had become acquainted with the combination by obtaining the knowledge of his discovery (2). The question in that case, then, was not one between independent inventors, but between an original inventor and those who sought to justify their acts under patents "surreptitiously obtained" for his invention; and his patent being otherwise held to be good, the defence failed as a matter of course. But that is not

(1) 9 Can. S.C.R. 46. (2) 9 Can. S.C.R. 60.

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the question in the present case, nor was it the question in *Barter* v. *Howland* (1) which appears to me to have been well decided, and to be a distinct authority in the defendant's favour. In an earlier case, *Vanorman* v. *Leonard* (2) decided when the Act of 7 Geo. IV. c. 5 was in force, a plea that the plaintiff was not the first discoverer of the alleged invention, but on the contrary that the same had been wholly and in part publicly and generally practised, used and vended at Albany in the State of New York, one of the United States of America, before the said supposed discovery of the plaintiff, was held to be a good plea. Apart from a matter of pleading, the principal question discussed was as to whether the Act extended to an importer or introducer of an invention from abroad, and it was thought that it did not. The case on the plea, however, was one of want of novelty and I mention it principally to add that I understand the Chief Justice, when he said that the preamble of the Act 11 Geo. IV. c. 34 showed that the legislature did not consider that a patent right could under the former law be granted to any but the actual original inventor, to mean an original independent inventor, not necessarily the first inventor. If more were meant I should not be able to agree. The preamble of the Act recites that the provisions of 7 Geo. IV. c. 5 were confined to sole inventors, and that Horner, for whose relief the Act 11 Geo. IV. c. 34 was passed, was a co-inventor with one Keys, a foreigner. If that were not the true difficulty to be overcome, I think it probable that some publication or use of the invention in the United States stood in Horner's way; not that he had any thing to fear from any earlier undisclosed invention on the part of his "co-inventor".

(1) 26 Grant 135. (2) 2 U.C.Q.B. 72.

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In the result, I am of opinion that under the patent law of Canada a prior foreign invention, of which the public had no knowledge or means of knowledge, is not sufficient to defeat a patent issued to an independent Canadian inventor. Whether the same rule should be followed in cases of conflicting applications for patents, is another question. In the present case the patent having been issued, the Crown's power or authority in respect thereof is exhausted. If the patent be good, if there be no ground of impeachment, it must stand, and the second patent is waste paper. In the case of conflicting applications, the Crown has not parted with its power to make a grant, and there is provision for the appointment of arbitrators to decide between the applicants. In such a controversy, it seems to me that the first applicant, if he be a true inventor and the first to make known his invention to the public, should be preferred. If there is any doubt as to that being the law at present, or if it is not the law, I venture to hope that the doubt may be removed or the law changed, for not only is the rule a just one, as it gives the reward to the person who first communicates a knowledge of the invention to the public, but it is a convenient one in respect of the proof by which under it any question of priority may be determined. On the other hand, it appears to me that the doctrine that he who first conceives an invention is to be preferred to him who first reduces it to practice and gives it to the public, leads of necessity to an inquiry as to what men may have done in secret, and opens wide and dangerously a door to perjury and the fabrication of evidence. In the present case there is nothing to throw even a shadow of suspicion upon the honesty of either the rival inventors; but one may easily conceive of instances in which to support a case of prior conception of an invention, evidence that it would be impossible to meet or discredit might be falsely devised.

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The only other objection taken to the patent has reference to the specification. In the description the following clause occurs :—" On each side of the felloe " D a lip A is shaped to form a recess into which the " strip C will fit ". And it is objected that the drawing may not be looked at to see what the recess is and how the strips fit into it. By the fifth clause of the 13th section of *The Patent Act* it is provided that one duplicate of the specification and of the drawings, if there are drawings, shall be annexed to the patent, of which it shall form an essential part ; and the other duplicate shall remain deposited in the Patent Office. In *Smith* v. *Ball* (1), Chief Justice Robinson, referring to a similar question and statute, said that—

" Taking the plan and specifications annexed as if they formed part " of the contents of the patent, which we are not merely allowed, but " are directed to do by the seventh and eighth sections of the statute, " Consol. Stats. C. ch. 34, it seems to us that the alleged invention is " sufficiently described ".

There can, I think, be no doubt that the drawings may be looked at to explain and illustrate the specification. If the defendant were attempting by reference thereto to limit his claim, or to enlarge it, in a manner not provided for in the specification, that would be another matter (2). But he is not attempting anything of the kind, and it seems to me that his specification, illustrated by the drawing attached thereto, is sufficient.

I find all the issues raised by the pleadings in the case in favour of the defendant, for whom there will be judgment with costs.

Judgment accordingly.

Solicitors for plaintiff: *Gormully & Sinclair.*

Solicitors for defendant: *Rowan & Ross.*

(1) 21 U.C.Q.B. 126.

(2) *Hincks* v. *Safety Lighting Co.*, L. R. 4 Ch. D. 607 ; *Clark* v. *Adie*, L. R. 2 Ap. Cas. 315.

1894.
Feb. 5.

CHARLES MAGEE, ADMINISTRATOR OF THE ESTATE AND EFFECTS OF THE LATE NICHOLAS SPARKS, THE YOUNGER, MARY SPARKS, NICHOLAS CHARLES SPARKS, AND SARAH SPARKS, INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, RESPECTIVELY, BY THEIR GUARDIAN THE SAID CHARLES MAGEE, ESTHER SLATER, MARY WRIGHT, AND ALONZO WRIGHT. ..... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Rideau canal—Gift of lands—Breach of condition—Discovery—Jurisdiction of court to enforce same against the Crown.

The Crown held certain lands at Ottawa for the purposes of the Rideau Canal. To its title to a portion of the lands was attached a further condition that no buildings should be erected on such portion. The court was of opinion that the breach of the conditions referred to, did not work any forfeiture or let in the heirs. (3 Ex. C. R. 304).

On motion under leave reserved:

Held, That the heirs (the suppliants) were not entitled to discovery or to an inquiry as to the particular uses to which the Crown had put the lands in question, or as to what buildings had been erected thereon.

Semble, That such a declaration and inquiry might be made in a case in which the court had jurisdiction to grant relief.

MOTION under leave reserved in a judgment of the court disposing of the principal issues in this case (1).

The grounds upon which the motion was based are stated in the judgment.

November 13th, 1893.

J. A. Christie, in support of motion.

Hogg, Q.C. *contra.*

(1) *See* the main case as reported in 3 Ex. C.R. 304.

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BURBIDGE, J. now (February 5th, 1894) delivered judgment.

The questions that were reserved in this case, and which have since been argued, had reference to the relief to which, if any, the suppliants were, under the finding of the court, entitled, and to costs.

With respect to that portion of the land at the By-wash, as to which Mr. Wise, the Government Engineer in charge of the canal, had expressed the view that, under existing circumstances, it was useful for building purposes only, further evidence has been taken which shows clearly, what perhaps was not a matter of serious question before, that this portion of the lands in dispute has not been abandoned by the Crown. It stands, therefore, in the same position as "the tract of sixty feet round the Basin" and the remaining portion of the land at the By-wash.

The suppliants, by their petition, prayed for a declaration:—

(1) That Her Majesty the Queen is a trustee of all the lands embraced in the gift of Nicholas Sparks that were not and are not now actually used for the purposes of the Rideau Canal, and of the rents and profits arising from the same.

(2) That the agreement expressed in the Act of the Provincial Legislature of Canada, 9th Victoria chapter 42, whereby the said Nicholas Sparks freely granted the two parcels of land therein mentioned, was made upon the condition that the said two parcels of land should be used for the purposes of the Rideau Canal, and upon the further condition that no buildings should be erected thereon.

(3) That the suppliants are entitled to discovery of all portions of said lands which are not now used for the purposes of the Rideau Canal; or on which buildings are erected, or which have been sold or leased.

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(4) That the suppliants are entitled to be paid all the rents and moneys received by Her Majesty for any portion of the said lands.

(5) That the suppliants are entitled to those portions of the said lands whereon buildings are erected, and of those portions not now used for the purposes of the Rideau Canal, and to a conveyance thereof from Her Majesty.

No specific objection was taken by the Crown to the form of the petition, or to the relief sought, or to the jurisdiction of the court; and so far as the petition presented a claim for lands or money in the possession of the Crown, there could, I apprehend, be no objection. In such a case the court has, without doubt, jurisdiction (50-51 Vict. c. 16 s. 15), and where it has jurisdiction, there can, I think, be no objection to the suppliants seeking, or the court making a declaration of the relief to which they are entitled. By the 12th section of *The Petition of Right Act* (R.S.C. c. 136) it is provided that the judgment on every petition of right shall be that the suppliant is not entitled to any portion, or that he is entitled to the whole or some specified portion of the relief sought by his petition, or to such other relief, and upon such terms and conditions, if any, as are just; and by the 13th section, that in all cases in which judgment, commonly called a judgment of *amoveas manus*, was formerly given in England upon a petition of right, a judgment that the suppliant is entitled to relief, shall be of the same effect as such judgment of *amoveas manus*.

On the merits of the controversy, I came to the conclusion :—

1. That the Crown is not a trustee for the suppliants of any portion of the lands in question; and

2. That although such lands are held by the Crown for the purposes of the Rideau Canal, and to the gift

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or grant of "the tract of sixty feet round the Basin and By-wash" is attached the further condition that no buildings should be erected thereon, the conditions so attached to the gift or grant of such lands are not such as would in the case of a breach thereof work a forfeiture and let in the heirs.

That, if I am right, disposes of the case, so far as this court can deal with it, unless there is some relief to which the suppliants are entitled in respect of the breach of the conditions to which I have referred. The Crown believed, and the case it set up was, that it held the lands in question free from any condition, and as was to be expected, under such circumstances, and as the evidence shows, portions of such lands have been used for purposes other than "the purposes of the canal." But as to that there is no question that the court cannot restrain the Crown from using such lands for any purpose for which it sees fit to use them, or compel it to remove any buildings that may have been erected thereon contrary to the condition to which I have referred. No doubt if the Crown accepts the view that I have expressed, or if it is ultimately determined that it holds these lands subject to any condition, the condition will be observed. I do not for a moment suggest anything to the contrary. I am speaking only of the authority of the court, and the well settled rule of law that it has no power to compel, on the part of the Crown, the observance of any such condition.

The suppliants contend, however, that the court may and should declare that they are entitled to discovery, and should direct an inquiry to be had as to the particular uses or purposes to which such lands have been put, and as to whether or not such purposes are "purposes of the canal" and also as to what buildings have been erected on such lands contrary to the condition attached to the gift thereof. But to what end and for

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what purpose would the court make such a declaration, and enter upon the inquiry mentioned? Not, as incident to any jurisdiction that it has to afford the suppliants any remedy, for as we have seen, it has no such jurisdiction. Not, it is equally clear, in aid of the jurisdiction of any other court, for there is no court which, in such a case, would have jurisdiction. The only purpose that such an inquiry could serve would be to elicit facts and collect materials upon which an appeal could be addressed to the Crown itself or to Parliament. But it is no part of the jurisdiction or duty of the court to adventure upon any such inquiry for any such purpose.

I am of opinion that I ought not to make the declaration or direct the inquiry prayed for.

As to costs, while the suppliants have not on the whole succeeded, they have not altogether failed. On the issues as to the conditions attached to the Crown's title they have substantially maintained their contention, although the court can in respect thereof afford them no relief. The case is one, I think, in which the costs might be apportioned, or in which, perhaps, the more convenient rule of leaving each party to bear his own costs, might be followed. I shall, I think, do what on the whole is fair between the parties, if I adopt the latter course. There will be no costs to either party, and either may within thirty days appeal as well from the principal judgment herein, as from the judgment now rendered on the questions reserved.

Judgment accordingly.

Solicitors for suppliants: *Christie, Greene & Greene.*

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

1894
Jan. 16.

WILLIAM DUNN.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of Right—Demurrer—50-51 Vict. c. 16 s. 50—Interpretation—Jurisdiction—Practice.

Where a petition of right has been demurred to and judgment obtained on such demurrer before a judge of the Supreme Court, acting as Judge of the Exchequer Court, prior to the passage of 50-51 Vict. c. 16, it was held to be a case fully heard and determined and not one coming within the class of cases referred to as being "partly heard" in section 50 of that statute; and the judge who heard the demurrer refused a motion to amend the petition, made after the passage of such Act, on the ground of want of jurisdiction.

Semble, That the provision in section 50 of *The Exchequer Court Act*, that "any matter which has been heard or partly heard or fixed or set down for hearing before any judge of the Supreme Court, acting as a judge of the Exchequer Court, may be continued before such judge to final judgment, who for that purpose may exercise all the powers of the Judge of the Exchequer Court," is not to be construed as an imperative enactment, and does not impose the duty upon a judge before whom a case was instituted before the Act was passed to continue to entertain the case until final judgment, nor does such provision oust the jurisdiction of the Judge of the Exchequer Court in respect of such matter.

MOTION to amend a petition of right after judgment allowing demurrer.

On the 30th June, 1883, the suppliant filed a petition of right. On the 30th November of the same year the Crown demurred thereto, the demurrer coming up for hearing before Mr. Justice Fournier, of the Supreme Court of Canada, acting as Judge of the Exchequer Court, on the 18th February, 1884. On the 22nd of October in that year judgment was delivered by the learned judge overruling the demurrer. This judg-

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ment was reversed on appeal to the Supreme Court, (1) and by the order of that court dated 16th November, 1885, leave was granted to the suppliant to apply to the court below to amend his petition of right. The motion to amend was not made until some seven years after leave was so granted, and was then made to the learned judge who decided the case on demurrer. In the meantime *The Exchequer Court Act*, 50-51 Vict. c. 16, was passed. The sections of the Act bearing upon the issues involved in the motion are set out in the judgment.

January 15th, 1894.

Gemmill, in support of motion;

Hogg, Q.C. *contra*.

FOURNIER, J. now (January 16th, 1894) delivered judgment.

The motion for leave to amend the petition of right in this case now presented to me purports to be made before the Exchequer Court. By section fifteen of *The Exchequer Court Act* (1887) exclusive jurisdiction in such cases as the present is given to the Exchequer Court, and by section fifty of the same Act the present petition, being a matter pending in the Exchequer Court when the Act came into force which has not been fixed or set down for hearing, is to be continued before the Exchequer Court. The learned counsel who has made the motion claims that the following words which are added in section fifty, namely:—

> But any matter which has been heard or partly heard or fixed or set down for hearing before any judge of the Supreme Court, acting as a judge of the Exchequer Court, may be continued before such judge to final judgment, who for that purpose may exercise all the powers of the Exchequer Court.

(1) *See* 11 Can. S.C.R. 385.

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give me jurisdiction. I will remark, first, that this right is only optional, and the duty is not imperatively imposed upon any judge of the Supreme Court and that this provision does not in my opinion oust the Exchequer Court Judge's jurisdiction over the case. However, I do not think the present case comes within the wording of this section, for the case on the demurrer has been fully heard and finally determined by me before the Act came into force, and as the amended case has not been heard or partly heard, or fixed or set down for hearing before me acting as a judge of the Exchequer Court, I am clearly of opinion that I have no jurisdiction to entertain the present motion. In virtue of the judgment of the Supreme Court granting to the suppliant the right to apply to the Exchequer Court for leave to amend his petition, it gave him the right to apply to any judge to make out a new case which was never heard, or fixed or set down for hearing and any judge other than the judge who heard the demurrer could have heard the amended petition of right.

Being of opinion that when the Act was passed in 1887 the case had been for years finally disposed of on the issue submitted, I think the case does not come within the words relied on in section fifty by the counsel who has made the motion. I order that the matter be referred back to the Exchequer Court.

Judgment accordingly.

Solicitors for suppliant: *Gemmill & May.*

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

JOHN DEKUYPER & SON.....PLAINTIFFS; 1894

AND Feb. 19.

VAN DULKEN, WEILAND & COMPANY..... } DEFENDANTS.

Trade-mark—Registered and unregistered mark—Jurisdiction of court to restrain infringement—Exactness of description of device or mark—Use of same by trade before registration—Effect of—Rectification of register.

This court has no jurisdiction to restrain one person from selling his goods as those of another, or to give damages in such a case, or to prevent him from adopting the trade label or device of another, notwithstanding the fact that he may thereby deceive or mislead the public, unless the use of such label or device constitutes an infringement of a registered trade-mark.

2. In such a case the question is not whether there has been an infringement of a mark which the plaintiff has used in his business, but whether there has been an infringement of a mark as actually registered.

3. When any one comes to register a trade-mark as his own, and to say to the rest of the world "here is something that you may not use," he ought to make clear to every one what the thing is that may not be used.

4. In the certificate of registration the plaintiffs' trade-mark was described as consisting of "the representation of an anchor, with the letters 'J. D. K & Z,' or the words 'John DeKuyper & Son, Rotterdam, &c.,' as per the annexed drawings and application." In the application the trade-mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the letters 'J. D. K & Z,' or the words 'John De Kuyper & Son, Rotterdam,' which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels, and other pakages containing geneva sold by plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *fac simile* of which was attached to the application, but there was no express claim of the label itself as a trade-mark. This label was white and in the shape of a heart with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor with the letters 'J. D. K & Z' and the words 'John

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De Kuyper & Son, Rotterdam,' and also the words 'Genuine Hollands Geneva' which it was admitted were common to the trade. The plaintiffs had for a number of years prior to registering their trade-mark used this white heart-shaped label on bottles containing geneva sold by them in Canada, and they claimed that by such use and registration they had acquired the exclusive right to use the same.

Held, that the shape of the label did not form an essential feature of the trade-mark as registered.

5. The defendants' trade-mark was, in the certificate of registration, described as consisting of an eagle having at the feet 'V. D. W & Co.,' above the eagle being written the words 'Finest Hollands Geneva'; on each side are the two faces of a medal, underneath on a scroll the name of the firm "Van Dulken, Weiland & Co., and the word 'Schiedam,' and lastly at the bottom the two faces of a third medal, the whole on a label in the shape of a heart (*le tout sur une étiquette en forme de cœur*). The colour of the label was white.

Held, that in view of the plaintiffs' prior use of the white heart-shaped label in Canada, and the allegation by the defendants, in their pleadings, that the use of a heart-shaped label was common to the trade prior to the plaintiffs' registration of their trade-mark, that the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade-mark should be so rectified as to make it clear that the heart-shaped label forms no part of such trade-mark.

THIS was an action to restrain the infringement of a trade-mark, and for incidental relief.

The facts of the case are sufficiently stated in the reasons for judgment, but in order to give a clearer apprehension of the essential features of the conflicting trade-marks, copies of the two applications for registration, showing diagrams of the respective labels, and the two certificates of registration are given below.

PLAINTIFFS' TRADE-MARK.

APPLICATION.

To the Minister of Agriculture,

Ottawa.

SIR,—I, John de Kuyper, one, and on behalf, of the firm of John de Kuyper & Son, carrying on business as distillers in Rotterdam, Kingdom of the Netherlands, hereby furnish a duplicate copy of a trade-mark,

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which I verily believe is the property of our Firm on account of having been the first to make use of the same.

The said trade-mark consists of a device or representation of:

On the casks containing our Geneva is marked near or under the bung,

hot iron brand

J D K & Z

and on one head

is painted in black letters

JOHN DE KUYPER AND SON.

ROTTERDAM.

On the cases and boxes on the fore-side right hand is painted, in white letters,

JOHN DE KUYPER AND SON.

and amid at the foot, in an unpainted spot, in hot iron brand

J D K & Z.

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On the bottles is affixed a printed label,

and the corks green waxed and sealed with the seal

the whole or any part thereof forming our trade-mark, the said device may be branded or stamped upon barrels, kegs, cases, boxes, capsules, corks, labels and other packages containing Geneva sold by us, and I hereby request the said trade-mark to be registered in accordance with the law.

In testimony thereof I have signed in the presence of the two undersigned witnesses, at the place and date hereunder mentioned.

ROTTERDAM, 3rd March, 1875.

Witnesses :

(Sgd) Charles de Kuyper. } (Sgd.)
" Jacob van der Plas } JOHN DE KUYPER.

I, the undersigned, Her Britannic Majesty's Consul for the Provinces of South Holland and Zealand, do hereby certify, that the signatures to the annexed document dated Rotterdam, 3rd March, 1875, are those of Mr. John de Kuyper, member of the firm John de Kuyper & Son, Distillers in this City, of Mr. Charles de Kuyper and of Mr. Jacob van der Plas, the witnesses, all residing in this City, and that the same are entitled to all due faith and credit as valid and effectual.

Given under my hand and Seal of Office at the British Consulate at Rotterdam, this fifth day of March, 1875.

(Sgd.) ALEX. TURING,
H. B. M. Consul.

L. S.

CERTIFICATE OF REGISTRATION.

This is to certify that this trade-mark which consists of the representation of an anchor with the letters J. D. K & Z or the words John de Kuyper & Son, Rotterdam, &c., &c., as per the annexed drawings and application has been registered in
"The Trade-Mark Register No. 4, Folio 666"
in accordance with "*The Trade-Mark and Design Act of* 1868." By
John de Kuyper, one, and on behalf, of the firm,
John de Kuyper & Son, of Rotterdam, Kingdom of the Netherlands, on the 21st day of April, A. D. 1875.

Department of Agriculture, Ottawa, Canada, this 21st day of April, A.D. 1875.

(Sgd.) J. C. TACHÉ,
Deputy Min. of Agr.

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Certified to be a true copy of the Application and Registration of trade-mark label herein mentioned on Folio 666 of Register No. 4.

Department of Agriculture, Ottawa, Canada, this 7th day of January, A.D. 1893. } (Sgd.) J. LOWE, *Dep. of the Min. of Agr.*

DEFENDANTS' TRADE-MARK.

DEMANDE.

Au Ministre de l'Agriculture,

Branche des Marques de Commerce et des Droits d'Auteurs,

Ottawa.

Je, Damase Masson, de la cité de Montréal, comté d'Hochelaga, un des représentants au Canada de la maison Van Dulken, Weiland & Co., de Rotterdam, Hollande, et autorisé par eux, transmets ci-joint copie en double d'une marque de commerce spéciale (conformément aux clauses 9 et 10 de "*l'Acte des Marques de Commerce et des Dessins de Fabrique de* 1879") dont je réclame la propriété parce que je crois sincèrement qu'ils en sont les véritables propriétaires.

Cette marque de commerce spéciale consiste en un aigle ayant à ses pieds VD W & Co.; au dessus de l'aigle sont écrits les mots "Finest Hollands Geneva;" de chaque côté sont les deux faces d'une médaille; en dessous, sur une guirlande, le nom de la maison "Van Dulken, Weiland & Co." puis le mot "Schiedam" et enfin au bas les deux faces d'une troisième médaille. Le tout sur une étiquette en forme de cœur.

Je demande par ces présentes l'enregistrement de cette marque de commerce spéciale conformément à la loi.

J'inclus un mandat de poste No. 7852, montant de la taxe de $25 requise par la clause 12 de l'Acte précité.

En foi de quoi j'ai signé en présence de deux témoins soussignés aux lieu et date ci-dessous mentionnés.

Montréal, 27 mars, 1884.

Témoins :

(Sgd.) L. P. Pelletier.
" H. P. Bruyère.

(Sgd.) D. MASSON.

Ottawa, 7th January, 1893.

Attested,
J. LOWE,
Dep. of the Min. of Agr.

Ottawa, 7th January 1893.

Attested,
J. LOWE,
Dep. of the Min. of Agriculture.

CERTIFICATE OF REGISTRATION.

CANADA.

LES PRÉSENTES SONT À L'EFFET DE CERTIFIER que la MARQUE DE COMMERCE (*Spéciale*) laquelle consiste en un aigle ayant à ses pieds VD W & Co., au-dessus de l'aigle sont écrits les mots "Finest Hollands Geneva;" de chaque côté sont les deux faces d'une médaille; en-dessous, sur une guirlande, le nom de la maison "Van Dulken, Weiland & Co.," puis le mot "Schiedam," et enfin au bas les deux faces d'une troisième médaille, le tout sur une étiquette en forme

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de cœur, tel qu'il appert par l'étiquette et la demande ci-contre, a été enregistrée au "Registre des Marques de Commerce No. 10, Folio 2242," conformément à "*l'Acte des Marques de Commerce et Dessins de Fabrique de* 1879," par Van Dulken, Weiland & Co, de Rotterdam, Hollande, ce 2ème jour d'avril A.D. 1884.

Ministère de l'Agriculture,
(Branche des Marques de Commerce et Droits d'Auteurs.)
Ottawa, Canada, ce 7ième jour de janvier A.D. 1893.

J. LOWE,
Dep. of the Min. of Agr.

On the 10th and 11th of January, 1893, the case was tried at Montreal.

Campbell, for the plaintiffs:—

The plaintiffs' trade-mark was registered under 31 Vict. c. 5. Under sec. 3 thereof by such registration they acquired the right to its exclusive use, the words being "and thereafter he [the person registering] shall "have the exclusive right to use the same to designate "articles manufactured or sold by him."

This being the case, the plaintiffs are entitled to an injunction restraining the defendants from infringing it. This remedy the court is entitled to give under 54-55 Vict. c. 26 sec 4. Under 54-55 Vict. c. 35 also the Exchequer Court of Canada is empowered to exercise practically the jurisdiction that has been heretofore exercised by the Minister of Agriculture in regard to the rectifying, expunging and varying of all entries which have been made without sufficient cause. There is no doubt about the court having jurisdiction to decree an injunction in this case. [Cites *McKinnon* v. *Thompson* (1); *Darling* v. *Barsalou* (2)]. We ask for an injunction to restrain infringement by the defendants, and a declaration that we are the proprietors of the trade-mark.

(1) 26 L. C. J. 329.

(2) 9 Can. S. C. R. 677.

Argument of Counsel.

In reference to the limitation of the issues arising here I cite the following authorities under the English Judicature Act, because the practice of the High Court is applicable to this case. As I understand the English Judicature Act, you must deal specifically with each allegation and raise, in substance, the grounds upon which the defence is based. There are several reported cases in which that has been fairly discussed; and it has always been held that where the rule has not been complied with you are entitled to judgment upon the constructive admission. [Cites *Thorpe* v. *Holdsworth* (1); *Byrd* v. *Nunn* (2); *Collette* v. *Goode* (3); *Harris* v. *Gamble* (4); *Rutter* v. *Tregent* (5); *Lowther* v. *Heaver* (6).]

The evidence shows that the plaintiffs were the first to use the trade-mark in question, and are entitled to be declared the owners of it. [Cites *Somerville* v. *Schembri* (7).] As this case arises in the Province of Quebec I would refer to the law dictionary of *Ruben de Couder* under the heading *Marque de Fabrique*, secs. 70 and 102. It is there stated that by the old law of France there is a common law ownership, independent of the statutes, which it says only give a sanction to the use.

[Cites, generally, *Ford* v. *Foster* (8); *Montgomery* v. *Thompson* (9), *Biegel's Trade-Mark* (10); *Re Rosing's Application* (11); *Johnston* v. *Orr-Ewing* (12); *Perry Davis* v. *Kennedy* (13); *Collins* v. *Brown* (14); *Sebastian on Trade-Marks* (15); *Eddleston* v. *Vick* (16).]

(1) L. R. 7 Eq. 139.
(2) 5 Ch. D. 781; 7 Ch. D. 284.
(3) 7 Ch. D. 842.
(4) 6 Ch. D. 748.
(5) 12 Ch. D. 758.
(6) 59 L. T. 631.
(7) 12 App. Cas. 453.
(8) 41 L. J. Ch. 689.
(9) 60 L. J. Ch. 757.
(10) 57 L. T. 247.
(11) 54 L. J. 975.
(12) 7 Ap. Cas. 219.
(13) 13 Grant. 523.
(14) 3 Jur. (N. S.) 929.
(15) P. 125 (ed. of 1878).
(16) 18 Jur. 7.

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Abbott, Q.C. followed on the same side:—

The Act which has given jurisdiction to this court does not create any new right, nor, does it even create a new remedy; it merely provides new machinery, or procedure; by which an already existing right, and an already existing remedy, may be enforced by this court. We had our rights and our remedies under the law before other courts, and the most that can be said is that this statute has provided a new procedure. I do not think it will be contended on the other side, that statutes providing as to procedure merely are exempted from that rule which holds that statutes, unless it is expressly stated, are not to be construed retroactively,—in other words, that statutes making new rules of procedure are given a retroactive effect. Apart from that, however, for the purposes of this case alone, we have shown that the offence which we complain of has been committed since this statute has come into force. As my learned friend, Mr. Campbell, pointed out, one of the statutes came in force in September, 1891, and we have proved the selling of these goods under this incriminated mark since that date, and up to the institution of the present suit, so that, as far as our remedies are concerned, with regard to the injunction at least, there can be no question, it seems to me, as to the jurisdiction.

[Cites *Singer Mfg. Co.* v. *Loog* (1); *Eugène Pouillet, Des Marques de Fabrique* (2).]

I submit the general proposition that the trade-mark does not consist, as some of the witnesses here certainly seemed to think, of any emblematical design, such as an anchor, or an eagle, or any device of that kind, but it consists in the whole label which is claimed by the owner of the trade-mark. The law says that the proprietor may register a label. We have proved that we

(1) 8 App. Cas. 15 (2) P. 79.

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were the proprietors of this label containing our trade-mark long previous to the registration; and we have proved that we registered this label as our trade-mark, the whole of it. My proposition is that if another person uses a label which is similar in shape and general design and general appearance, the *tout ensemble* (the French expression conveys the sense perhaps better than the English), then there is an infringement of the trade-mark. The mere fact that they have not copied the anchor on the trade-mark, it seems to me, makes no difference. It is quite possible they might take our anchor and use it on a different label, a square blue label, or a round red label arranged in an entirely different way. I do not pretend that we have any property in any particular word or in any particular mark upon that label, I contend that our property is in the trade-mark, its shape and general appearance as presented in the application, and I submit that there is such a general resemblance between the two as constitutes an infringement.

Generally speaking, according to my apprehension of the rules, the court must look at the general appearance of the two labels, and not at any particular detail.

In the case of *Darling* v. *Barsalou* (1) the first court granted an injunction and it was reversed by the Court of Appeal with strong dissent by Mr. Justice Cross. He laid down the principle we contend for, that where there is a general resemblance which will deceive parties purchasing who use ordinary care, it is sufficient. The case went to the Supreme Court of Canada, and there it was reversed.

Your lordship will find that Mr. Justice Cross made use of words in that case practically the same as were used by Lord Cransworth in the case of the *American*

(1) 1 Dor. 218; 9 Can. S.C.R. 677.

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Leather Cloth Co. v. *The Leather Cloth Co.* (1). He said there, that no general rule can be laid down as to what is or is not a mere colourable imitation, that is not the design of the Trade-Marks Act; all that can be done is to ascertain, in every case as it occurs, whether there is such a resemblance as to deceive a person using ordinary caution. Mr. Justice Cross used the same words. Your lordship will see in following the history of the decisions that they rather tend to widen the interpretation placed upon the Act, instead of restricting it, as Lord Cransworth said, to the case of the deception of a person using ordinary caution. The court is to hold that the thing to be looked at is whether the unwary purchaser or incautious person would be deceived.

[Cites *Wotherspoon* v. *Currie* (2); *Johnston* v. *Orr-Ewing* (3); *Brown on Trade-Marks* (4); *Reeve* v. *Richardson* (5); *Oakey* v. *Dalton* (6); *Hennessy* v. *White* (7); *Hennessy* v. *Hogan* (8); *Swift* v. *Day* (9); *Gillespie* v. *Poupart* (10); *Eugène Pouillet, Des Marques de Fabrique* (11).

Ferguson, Q.C., for the defendants: It was said by Lord Bramwell, in one of the leading cases on trade-marks, that the decisions in trade-mark cases, no matter how elaborate they may be, are a very little guide to a judge coming to a conclusion under the particular circumstances of a particular case, because each case presents itself under peculiar circumstances and upon peculiar facts which will never be found applicable to any other; and that, after all, it is a simple question of deciding whether a trade-mark is an infringement of

(1) 11 Jur. N. S. 513.
(2) L. R. 5 H. L. 508.
(3) 7 App. Cas. 219.
(4) Sec. 34.
(5) 45 L. T. 54.
(6) 35 Ch. D. 700.
(7) Seb. Dig. 401.
(8) Seb. Dig. 403.
(9) 2 Abb. P. 459.
(10) 14 L. N. 41.
(11) Secs. 184 to 190.

another, and each case must rest upon its own foundation, and must be decided almost apart from authority. But, there are some general principles, notwithstanding that truism, which are well to bear in mind in considering a case of this sort.

In the first place, I will draw attention shortly to the jurisdiction which this court has the right to exercise in cases of trade-mark. By the Act of 1891, which repealed what was found to be an insufficiently worded Act in 1890, it will be found that under section 1, the old section which dealt with the jurisdiction of the Minister—giving him the right to refuse the registration of trade-marks in certain cases,—was repealed and a new one substituted therefor, and in the succeeding sections are stated five grounds upon which the Minister might refuse to register a trade-mark. This section of course dealt wholely and entirely with pending applications and gave the Minister no jurisdiction whatever to expunge in respect of any of such grounds. Although he may refuse to register, it gives him no jurisdiction to expunge on the same ground; and, by this section, he may, if he pleases, refer to the Exchequer Court the question of whether registration should be granted or not. The second part of section 1 is the one which, in that Act, confers upon this court, if it has jurisdiction in this case, the jurisdiction to grant any relief.

Section 12, which is the substituted section for the Trade-Marks Act, as provided by the Act of 1891, gives simply a jurisdiction to the court to make, expunge, or vary an entry where registration has been refused without sufficient cause, or where it is alleged that an entry has been made without sufficient cause.

Then the sub-section following provides that the said court may in any proceeding under this section decide any question which it may be necessary

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or expedient to decide for the rectification of the register. These are the only provisions of that Act giving any jurisdiction in trade-mark cases to this court.

Now, turning to *The Exchequer Court Amendment Act*, 1891, c. 26 sec. 4, we find the provision there dealing with the question of jurisdiction in trade-mark cases. That of course clearly and obviously refers to the provisions of the eleventh section of the Trade-Marks Act of 1891, where there are applications pending, and where the Minister refers the question as to which is entitled to the trade-mark to the Exchequer Court.

[He quotes at length sub-secs. (*b*) and (*c*) of 54-55 Vict. c. 26]. These are the only statutory provisions which give jurisdiction to this court.

Now, what is the meaning of an entry "without sufficient cause?"

In sections 3, 8, 9, 10, 13, and 14 of *The Revised Statutes of Canada c.* 63 will be found what are the requirements and conditions upon which a person applying for the registration of a trade-mark shall be entitled to it, and what effect it shall have when granted.

By these sections it is provided that the Minister may make regulations with reference to applications for trade-marks, the form the application should be in, and what facts should be stated in support of them. It is then provided that, upon these conditions being complied with to the satisfaction of the Minister, he shall grant the registration, and that it shall endure for twenty-five years, is renewable, and may be sold or assigned to a purchaser.

I submit, in the first place, that there is no ground established for saying that the defendants' certificate was improvidently issued. The certificate itself is put in by the plaintiffs; it shows what was claimed by

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the defendants, Van Dulken, Weiland & Co., it shows on its face a compliance with the rules and regulations. The certificate, *primâ facie*, shows that we are entitled to the trade-mark under which we have been carrying on business.

Now, I submit that what is included or meant by "registration without sufficient cause" must be that these conditions were not complied with, and that if they are complied with there is no jurisdiction under this particular section to set that registration aside.

What is the other possible jurisdiction that this court may exercise? The expression "in all cases in which it is sought to impeach or annul a patent of invention, or have the entry in any register, etc., made, expunged, varied or rectified" is taken really from *The Revised Statutes*, or is an adaptation of *The Revised Statutes* in several sections where it refers, for instance, to applications made by the holder of the certificate himself. If he finds that he has made an error, that he has made a mistake in registering his own trade-mark, he may make an application to have it amended or have it expunged, or a new one substituted in its place.

I submit that the court must construe these provisions strictly in favour of the defendants' certificate. We have, as I have already pointed out to your lordship in the sections of *The Trade-Marks Act*, acquired a property, we have acquired rights, we have been enjoying these rights; we applied, in the way pointed out by the Act, for the registration of a particular trade-mark, and we complied with the regulations and the provisions of that Act. The Minister after proper consideration, it must be presumed, granted that registration, which we have been in the enjoyment of for at least 8 or 9 years, and the court ought not lightly or by any strained construction, interfere with or take

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away the rights, the property, or the privileges which we have by virtue of the registration.

The distinction now between an unregistered trade-mark and a registered trade-mark is, that a man claiming an unregistered trade-mark has no right of action. Until it is registered there is no right of action.

If I am right the plaintiffs' case must fall to the ground; unless their registration covers the heart-shape, which is, after all, what they are basing their case upon, they would have no remedy or right of action.

The plaintiffs are confined strictly, so far as their right of action is concerned, to what is given to them by their certificate.

[Cites *Horsburg's Trade-Marks* (1); *Singer Mfg. Co.* v. *Loog* (2); *Ellis & Son* v. *Ruthin Soda-Water Co.* (3); *Lawson on Trade-Marks* (4); *Martin* v. *Wright* (5).]

Duhamel, Q. C. followed for defendants:—

The authorities on the matter are very clear. [Cites *Eugène Pouillet, Des Marques de Fabrique* (6).] This clearly states that in order to judge of the possibility of confusion of trade-marks it is not proper to take as a basis of comparison the degree of attention given by the first man that passes, the ignorant, or the unintelligent consumer; but that it is necessary to take the degree of attention given by a vigilant and sufficiently careful man who examines the article. This authority, in this instance, is supported by many instances which are contained in the report. In support of this quotation from *Pouillet*, I quote *Adams on Trade-Marks* (7). The court will not restrain the use of a trade-mark on the ground of general similarity, nor if it is different in

(1) 53 L. J. Chy. 237.
(2) 8 App. Cas. 15.
(3) Sebastian 3rd ed. p. 137.
(4) (2nd ed.) p. 213.
(5) 6 Sim. 297.
(6) P. 203, paragraph 189.
(7) Ed. 1876, p. 112.

the part to which the consumer would look to see whose manufacture he was purchasing.

[Cites *Blackwell* v. *Crabb* (1); *Bondier* v. *Dépatie* (2).]

Ferguson, Q.C. cites the following additional authorities: *Beard* v. *Turner* (3); *Reddaway* v. *Bentham Hemp Spinning Co.* (4); *Perry Davis* v. *Harbord* (5); *Baker v. Rawson* (6).

On the 26th June, 1893, on motion of the defendants the trial was reopened for the purpose of taking further evidence as to the user of the heart-shaped label in the trade in the Kingdom of Holland.

February 19th, 1894.

The commission having been returned, *Campbell* now moved for judgment for plaintiffs, citing, in addition to the authorities presented on the argument, *Re Trade-Mark of La Société Anonyme des Verriers de l'Étoile* (7); *Sebastian on Trade-Marks* (8).

Ferguson, Q.C. and *Duhamel*, Q.C., *contra*, cited *Re Loftus' Trade-Mark* (9); *Re Payne & Co's. Trade-Mark* (10); *Re Powell's Trade-Mark* (11).

BURBIDGE, J.:—The plaintiffs, who are distillers residing at Rotterdam in Holland and who carry on business there and in the Province of Quebec, bring their action (1st) to restrain the defendants, who are also distillers residing at Rotterdam and who also carry on business there and in the Province of Quebec, from infringing a trade-mark which the plaintiffs registered in the office of the Minister of Agriculture on the 21st of April, 1875, and (2ndly) for the recti-

(1) L. J. [1867] No. 36. N. S. 504.
(2) 3 Dor. 233.
(3) 13 L. T. R. N. S 746.
(4) [1892] Q. B. 639.
(5) 15 App. Cas. 316.
(6) 45 Ch. D. 519.
(7) [1894] 1 Ch. 61.
(8) P. 127.
(9) [1894] 1 Ch. 193.
(10) [1893] 2 Ch. 567.
(11) [1893] 2 Ch. 388.

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fication of the Register of Trade-Marks in the office of the said Minister in respect of the entry and registration of a certain trade-mark therein registered on the 2nd of April, 1884, by Mr. Damase Masson, of the City and District of Montreal, acting as agent of the defendant firm.

The plaintiffs' trade-mark is, in the certificate of registration, described to consist of "the representation of an anchor with the letters 'J. D. K & Z,' or the words 'John de Kuyper & Son, Rotterdam,' &c., &c., as per the annexed drawings and application." Turning to the application we find that the trade-mark is claimed to consist of a device or representation of an anchor inclined from right to left in combination with the letters 'J. D. K & Z,' or the words 'John de Kuyper & Son, Rotterdam,' which it is stated may be branded or stamped upon "barrels, kegs, cases, boxes, capsules, casks, labels and other packages containing Geneva" sold by plaintiffs, and the manner of applying the trade-mark to casks, cases and bottles is described. On bottles was to be affixed a printed label, a copy or *facsimile* of which was attached to the application, but without any express claim of the label itself as a trade-mark. This label is white and in the shape of a heart with an ornamental border of the same shape. On the label is printed the device or representation of the anchor with the letters 'J. D. K & Z' and the words 'John de Kuyper & Son, Rotterdam,' and also the words 'Genuine Hollands Geneva' which it is admitted are common to the trade. The plaintiffs had for a number of years prior to registering their trade-mark used this white heart-shaped label on bottles containing geneva sold by them in Canada, and they claim that by such use and registration they have acquired the exclusive right to use the same.

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The defendants' trade-mark is in the certificate of registration described to consist of an eagle having at its feet 'V D. W & Co.,' above the eagle being written the words 'Finest Hollands Geneva'; on each side are the two faces of a medal, underneath on a scroll the name of the house 'Van Dulken, Weiland & Co.,' and the word 'Schiedam' and lastly at the bottom the two faces of a third medal, the whole on a label in the shape of a heart, (*le tout sur une étiquette en forme de cœur.*) The colour of the label is white.

Tested by an examination of the two labels, or by the opinions of the witnesses examined, it will be seen that in the shape, colour and general arrangement of the two labels there is a somewhat marked similarity; but the differences are such, I think, as to prevent persons of reasonable care and caution from mistaking the one for the other. That would clearly be the case with persons who could read, and for the illiterate there is in the one case the distinctive mark or device of an anchor, and in the other that of an eagle.

There is no evidence that the defendants have ever sold their geneva for the plaintiffs' or that any one has ever been misled or deceived by the defendants' label or bought their geneva for the plaintiffs,' and with respect to those who purchase for the wholesale or retail trade there is, I think, no danger of such deception. At the same time there may be, and there probably are, a number of the ultimate purchasers of gin —the unwary and incautious among the illiterate consumers—who are likely to be misled and deceived by the general resemblance in shape, colour and arrangement between the two labels. The plaintiffs' trade has been established for many years and their geneva is well and favourably known, and has acquired a reputation throughout the Province of Quebec. It is known generally, I think, by the name of 'De

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Kuyper' but also by the brand or mark of an anchor, and in some sections of the Province, and among some classes, by the heart-shaped label. And the fair inference from the facts and circumstances disclosed by the case is, I think, that the defendants, while not perhaps attempting to sell their geneva as that of the plaintiffs', thought to gain a trade advantage by adopting and using a label which in shape and colour resembled that used by the plaintiffs, though otherwise distinguishable from it.

It will have been observed that the defendants in their application to register their trade-mark claimed to be the proprietors of the words and device mentioned, written or printed upon a heart-shaped label. They claimed, I think, to register a label in that form—with such words and device printed or written upon it. Now a label in that shape had been in use for years in Canada by the plaintiffs upon the same class of goods. This fact must, I think, have been known to the defendants' agent when he made the application for them to register their trade-mark. Clearly they had no exclusive right to the heart-shaped label which they claimed. / That they do not now deny, for they seek to protect themselves against the charge of infringing the plaintiffs' trade-mark by alleging that the use of a heart-shaped label was common to the trade prior to the plaintiffs' registration of their trade-mark. / If the heart-shaped label was common to the trade the defendants were not the proprietors of it, and they had no right to an exclusive use of it./ Possibly in view of the evidence in this case they had no right to use it at all. It is clear in any view of the case that they were not entitled to register as their trade-mark one of which an essential feature and claim was a heart-shaped label. / Perhaps in such a case the registration of the trade-mark should be cancelled, and the

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entry thereof expunged from the registry. But that is not necessary in the present case in order to do justice between the parties, and I shall limit the order and direction of the court to the rectification of the entry in the registry in such a way as will make it clear that the heart-shaped label is no part of the trade-mark. For that purpose it will probably be sufficient to expunge from the entry and certificate the words "*le tout sur une étiquette en forme de cœur*," or the words "*en forme de cœur.*" If any question arises as to that it may be decided when the minutes of the judgment are settled.

That brings us to the other question of the infringement of the plaintiffs' trade-mark. And here it is necessary to bear in mind that the court has no general authority or jurisdiction to restrain one person from selling his goods as those of another or to give damages in such a case, or to prevent any one from adopting, in his business, labels or devices that may be calculated to deceive or mislead the public, unless the use of such labels or devices constitute an infringement of a registered trade-mark (1). In such a case as has been pointed out the point is not whether there has been an infringement of the mark which the plaintiff has used in his business, but whether there has been an infringement of the mark which he has actually registered (2). And in considering whether there has been an infringement of the registered trade-mark, it is necessary to see whether the essential particular in that registered trade-mark has been imitated. Now what is the essential particular of the plaintiffs' trade-mark? Clearly the anchor in combination with the letters 'J. D. K & Z' or the words 'John de

(1) R. S. C. c. 63 s. 19; 54-55 Vict. c. 26 s. 4 (*c*).

(2) Sebastian, 3rd ed. p. 137, citing *Ellis & Sons* v. *Ruthin Soda Water Co.*

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Kuyper & Son, Rotterdam.' That is what we find to be common to all the forms in which the trade-mark is to be applied to packages containing geneva manufactured by them. That is what they say may be branded or stamped upon such packages or upon capsules, casks or labels, and that is what in the certificate of registration issued to, and accepted by, them their trade-mark is said to consist of. Their claim is for the device or representation that I have mentioned, and they say it may be stamped upon labels, which are of course to be affixed to bottles containing their geneva. It is true that a heart-shaped label bearing the device was affixed to the plaintiffs' application, but they did not, so far as I can see, claim the form of the label as constituting a part of the trade-mark. When any one comes to register a trade-mark as his own, and to say to the rest of the world, "here is something that you may not use," he ought to make clear to everyone what the thing is that may not be used. If he seeks to register a label he should say so, and no one is, I think, bound to infer that because he registers a device that he says may be stamped or printed on labels, that it was intended that the form of a label accompanying or affixed to the application, but not claimed, not even described, is an essential part of the mark, to the exclusive use of which the applicant is entitled. A label may, no doubt, be registered as a trade-mark, and it may be that the plaintiffs are entitled to the exclusive use of the one in question, and on application to the Minister of Agriculture to have it registered. On that question I express no opinion for it is not now, I think, before me. What I have to do with at present is the trade-mark that they have registered, of which it does not seem to me that the shape of the label forms, or is claimed to form, an essential or any feature. If that is so the defendants,

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whatever else they may have done, have not infringed the plaintiffs' registered trade-mark.

The application for an order to restrain the defendants from infringing the plaintiffs' trade-mark will be refused.

On the issues as to the rectification of the entry in the registry of the defendants' trade-mark the plaintiffs are entitled to costs, and that will carry the general costs of the cause.

On the other issues of fact, those raised by the 4th paragraph of the statement in defence, each party has succeeded in part, and there will be no costs on such issues. Both parties may have sixty days from this date in which to appeal, and the leave shall apply as well to the judgment on demurrer herein.

Judgment accordingly.

Solicitors for plaintiffs: *Abbotts, Campbell & Meredith.*

Solicitors for defendants: *Duhamel & Merrill.*

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Jan. 19.

QUEBEC ADMIRALTY DISTRICT.

WALTER J. RAY, THOMAS CONNOLLY AYLWIN, JAMES BOSWELL, VEASEY BOSWELL AND HENRY HAVELOCK SHARPLES.. } PLAINTIFFS;

AND

THE HONOURABLE AUGUSTE C. P. R. LANDRY..... } DEFENDANT.

The BERNADETTE and the MURIEL.

Maritime law—Collision between yachts during race—Breach of Quebec Yacht Club rules—Damages—Costs.

By one of the general rules of the Quebec Yacht Club it is provided that while a race is in progress, boats, other than those in the race, shall keep clear of the competing yachts, and, particularly, that they shall not round any of the buoys that mark the course of the race.

One of the conditions of the *Ritchie-Gilmour* cup race is, that "the yachts are to be manned entirely by members of the club, and sailed and steered by the owners or part-owners."

Two yachts, the *B.* and the *M.*, started upon a certain race for this cup, the former being in every way qualified to compete, the latter being disqualified for winning the cup from the fact that she was partly manned by a professional crew. It appeared from the evidence that the owner of the *B.* was under the impression that the *M.* was really not in the race; but, on the other hand, the *M.* carried a flag indicating that she was in the race, and in every way acted as if she was a competing yacht. The two boats rounded the first buoy, the *B.* leading, and after one or two tacks had been made beating against the wind, they came towards each other close hauled, the *M.* on the starboard and the *B.* on the port tack. Under the regular sailing directions it was the duty of the *B.* in such a case to give way, and that of the *M.* to continue her course. Instead of this, they both continued their course until the *B.*, when too late, attempted to give way and then ran into the *M.* doing her considerable damage. Those on board the *B.* claimed they did not see the *M.* until they were immediately upon her, and that when they did see her they thought she would keep out of their way because she was not in the race.

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Held, that those in charge of the *B.* had no right to suppose, under the circumstances preceding the collision, that the *M.* would act in any other way than a competing yacht would do, and that they were at fault for not giving way to her, as the sailing rules required, quite irrespective of any rights which the *M.* might have with regard to the race.

2. That the *M.*, not having complied with the conditions of the race with regard to the character of her crew, was wrong in sailing the course at all, and was, therefore, also at fault for the collision.

The damages were ordered to be assessed and divided, each party paying his own costs.

THIS was an action arising out of a collision between two yachts belonging to members of the Quebec Yacht Club while competing for a cup in a Corinthian race.

December 22nd and 23rd, 1893.

The case was heard before the Honourable George Irvine, Local Judge in Admiralty for the Quebec Admiralty District.

Pentland, Q.C. for plaintiffs;

Belleau, Q.C. for defendant.

IRVINE, L. J., now (January 19th, 1894,) delivered judgment

This case arose out of a collision between two yachts belonging to the members of Quebec Yacht Club, the *Bernadette*, owned by the Honourable Senator Landry, and the *Muriel*, owned by Mr. Walter Ray and others.

The collision occurred during the race for what is called the *Ritchie-Gilmour* cup, on the 23rd July, 1892.

This race was originally intended to have been run a month earlier, but, for one reason or another, was postponed until the last mentioned day. The course was from off Bellechasse light, rounding the buoys off St. Thomas Banks, Margaret Islands and Grosse Isle, thence back to Bellechasse light. The conditions of the race were "that the yachts were to be manned entirely by

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members of the club and sailed and steered by owners or part owners." Previous to the day on which it was originally intended that the race should take place, three yachts were entered for the race, the *Bernadette*, the *Muriel* and the *Onyx*; the entries seem to have been regularly made and no objection is made on this score. On the morning on which the race was run the three yachts met near Bellechasse light at the starting point. There seems to have been, for some reason not explained in the evidence, a doubt as to whether the *Muriel* would take part in the race or not, and, on the invitation of Mr. Ray, Mr. Landry, Mr. Panet Angers and Mr. Stafford went on board the *Muriel* and in the course of conversation asked Mr. Ray whether he intended to take part in the race. There seems to be a little uncertainty and confusion as to what exactly took place. Mr. Landry claims that Mr. Ray gave evasive answers and avoided saying whether he would go into the race or not. Mr. Ray said, and it is pretty well admitted by the others :—" I am going to sail over the course, so look out for me." The visitors then returned to their own yacht and at the proper time the three boats started together. The *Muriel* had a flag hoisted, indicating that she was in the race, and she had on board, and kept there all the time, the two men who formed her ordinary crew

The vessels started on the course. After they rounded the first buoy—the *Bernadette* leading, and the *Muriel* following—and after one or two tacks had been made beating against the wind, the *Muriel* and the *Bernadette* came towards one another close hauled, the *Muriel* on the starboard and the *Bernadette* on the port tack. Under the regular sailing directions it was the duty of the *Bernadette* to give way and for the *Muriel* to continue her course. Unfortunately they both continued their course until the *Bernadette*, when too late,

attempted to give way and then ran into the *Muriel*, doing considerable damage and endangering the lives of those on board. The persons on board the *Bernadette* all say that they did not see the *Muriel* until they were immediately upon her, and that when they did see her they thought she would keep out of their way because she was not in the race. The *Muriel* had throughout the race up to this point acted as if she was a competing yacht. The crew of the *Bernadette* had no right to suppose, in view of the circumstances preceding the collision, that the *Muriel* would act in any other way than a competing yacht would do; being on the port tack it was therefore the duty of the *Bernadette* to give way to the *Muriel* quite irrespective of any rights which the *Muriel* might have with regard to the race. The crew of the *Bernadette* had not kept a proper lookout, they knew the *Muriel* was near them and they did not see her until it was too late to avoid the collision.

I am of opinion, therefore, that the *Bernadette* was in the wrong, and upon that point there is very little doubt in the case. But the question as to how far the *Muriel* was in the wrong, and contributed to the accident is one of more difficult solution. After giving the subject my best consideration I have come to the conclusion that the *Muriel* had no right to be in the race. It is impossible to say that a vessel under circumstances such as existed in this case, can be a *bonâ fide* competing yacht. She had her ordinary crew on board and the principal object in this race, as expressed in the letter from the donors who presented the prize to the club, is to give an opportunity to increase the maritime knowledge of the amateur members of the yacht club. If the plaintiffs sailed their yacht with an ordinary crew of seamen it is quite clear, as is properly explained by Mr. Shaw, who was the judge of the race, that they could never win the prize. How is it possible to say

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that in a case of this kind a vessel which was disqualified from winning the prize by the character of her crew could be considered as *bonâ fide* in competition with others who were properly qualified? This the owners of the *Muriel* must have been well aware of. It is worthy of remark here, however, as supporting the correctness of my views respecting the *Bernadette*, that the people on board the *Bernadette* could not during the race have known with certainty whether the *Muriel* was qualified or not, as without their knowledge the professional crew might have been sent ashore before the boat started. The owner of the *Muriel* in my opinion was acting against the rules of the club in being at or near the race at all. The rule forbids any vessel not in the race keeping near the racing yachts in any way, and particularly they are forbidden to round any of the buoys which form the marks of the course. All this was done in this case by the *Muriel*. Had the *Muriel* not been in the place in which she was at the time the collision occurred, and I hold she had no right to be there, the accident would not have happened; and I, therefore, hold that the owners of the *Muriel*, being members of the yacht club, were bound by its rules and that Mr. Ray, who was in charge of the vessel at the time, although from the point of view of the sailing rules he was right in keeping his course when on the starboard tack, he was wrong in being on the course at all, and I hold, therefore, that he was also in the wrong and contributed to the accident.

It has been extremely difficult to find any case at all in point to the rather difficult question which was raised in this case. As far as I have been able to discover there is no single case which has come before the courts in England, or up to this time in Canada, in which a question has come before the Admiralty in reference to collision between yachts in a race, although

no doubt many such cases must have occurred. Doubtless the yacht clubs in England settle this among themselves.

I think it also of importance to notice the fact that Mr. Shaw, who was chairman of the sailing committee of the club and was a judge of the race, by his final report, the only one which is of record in the yacht club, leaves the *Muriel* out of the race altogether. It is quite true that in the first instance he did not seem disposed to go so far and prepared a report in which he gave the time of the *Muriel* from the start up to the moment of the collison, but this report was never sent in and was destroyed, and the one now produced substituted.

It is true that this was done under the idea that the difficulty between the parties to this case had been amicably settled, but, in my opinion, that does not change the fact that the report which is filed is the final decision of the judge of the race.

I must say that it is much to be regretted that this case should have come before the courts at all. A club, such as the yacht club, composed of gentlemen associated together for the purpose of promoting the manly and enjoyable sport of yachting, ought to be able to settle their own difficulties under their own rules.

I, therefore, hold that both vessels were in fault, and I order the damages to be assessed and divided and that each party pay his own costs.

Judgment accordingly.

Solicitors for plaintiffs: *Caron, Pentland & Stuart.*

Solicitors for defendant: *Belleau, Stafford, Belleau & Gelly.*

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April 2.

GEORGE LEPROHON .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Tort—Injury to person falling on icy step of Government Post Office—Liability of Crown—50-51 Vict. c. 16 s. 16—Interpretation.

The Crown is under no legal duty or obligation to any one who goes to a post office building to post or get his letters, to repair or keep in a reasonably safe condition the walks and steps leading to such building.

2. A person who goes to a post office to post or get his letters goes of his own choice and on his own business; and the duty of the Crown as owner of the building, if such a duty were assumed to exist, would be to warn or otherwise secure him from any danger in the nature of a trap known to the owner and not open to ordinary observation.

3. A petition of right will not lie against the Crown for injuries sustained by one who falls upon a step of a public building by reason of ice which had formed there and which the caretaker of the building, employed by the Minister of Public Works, had failed to remove or to cover with sand or ashes.

4. The expression "public work" occurring in the 16th section of *The Exchequer Court Act* includes not only railways and canals and such other public undertakings in Canada as in older countries are usually left to private enterprise, but also all public works mentioned in *The Public Works Act*, R.S.C. c. 36, and other Acts in which such expression is defined.

PETITION OF RIGHT for damages for injury to the person sustained in falling on an approach to a Government post office by reason of ice having been allowed to form thereon.

The facts of the case are stated in the judgment.

The case was tried at Three Rivers, P. Q., on the 4th of November, 1893, *Belcourt* and *Harnois* appearing for the suppliant, and *Hogg* Q. C. and *Desilets* for the respondent.

The argument was reserved to be heard at Ottawa.

December, 12th, 1893.

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Argument of Counsel.

The case now came on to be argued.

Belcourt, for the suppliant:

This action is based on the remedy provided in sec. 16 (*c*) of 50-51 Vict. c. 16. We have, I think, no remedy under the Civil Code. The post office is a public work forming part of the public domain of the Crown, and the accident happened on that public work. It is a clear case within the quoted section. It was the duty of the caretaker of the post office, a servant of the Crown, to remove the snow and ice from the approaches to the building. This was not done, and this neglect was the proximate cause of the accident. The officer of the Crown was negligent within the scope of his duty. [Cites sub-section (*c*) of sec. 2 of *The Public Works Act* (1).] The post office is a public work thereunder.

The only questions necessary to discuss here are questions of evidence. The decisions already pronounced in this court as to the liability of the Crown under sub-section (*c*) of sec. 16 of *The Exchequer Court Act* render it unnecessary for me to discuss that point now (2).

There was a clear breach of duty by the Crown's servant that occasioned the accident, and therefore we must apply the doctrine of *respondeat superior*.

Curran, Q. C., S. G. Can., for the respondent:

The instructions to the caretaker do not say one word about sprinkling sand or ashes on the steps. He is only required to keep the approaches free from snow. You can only hold the Crown liable for the

(1) R. S. C. c. 36.

(2) REPORTER'S NOTE.—*See Brady* v. *The Queen* 2 Ex. C. R. 273; *The Corporation of the City of Quebec* v. *The Queen*, 2 Ex. C. R. 252; *Gilchrist* v. *The Queen* 2 Ex. C. R. 300; *Martin* v. *The Queen* 2 Ex. C. R. 328; and *Lavoie* v. *The Queen* 3 Ex. C. R. 96.

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Argument of Counsel.

breach of something in respect of which it was under an obligation to perform and which it had instructed its servant to perform. Anything the caretaker might do beyond his instructions would not bind the Crown. He must have a specific authorization for performing the service, whatever it might be. The instructions so provide. Merely doing it sometimes of his own motion would not make the Crown liable for his neglect to do it at others.

The current of authority in the Province of Quebec shows that in the case of accidents arising from slippery side-walks the defendant is not responsible where the cause is attributable to sudden climatic changes. [Cites *Foley* v. *The City of Montreal* (1); *Lulham* v. *City of Montreal* (2); *Sherbrooke* v. *Short* (3); *Beaucage* v. *Parish of Deschambault* (4); *Corporation du Canton de Douglass* v. *Maher* (5); *Perriam* v. *Dompierre* (6); *Allen* v. *Mullin* (7); *Moffette* v. *Grand Trunk Ry Co.* (8).]

Hogg, Q. C., followed on the same side:

The cases arising out of accidents from snow or ice on the streets are decided in the same line in the provinces of Quebec and Ontario. Municipalities are not held responsible for the uncontrollable changes of the weather in Canadian winters. The same rule would apply to the Crown. [Cites *Ringland* v. *City of Toronto* (9); *Forward* v. *City of Toronto* (10); *Bleakley* v. *Corporation of Prescott* (11); *Nason* v. *City of Boston* (12); *Cook* v. *City of Milwaukee* (13); *Johnson* v. *City of Lowell* (14); *Wilson* v. *City of Charlestown* (15); *Burns*

(1) 2 Q. R., (S. C.,) 346.
(2) 6 L. N. 93 and 29 L. C. J. 18.
(3) 15 R. L. 283.
(4) 14 R. L. 655.
(5) 14 R. L. 45.
(6) 1 L. N. 5.
(7) 4 L. N. 387.
(8) 16 L. C. R. 231.
(9) 23 U. C. C. P. 93.
(10) 15 Ont. R. 370.
(11) 12 Ont. App. 637.
(12) 14 Allen 508.
(13) 24 Wisc. 270.
(14) 12 Allen 572.
(15) 8 Allen 137-138.

v. *City of Toronto* (1); *Senior* v. *Ward* (2); *Dowell* v. *General Steam Navigation Co.* (3); *Chalifoux* v. *Canadian Pacific Railway Co.* (4); *Lazarus* v. *City of Toronto* (5).]

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BURBIDGE, J. now (April 2nd, 1894) delivered judgment.

The suppliant brings his petition to recover damages for personal injuries occasioned by falling upon the step of the post office at the City of Three Rivers, in the province of Quebec. The porch of the main entrance to the post office there is, it appears, six or eight feet from the line of Notre Dame Street. Between the side-walk and this porch, and on the same level with the side-walk, is a plank walk or approach. The threshold of the porch door is about a foot above the level of the walk, across which, at the entrance, there is a plank that forms a step, and the only step, between the walk and the porch. This plank has been worn away somewhat, but it is not in itself dangerous or a menace to any one who has occasion to go to the post office. It was still in use at the time of the trial, and I think served its purpose fairly well. But the inclination and the unevenness occasioned by the wearing of the step has made it, of course, more dangerous when covered with ice than it would be if it were even and level, and has rendered it all the more necessary to remove any ice that forms upon it, or to cover the ice with sand or ashes or something of the kind, as a precaution and to prevent accidents. The accident that occasioned the injury of which the suppliant complains happened on the 2nd of January, 1893, between 5 and 5.30 p.m. The night before there had been a fall of

(1) 42 U. C. Q. B. 560.
(2) 1 El. & El. 385.
(3) 5 El. & Bl. 195.
(4) Cassels' Dig. 2nd ed. 749.
(5) 19 U. C. Q. B. 1.

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snow, and Carbonneau the caretaker of the post office, and Dubord, a labourer employed by him to assist him, were that day engaged in removing the snow from the side-walk and approaches to the building and from its roof. In the morning before the post office was opened they removed the snow from the step at the main entrance and threw ashes on the step. During the day a thaw set in which, with some rain and a little snow, continued up to 4 p. m. The rain and the water that dripped from the roof of the porch washed the ashes away leaving the step bare but wet. That was its condition when about four, or half-past four, in the afternoon, Carbonneau and Dubord left off work. The 2nd of January, 1893, was a public holiday and the post office was closed from one p.m. to five, at which hour, as Carbonneau knew, it was to be opened. Had he thought that it was going to turn cold enough to cause ice to form on the walk and step, he would have taken the precaution to sprinkle ashes over them. That was his practice, and as Dubord was leaving that day he spoke with him about the necessity of doing this. At the time, as the step was bare to the wood, and it was not freezing, they concluded it would not be necessary. In that they were mistaken. It turned cold suddenly, and when at five o'clock the post office was opened, or a few minutes later, the walk and step were in a slippery and dangerous condition in the sense that ice, and especially ice the surface of which is uneven, is dangerous to persons who have occasion to walk over it. Carbonneau who lived on the third floor of the building, and who had remained within doors, was not aware of the change in the temperature or of what was happening outside. It is doubtful who first told him, nor is it a matter of any consequence. The witness Larue, if one should accept his view of the time when he spoke to Carbonneau, would appear

to have been the first, but I am inclined to think that he was not. He said it was before the accident, but he qualified that statement afterwards and admitted that he did not know. The answer that Carbonneau made to him would indicate that Manseau, the constable, had been before him. To the constable, Carbonneau at first objected that he was sick, that his man had gone, that the office was going to close and that it was not necessary to put sand on the ice. To Larue, Carbonneau said that he was going immediately to attend to it. In either case there was not, I think, any delay. The suppliant fell and was injured before Carbonneau, after notice, had time to make the step safe. Manseau saw the accident happen as he came down stairs, after notifying Carbonneau.

The suppliant fell twice, both times in coming out of the building. The first time he escaped without injury. Then he went back he says to get the letters of a Mr. Thompson, who had a box with him, and to tell the postmaster of the condition in which the step was. As was natural enough, he was angry because of his fall, and the desire to have a word with the postmaster afforded probably the more impelling motive for his return. Dominique Toupin, one of the clerks employed in the post office, who saw the suppliant when he came in the second time, and heard what he said, thought he was intoxicated. But it was shown that he was not. He was not addicted to drink, and had not, it appears, been drinking on the day in question. His excitement and boisterous manner are sufficiently accounted for by his fall. In going out the second time he took, he tells us, all possible precautions. He went out sideways, putting his foot on the step and holding himself by the door. It was not, he says, very dark, and there was some light from the post office. Apparently it was light enough to see

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from some distance what was going on, as the suppliant says that he told the postmaster that people were falling, and that those on the other side of the street were laughing at them, and that it was a shame. Notwithstanding his knowledge of the danger and the care he took, he fell a second time, and on this occasion sustained a simple fracture of the left arm, about one inch above the wrist.

The suppliant rests his case upon clause (*c*) of the 16th section of *The Exchequer Court Act*, which provides that the court shall have exclusive original jurisdiction to hear and determine "every claim against the "Crown arising out of any death or injury to the per- "son 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 employ- "ment." And he says that the post office building and premises at Three Rivers was a public work, and that it was Carbonneau's duty as caretaker of the building to see that the ice that formed on the step of the building on the afternoon of the day in question was removed or covered with sand or ashes, to make it safe for persons going to the post office to post or get their letters.

The first question in cases of this kind is whether the injury has happened on a public work. In *Brady* v. *The Queen* (1) it was admitted by the demurrer that the Rocky Mountain Park of Canada is a public work; and in *The Corporation of the City of Quebec* v. *The Queen* (2) I thought that the Citadel at Quebec was a public work within the definitions contained in the Acts therein referred to. So here there can, I think, be no doubt that a post office building owned and occupied by the Crown is a "public work" within the definition given in *The Public Works Act* (3). The

(1) 2 Ex. C. R. 273. (2) 3 Ex. C. R. 176.
(3) R.S.C. c. 36, ss. 2 (*c*) and 7.

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liability of the Crown for the negligence of its officers and servants in the construction and management of its public works was first recognized by the Act 33 Vict. c. 23, intituled: *An Act to extend the powers of the Official Arbitrators to certain cases therein mentioned*, by which such Arbitrators were, among other things, authorized to hear and determine claims "arising out of any death or injury to the person or property "on any railway, canal or public work under the control and management of the Government of Canada." And it is doubtful, looking at the provisions of this Act and of the Public Works Act then in force, (1) whether at the time Parliament had any intention to make the Crown liable in proceedings before the Official Arbitrators for the acts or negligence of its officers and servants in relation to public properties, other than railways and canals or works of a like character, which, as pointed out by the Judicial Committee of the Privy Council in cases that I shall refer to, are in other countries usually left to private enterprise. The Act 33 Vict. c. 23 was however followed two years later by another amendment to *The Public Works Act*, 1867 (2), by which, among other things, it was provided that every canal, lock, dam, hydraulic work, harbour, pier, public building, or other work or property of the nature of any of those mentioned in the 10th section of *The Public Works Act*, 1867 (3) should be a public work under the control and management of the Minister of Public Works, and that all the enactments and provisions of the Act last mentioned, and of any Act amending it, did and should apply to every such work. The Act 33 Vict. c. 23 was such an Act, and after 1872 there was, I think, no chance for any such distinction as that suggested, arising out of the character of the

(1) 31 Vict. c. 12.

(2) 35 Vict. c. 24.

(3) 31 Vict. c. 12.

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public work. The liability of the Crown in a proper case and in a proceeding before the Official Arbitrators for damages arising out of any death or injury to person or property on any public work was, without any such distinction, clearly recognized; and I think that the expression "public work" occurring in the 16th section of *The Exchequer Court Act* must be taken to include not only railways and canals and other undertakings which in older countries are usually left to private enterprise, but also all other "public works" mentioned in *The Public Works Act*, (3) and other Acts in which that term is defined.

Now it is obvious that the negligence of the Crown's officer or servant, for which it will be answerable, might arise either by his doing in a negligent and improper manner something that he should do, or in his neglecting to do something that it was his duty to do, and that his duty might arise in one or both of two ways. In the present case it might be that the Crown, quite apart from any question as to whether or not, as owner of the premises, it had any duty to remove the ice that formed on the step of the post office, or to cover the ice with sand, would impose that duty on the caretaker by the instructions or directions given to him; or if the Crown owed any such duty to those who went to the post office, the caretaker's duty might arise from his employment as caretaker.

Carbonneau's instructions from the Chief Architect of Public Works were, so far as it is necessary to refer to them, to take general care of the building, the grounds, the trees, and the yards, &c.; to remove the snow from the roof, and from all the side-walks and ways leading to the building, and from the yard at the necessary places; to give warning as soon as any pipe was broken, and to make no change or modification,

(1) R.S.C. c. 36.

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and to do no new work or repairs, without special authority. So far then as respects the duties imposed upon the caretaker by the authority of the Crown, there was no express direction to do anything or take care to protect anyone from any danger incident to the forming of ice upon the walk or step leading to the post office. It may be said, however, that such a duty is involved in, and to be implied from, the direction to take care of the building and grounds and to remove the snow from the side-walks and ways leading to the building. That would, I think, be so if the Crown itself owed any such duty to persons going to the post office. But that is another aspect of the case, and what I am now referring to are the instructions, by which, in express terms, the caretaker's duties are prescribed, and which are not, I think, to be enlarged against the Crown by any inference or implication.

Does the Crown then as the owner or proprietor of a public building, such as a post office, owe any duty, within the legal meaning of that term, to persons using the ways and steps leading to the building, to keep the same in repair, and in reasonably good condition, and in the winter time free from any accumulation of ice?

The suppliant put in evidence *La Charte et Règlements de la Cité des Trois-Rivières*, and relied upon sections 14, 89 and 92 of Chapter 7, respecting *Le Département des chemins et grèves*, by which certain duties in reference to the streets and side-walks of the city, and among others that of putting sand or ashes on the side-walks when icy, are imposed upon the owners of premises abutting upon such streets. Similar by-laws have, however, been thought to create no duty for neglect of which an action would lie against a private owner (1);

(1) *Ringland* v. *The City of Toronto*, 23 U. C. C. P. 92; *Skelton* v. *Thompson*, 3 Ont. R. 11; *Lulham* v. *The City of Montreal et al.* 29 L. C. J. 18.

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and it is clear, I think, that under any circumstances the Crown, as an owner of land abutting on a street or highway, would not be bound thereby. No duty for breach of which the Crown would be answerable in any of its courts could be created by such by-laws. Then, as to the present case, the accident did not happen on the side-walk or in the street, but at the post office door, and some feet from the line of the street; and no question arises as to the duty of an owner of premises in the city to remove the snow or ice from, or to put sand on the ice, on the side-walk adjoining his property.

It is equally clear, it seems to me, that the Crown as the owner of the walk or way leading to the building is under no duty or obligation to keep the same in repair, for neglect of which an action would lie against it; and that not merely because of the incident, that, apart from certain special statutes, such as that on which the suppliant relies in this case, there is no remedy against the Crown in cases of tort, but also for the reason that there is no legal duty or obligation. I do not suppose that anyone would for one moment think that the Crown's obligation or liability in such a case would be greater than that of a municipal or other body to which the ownership of such a way might be transferred by grant, charter or statute, and the latter, it seems, would not be liable for non-repair only—for non-feasance—unless the duty to repair and maintain in good condition were imposed by the instrument of transfer or by statute. (1). Where the legislature of a colony has given the subject a remedy against the Crown for the wrongs of its officers, and the Government of the colony has embarked on undertakings such as the construction of railways, canals,

(1) *Russell* v. *The Men of Devon*, 2 T. R., 667; *The Mayor, &c., of Lyme* v. *Regis* v. *Henley*, 3 B. & A., 77; *The Sanitary Commissioner of Gibraltar* v. *Orfila*, L. R. 15 App. Cas. 401; *The Municipality of Pictou* v. *Geldert*, (1893) A. C. 524.

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and other works, which in England are usually left to private enterprise, the Judicial Committee of the Privy Council has said that to apply the maxim that "the King can do no wrong" would work much greater hardship than it does in England, and that justice requires that the subject should in such cases have relief against the colonial Government for torts as well as in cases of breach of contract, or the detention of property wrongfully seized into the hands of the Crown (1). And in accordance with that view of the question, but before it was stated in the terms I have used, it was held that the Executive Government of New Zealand owed a duty to persons bringing their vessels to a wharf owned by the Government, and for which wharfage and tonnage dues were collected, to take reasonable care that a vessel using the wharf in the ordinary manner might do so without danger to the vessel, and that the Government was liable for injuries received by a steamship grounding upon a snag at the bottom of the harbour, and alongside the wharf, at which the steamship was lying, the proper officer of the Government having had notice of the obstruction and having failed to give warning (2). In respect, however, of any duty incident to the ownership of a public building in which the administration of public affairs, such as the business of the Post Office Department, is carried on, the Government of a colony stands in the same position as the Government of the United Kingdom; and it cannot, I think, be doubted that there rests upon the latter no duty, for neglect of which a petition of right would lie, to maintain or keep such a building in repair and in a reasonably good and safe condition. Neither at common law nor by statute is any such obligation

(1) *Farnell* v. *Bowman*, 12 App. Cas. 648; *The Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas. 192.

(2) *The Queen* v. *Williams*, App. Cas. 418.

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cast upon the Crown, and it follows of course that if there is no duty or obligation there can be no action for the breach of it.

Assuming, however, that such a duty exists and that the Crown is bound to the exercise of such care as a prudent owner would take in a like case, then its duty is either to warn or otherwise secure persons coming to the building from hidden dangers in the nature of a trap, not open to ordinary observation; or to keep it in a reasonably safe condition to secure such persons from harm from anything about the premises hidden or open to observation making it dangerous for such persons, using reasonable care, to be upon the premises for the purposes for which they are induced to come. Whether the Crown's obligation in such a case would fall within the larger or the more limited definition that I have given would depend upon the view taken as to whether or not such persons went to the post office as well on the business and interests of the Government as on their own business. The open door of the public building, and the public service therein performed, invite every one to enter who has occasion to do so, but that is not the determining test. As suggested by Byles, J., in *Smith* v. *The London and Saint Catharines Dock Company* (1), the knocker on the door of a private residence says "come and knock me," and the bell "come and ring me," but any one who of his own choice, and for his own pleasure or business, accepts the invitation and goes upon the door-step to knock or ring must take the step as he finds it, and the owner owes him no larger duty than to take the care of a prudent man to warn or otherwise secure him from hidden dangers known to the owner. If the visitor sees ice on the door-step, and venturing upon it, falls and is injured, he may very properly have an unfavour-

(1) L. R. 3 C. P. 331.

able opinion of the owner's care for the safety of his friends, but he will have no cause of action against him.

A more severe rule is applied as between the shopkeeper and his customer, or between the owner of premises and those who, on his invitation, go there upon business that concerns the owner. "The distinction" says Earle, J. in *Chapman v. Rothwell* (1), "is between the case of a visitor (as the plaintiff was "in *Southcote* v. *Stanley*) (2) who must take care of "himself, and a customer who, as one of the public, "is invited for the purposes of business carried on by "the defendant."

The class to which customers belong as defined by Willes, J., in the leading case of *Indermaur* v. *Danes* (3), includes persons who go not as mere volunteers, or licensees or guests or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation express or implied.

Does the person who goes to a post office to mail a letter or to get one go on his own business or on business that concerns the Government? It seems to me that he goes on his own business. The Government does not carry on the business of the post office for profit. It is part of the public service. A revenue is collected by requiring the sender of a letter or parcel to attach a stamp, but the difference between the expenditure and income, and the latter it is well known never exceeds or equals the former, is paid out of the public treasury. The Government is concerned of course to perform the service as efficiently and economically as possible, but it is not concerned about the

(1) E. Bl. & E. 170. (2) 1 H. & N. 247

(3) L. R. 1 C. P. 288.

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receipts from, or profits of, the business in the sense that a shopkeeper is concerned. As the agent of the public it conducts the public business for the public, of whom the person who goes to the post office to get his letters is one. The business as a whole, is the business of the public, the business on which the individual goes to the post office is his own business; and assuming, as we have been doing, that the Crown, as the owner of the building, owes him a duty in respect to the condition, as regards his safety, in which the building is kept, it is to warn or otherwise secure him from any danger, in the nature of a trap, known to the owner and not open to ordinary observation. If that, on the assumption that I have mentioned, would, and I think it would, be a true definition of the Crown's duty in such a case, it is obvious that the petition in this case cannot be maintained.

Being of opinion to dismiss the petition on the ground that the caretaker of the building owed the suppliant no duty, for neglect of which the Crown is liable to an action, to remove the ice that formed on the step on the day of the accident, or to cover the ice with sand or ashes, it is unnecessary for me to come to any conclusion as to whether or not, having regard to conditions of climate, there was in fact any negligence on the part of the caretaker. If he were held to be under any such obligation or duty, he would not have the same excuse for his neglect that civic or municipal bodies often have. The law does not, of course, exact the impossible; and, in cases where streets become impassable or dangerous because of storms or sudden changes of the weather, it allows such bodies a reasonable delay and latitude in putting the streets in a good and safe condition again. In the present case, however, it would have been a matter of only a few minutes'

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work for the caretaker to make the walk and step leading to the post office building perfectly safe.

Neither is it necessary for me to express any opinion as to whether or not, assuming actionable negligence on Carbonneau's part, the suppliant must still fail because he voluntarily encountered the danger, and the second time, with a full knowledge of the risk he ran.

Judgment for the respondent.

Solicitors for the suppliant: *Harnois & Méthot.*

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

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April 2.

MOSSOM BOYD & COMPANY.....PLAINTIFFS;

AND

EDWARD T. SMITH.....DEFENDANT.

Tort—Officer of the Crown acting without, or in excess of, authority—Damages—Personal liability.

For acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him, by law, an officer of the Crown is personally responsible to any one who sustains damage thereby.

THIS was an action brought to recover damages in respect of certain seizures of lumber by an officer of the Crown for tolls alleged to be due thereon.

The trial of the case took place at Peterborough on June 8th, 1893.

Lash, Q. C., and *Wickham* for the plaintiffs;

Hogg, Q. C., for the defendant.

The material facts of the case, taken from the reasons for judgment, are as follows:—

The plaintiffs are manufacturers of lumber, carrying on business at the village of Bobcaygeon, in the county of Victoria and province of Ontario. The defendant is an officer in the service of Her Majesty's Government of Canada, and is charged with the duty of collecting tolls and dues upon timber and logs passing through slides and other works mentioned in chapter 98 of *The Revised Statutes of Canada*. The action is brought to recover damages in respect of certain seizures of the plaintiffs' lumber made by the defendant to enforce the payment of tolls that were thought to have been payable in respect of the saw-logs from which such lumber was manufactured. The jurisdiction which the court is asked to exercise is defined in the 17th section of

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The Exchequer Court Act (1), by which it is, amongst other things, provided that the court shall have and possess concurrent original jurisdiction in Canada in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer.

In 1874 there was at Fenelon Falls a slide through which saw-logs and timber were passed into the Fenelon River. The slide had been built in 1858, or 1859, at the expense of the lumbermen who had occasion to pass their logs over the falls, and it was maintained by them until the year 1872. In 1875 the local Government of Ontario made what are spoken of by the person who superintended the work as substantial repairs to the slide, and in 1882, and in subsequent years, such repairs as have been necessary have been made at the expense of the Government of Canada.

In 1874, in order to afford to steamboats plying on the Fenelon River a free passage, the Government of Canada constructed a boom dividing the river into two channels, one for the use of such steamboats, the other for the logs passing down the river. The head or upper pier of the boom was about half a mile from the Fenelon Falls Slide, and the boom extended down stream some 2,500 feet, the lower pier being in Sturgeon Lake. The main current of the river was west of the boom. To the east of it there were a number of eddies, the largest of which was described as working around and up the river. In the east channel there was apparently no current down stream except at, and for six or eight feet east of, the head of the boom. In some way it happened that in assigning one channel to steamboats and the other to the logs and timber com-

(1) 50-51 Vict. c. 16.

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ing down the river, the west channel with the current was set apart for the former, and the east channel with its dead water and eddies for the latter. The result was that the lumbermen could not without great difficulty get their logs down the east channel, and after a few ineffectual efforts to use it, they appear to have abandoned the attempt and to have made use of the west or steamboat channel. In 1881, or 1882, Messrs. Ellis & Green, who had a mill on the west bank of the river opposite the boom, closed the lower end of the saw-log channel and used it until 1887 as a booming ground. Afterwards in that year or the next the boom which had, from year to year, been getting out of repair went away altogether.

On the 10th of August, 1874, His Excellency in Council, in addition to the general regulations respecting slides then in force, prescribed regulations for the running of timber of any description down the Fenelon River from Cameron's Lake to Sturgeon Lake, in the province of Ontario, by which it was provided: 1. That the owner or person in charge of any raft or parcel of timber, previous to entering the Fenelon River for the purpose of passing such raft or parcel of timber down the east channel allotted to the same, should attach a boom to the snubbing post on the west bank of the river, and to the up-stream pier of the boom, so as to prevent any of the timber entering the west channel set apart for vessels; 2. That no raft or parcel of timber of any description whatever should be permitted to enter the Fenelon River through the slide at the Falls, without the owner or person in charge thereof first giving notice to, and obtaining permission from, the superintendent or officer appointed to regulate the running of timber down the river; and, 3. That the timber should not be run through the slide at a faster rate or in greater quantities than that directed by the

officer in charge of running timber down the river. For any violation of these regulations the offender was liable to a penalty of not less than fifty, or more than two hundred dollars. On the 10th of September in the same year a schedule of tolls was, by order in council, established in respect of the Newcastle District Works in lieu of that prescribed by the order in council of the 10th of August preceding. The schedule has reference to the Fenelon River, and authorizes the collection of tolls on saw-logs and other timber passing down the saw-log channel, then in course of construction. There is no toll prescribed for passing the slide at Fenelon Falls, and there is no evidence that any such toll or due was ever imposed.

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From 1875 to 1881 the plaintiffs and other lumbermen paid the tolls levied under the order in council of Sept. 10th, 1874, upon logs passing down the Fenelon River. After that no tolls were paid, and none demanded, until in January, 1891, when the defendant made a demand upon the plaintiffs for "slidage at the Fenelon Falls" on logs and timber passing through the slide there during the years 1882 to 1890, inclusive, amounting to $1,869.36. This sum the plaintiffs declined to pay, and on the 20th of July, 1892, the defendant, as collector of slide and boom dues, to secure payment thereof and of tolls that were thought to have accrued due in the meantime (the whole amounting to $2,245.81) seized fifty piles of sawn lumber, containing about 400,000 feet, lying in the lumber yard adjacent to the plaintiffs' mill. On the 27th of the same month he served a notice upon the Grand Trunk Railway Company of Canada, by which the company were forbidden to remove any lumber from the plaintiffs' piling grounds or yard on the Scugog River at the town of Lindsay, from which point the plaintiffs were accustomed to ship the same. On the 4th of August this

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notice was withdrawn for a few days. At that time none of the plaintiffs' lumber there was under seizure, but subsequently, on the 11th of August, the defendant, to secure payment of the amount mentioned, made a further seizure of 130,000 feet of lumber belonging to the plaintiffs and loaded on cars and a scow at Lindsay. In each case, in the notice of seizure, it was stated that the sum of $2,245.81, for which it was made, was due from the plaintiffs to Her Majesty "for slide and boom tolls or dues for the transmission of timber and saw-logs through the Fenelon Falls Slide."

On the 18th of August the plaintiffs brought this action against the defendant for an injunction to restrain him from selling the lumber he had seized, and from further interfering with their business, by seizing any more lumber or by giving any more notices to the Grand Trunk Railway Company forbidding them to transport the plaintiffs' lumber, and also to recover damages for the losses they had sustained by reason of such seizures and notice. Thereupon the plaintiffs paid into court to the credit of this cause the sum of $2,245.81, and it was agreed that the seizures should be released and that that amount should remain in court until the final disposition of this action and should be applied on any judgment which the Government might obtain for such dues.

At the conclusion of the evidence it was agreed between counsel that their arguments should be submitted to the court in writing.

On the 25th of January, 1894, the plaintiffs filed their argument, in which they contended as follows:

The main question involved in this action was as to the right of the defendant to make the seizures. The law is clear that if the defendant's acts are unlawful he is personally responsible and is not protected from such personal responsibility by his position as a

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Government officer; and it is equally clear that for the unlawful acts of its servants the Crown cannot be made responsible unless some statute so provides, and there is no such statute applicable to this case.

The questions to be decided are first, whether the defendant was justified in seizing any lumber of the plaintiffs; secondly, whether he was justified in seizing a second time in order to enforce payment of the tolls alleged to have been due; thirdly, whether he was justified in interfering between the plaintiffs and the Grand Trunk Railway Company; and, fourthly, what damages the plaintiffs are entitled to. If the first question be decided in the plaintiffs' favour, the second and third will be material only in aggravation of damages.

If the plaintiffs' logs were not liable for dues under the order in council of 1874, the defendant clearly had no right to make the seizure.

Now, the evidence establishes that the logs under seizure did not pass through the channel referred to in this order in council. This is proved not only by the general evidence as to the condition of the boom and the impossibility of using the channel for logs, and as to the boom placed across to prevent stray logs from going down, but also by the evidence of the plaintiffs' foremen, who spoke specifically for each year from 1882 to 1887, in which latter year the few remaining parts of the boom were removed by the Government officer. Instead of there being any channel through which logs could pass, it was used by some parties as a storing place for their logs for some years before 1887. It is therefore clear that no dues became payable by the plaintiffs since 1881 in respect of logs passing through this channel, and unless the defendant can support the claim for dues on some other ground, he must fail in this action.

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The only other ground set up is, that because the regulations provided that a glance boom should be placed across the steamboat channel (so as to send the logs down the log channel) and because the plaintiffs did not comply with this provision, their logs became subject to dues just as if they had passed through the log channel. This contention is unsound, because the result of a breach of the regulations is provided for, viz., a personal penalty is imposed, and no attempt has been made under the regulations to charge the logs with tolls as well, and no remedy for a breach, other than that provided by the regulations, exists. The tolls were imposed upon logs passing through the saw-log channel, and unless the logs do so pass, they are not within the provision of the order so far as tolls are concerned. [He cites *Wilson* v. *Robertson* (1).]

Placing a boom on the river, and calling it a public work, did not make it one within the statute, and did not warrant the attempted interference with the public rights of navigation, which cannot be interfered with by merely executive authority not founded on a statute.

The fact that the plaintiffs paid tolls in prior years, does not establish the legality of the tolls exacted, or justify the seizure. It is submitted that the action of the defendant in seizing the lumber was illegal, and that the plaintiffs are entitled to damages therefor. The defendant's action in this matter was unlawful and unreasonable, and not in good faith. His conduct, in preventing the Grand Trunk Railway from shipping plaintiffs' lumber, has aggravated the damages to which plaintiffs are entitled.

On the 5th of September, 1893, the defendant filed his argument, which comprised the following contentions:—

(1) 4 El. & Bl. 932.

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Argument of Counsel.

There can be no doubt, under section 5 (1), that in a proper case the collector of tolls and dues has the right to seize and detain all the lumber in respect of which the tolls and dues payable for the use of the slide or "work" have been incurred, and he may also detain and hold the same until the dues are paid or otherwise secured. There is no question in this case that for the years mentioned in the notice of seizure dues and tolls were not paid by the plaintiffs upon the logs which passed over the slide at Fenelon Falls, so that at the time of the seizure in July and August, 1892, all the lumber which was in the yard of the plaintiffs at Bobcaygeon was subject to the payment of the dues and tolls, provided the orders in council and the regulations and tariff made the lumber liable.

By the order in council of the 10th August, 1874, the slide and "works" at Fenelon Falls, including the boom which was then in course of construction, were made subject to the jurisdiction of the Dominion Government; and by the regulations attached to that order in council not only was it pointed out how the slide should be used, but also how the boom should be dealt with by the persons passing logs over those "works."

Now the question is whether, under the circumstances, where a public work has been established and regulations made with reference to the use of it, and where the duty is cast upon the lumbermen of bringing his logs into a certain channel in which case he is to pay certain tolls, he can, by adopting another course, that is by using the glance boom so as to secure to himself that which he may consider a better channel and better use of the public work, escape the payment of the tolls and dues which are imposed by the tariff of 1874.

(1) R. S. C. c. 98.

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Argument of Counsel.

It is submitted, that in view of the fact that it was the duty of the plaintiffs to pass their logs through the log channel and so place the glance boom that the navigation channel would be left free and open, and having used or mis-used the glance boom so as to allow the logs to run in the navigation channel, they cannot now be heard to say that by reason of the breach of duty which was imposed upon themselves, they are to escape the payment of the dues for the use of the public works there.

[He cited R.S.C. c. 98 sec. 5.]

Under this section of the statute the defendant would be quite justified in seizing for the tolls and dues unpaid during the years from 1888 to 1892, and that the question of excessive seizure cannot arise under the provisions of this statute. In other words, the statute takes the case out of the ordinary rules of law which imposes the burden upon the person seizing to seize only what would be reasonably certain to cover and secure the amount for which the seizure is made. And the fact that the defendant intended to seize and did not notify the plaintiffs that he was seizing for a larger amount than would be due upon the lumber then in the yard, would not affect the validity of the seizure or make him liable for an action of excessive distress.

[He cited *Jacobson* v. *Blake* (1); *Smith on Master and Servant* (2); *McLaughlin* v. *Prior* (3); *Lyons* v. *Martin* (4); *McManus* v. *Crickett* (5); *Buron* v. *Denman* (6); *Tobin* v. *The Queen* (7); *Ferguson* v. *Kinnoul* (8); *Pedley* v. *Davis* (9); *Brayser* v. *McLean* (10).]

(1) 6 M. & G. 919.
(2) P. 110.
(3) 4 M. & G. 58.
(4) 8 A. & E. 512.
(5) 1 East 106.
(6) 2 Ex. 167.
(7) 16 C.B.N.S. 310.
(8) 9 Cl. & F. 290.
(9) 10 C.B.N.S. 492.
(10) L.R. 6 P.C. 398.

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BURBIDGE, J. now (April 2nd, 1894) delivered judgment.

After stating the facts of the case he continued: The first question that arises in this case is, were the plaintiffs at the time of the seizures mentioned indebted to the Crown for the dues which the defendant attempted to collect? And it seems to me very clear that they were not. No toll or due had ever been imposed in respect of the Fenelon Falls Slide, and during the years in which the dues in question were alleged to have become due, there was no saw-log channel on the Fenelon River open for the passage of logs, and no logs or timber belonging to the plaintiffs or other persons were in fact passed through such channel. If there had been any such channel that could have been used by lumbermen and they had not used it, but, contrary to the regulations prescribed, had passed their logs down the west or steamboat channel, it might well be that they could not in that way have escaped the payment of the tolls imposed by the order in council of the 10th of September, 1874. But, as we have seen, the persons in charge of the Government works at and near Fenelon Falls permitted the saw-log channel to be closed up and for five or six years to be used as a booming ground, and afterwards the boom was allowed to go away altogether. It would have been oppressive under such circumstances to compel persons floating their logs down the Fenelon River to pay the tolls imposed for the use of the saw-log channel. That probably was so obvious that no attempt was made after 1881 to enforce payment of any such tolls, and there is, as we have seen, no authority for their collection in respect of the transmission of timber or logs through the Fenelon Falls slide. That such tolls were paid without protest for several years prior to 1881 cannot,

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I think, alter the question or affect it in any manner. Not in that way, but by the order of His Excellency in Council, do such tolls become payable. By the fifth section of *The Revised Statutes of Canada*, chapter 98, respecting tolls on Government works for the transmission of timber, the collector of tolls and dues is authorized to seize and detain any timber or lumber on which any tolls or dues are chargeable for transmission through or over any slide, boom, or other work mentioned in the Act. But where, as in this case, there are no tolls or dues chargeable against the lumber seized, there is no authority for the seizure and it cannot be justified.

It is argued, however, that as the defendant acted under instructions from his superior officers he is not liable for his acts. In my opinion that will not avail him. I have no doubt that he was a ministerial officer having in respect of the collection of tolls and dues on slides and other river improvements a duty to perform, and that for the manner in which he performed that duty he must himself answer. Others may or may not have made themselves liable for his acts. We need not enquire as to that now. He took upon himself to make the seizures in question, and if there was no authority therefor he must answer to the plaintiffs for the damages they have sustained. There is no occasion to cite authorities. The law is well settled (1).

The case of *Buron* v. *Denman* (2) in which the acts of the defendant in firing the barracoons of the plaintiff and carrying away his slaves and destroying his goods were ratified by the Crown and became acts of state,

(1) *Lane* v. *Cotton*, Ld. Raym. 647 ; 1 Salk. 17 ; *Rowning* v. *Goodchild*, 2 Wm. Bl. 906 ; *Whitefeld* v. *Lord Le Despencer*, 2 Cowp. 754 ; *Barry* v. *Arnaud*, 10 Ad. & E. 646, 2 P. & D. 633 ; *Barrow* v. *Arnaud*, 8 Q. B. 595 ; *Tobin* v. *The Queen*, 16 C. B. N. S. 310.

(2) 2 Ex. 167.

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and that of *Irwin* v. *Grey* (1) in which the plaintiff sought to recover damages from the defendant for having, in breach of his duty as Secretary of State, neglected to submit to Her Majesty a petition of right presented by the plaintiff, are obviously distinguishable. The Crown is not liable for the wrongs committed by its officers except in cases in which such a liability has been expressly created by statute, and if the officer himself were in such a case not liable the subject would be without remedy. That fortunately is not the law. For acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him, by law, a public officer is personally responsible to any person who sustains damage thereby. The officer may also, it seems, be liable though there be no excess of authority or breach of duty if in the exercise of his powers he is guilty of harsh and oppressive conduct.

In the case of some public or ministerial officers, such as officers of the Customs (2) and of the Inland Revenue, (3) the statute law affords protection for anything done in the exercise of their duties as such officers, by requiring notice of action to be given to them, so that they may tender amends, and by limiting in certain circumstances the amount of damages that may be recovered against them. Prior to 1889, the collector of tolls, such as came in question in this action, was an officer of the Inland Revenue, and in a position to invoke the protection to which I have referred. But by the passing of the Act 52 Vict. c. 19, the duty of collecting such tolls was transferred to the Minister of Public Works, and is now performed by the officers of his department. For the protection of the latter in like circumstances the legislature does not appear to have

(1) L. R. 1 C. P. 171. (2) R. S. C. c. 32 secs. 145-148.
(3) R. S. C. c. 34 secs. 77-81.

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made any similar provision. At least no such provision has been pleaded or called to the attention of the court.

With reference to the damages, I cannot but feel that the amount for which I am about to enter up judgment for the plaintiffs is in all probability much less than a jury would have given them. But for the release of the seizure, the damages must in any case have been very large. One can hardly understand why the defendant should have taken such risks when the Act under which the tolls were imposed provided that such tolls could be recovered, with costs, in any court of competent jurisdiction by the collector or person appointed to receive the same, in his own name or in the name of Her Majesty (1). The plaintiffs were men of means and able to give security for, or to answer any judgment for, tolls that might go against them. The tolls which the defendant sought to collect had been allowed to accumulate for some ten years; and there was a question and dispute as to whether or not the plaintiffs were liable for the same. No doubt, assuming that the tolls were due and payable, the collector was not bound to adopt the milder means that have been suggested. In taking the more extreme measures, he would in such a case have been within his right; and I am not prepared to say that under such circumstances it would not have been his duty to make the second seizure when he became convinced that a sale of the lumber first seized, because of the place where it was and the difficulty of moving it, would not have realized the amount for which the seizure was made. But for the notice to the Grand Trunk Railway Company, given at the time and in the terms in which it was given, I can find no justification. The defendant had a right,

(1) 31 Vict. c. 12 s. 61. See also C.S.C. c. 28 s. 90, and R.S.C. c. 36 s. 21 (2).

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of course, to see that none of the lumber he had seized was removed, but he had no right to forbid the railway company to move any lumber that was not under seizure. On the other hand, the amount of actual damages proved cannot be considerable. There were, no doubt, interferences with the course of the plaintiffs' business that must have been very annoying to them. They ask for a reference as to damages, but that is not, I think, necessary. I am disposed to save both parties any further costs in that respect. There will be judgment for the plaintiffs for three hundred dollars, and costs to be taxed without any deduction, because the amount recovered is less than four hundred dollars.

With reference to the sum of $2,245.81 paid into court to be applied on any judgment that the Crown may obtain for the dues for which the seizures in question in this case were made, it does not appear that any action has been brought for such dues. The money may, however, remain in court for thirty days, and shall then be paid out to the plaintiffs, if no such action is commenced in the meantime. If such an action is brought within that time, the question as to the disposition to be made of the money may be brought before the court by the plaintiffs or by the Crown.

Judgment accordingly.

Solicitors for plaintiffs: *Wickham & Thompson.*

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

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April 4.

LEWIS P. FAIRBANKS.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injurious affection of property—Undertaking to abate cause of injury before action brought—Omission in pleadings—Costs.

Where an offer to do certain work, which would abate an injury to suppliant's property caused by a public work, was made in writing by the Crown and its receipt acknowledged by the suppliant before action brought, but such offer was not repeated in the statement of defence (although filed subsequently pursuant to leave given), the Court, in decreeing the suppliant relief in the terms of the undertaking, refused costs to either party.

PETITION OF RIGHT for damages alleged to have been sustained by the suppliant by reason of the construction of a public work.

In the year 1878 the Dominion Government constructed a new railway bridge over the Shubenacadie River at Enfield, Hants County, in the Province of Nova Scotia.

The portion of the waters of the Shubenacadie River across which such bridge was built formed part of the Shubenacadie Canal. This was a work constructed by private enterprise for commercial purposes in Nova Scotia, and the suppliant claimed to have become, by purchase, proprietor thereof and of the rights and franchises appertaining thereto. The canal had never been operated efficiently from its inception, and many years before the bridge in question was constructed had ceased to be operated at all. The evidence offered by the suppliant failed to show that his property, in respect of its present use, had suffered any injury by reason of the bridge constructed by the Dominion Government; but it was shown that the girders of this

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bridge were lower than those of the old bridge, on the site of which it was erected, and might interfere with traffic through the canal, should it be put into operation in the future. Prior to action brought the Crown offered to raise the girders of the bridge in such an event, and communicated the offer to the suppliant in writing. He did not accept such offer, however, and filed his petition claiming a larger measure of relief than the offer of the Crown would have afforded him. The Crown did not repeat the undertaking in its statement of defence.

May 15th, 1893.

The case now came on to be tried at Halifax, the suppliant appearing *in person*, and *Borden* Q.C. and *W. F. Parker* for the respondent.

The court referred the matter to William Compton, Esquire, one of the Official Referees of the court, to ascertain and report the damages.

October 23rd and 24th, 1893.

The Official Referee having filed his report the case was now argued at Ottawa.

The suppliant *in person*;

W. F. Parker for the respondent.

BURBIDGE, J. now (April 2, 1894) delivered judgment.

The jurisdiction of the court in such a case as this is defined by clauses (*a*) and (*b*) of the 16th section of *The Exchequer Court Act* (1), by which it is provided that the court shall have exclusive original jurisdiction to hear and determine every claim against the Crown—(*a*) for property taken for any public purpose; and, (*b*) for damage to property injuriously affected by the construction of any public work. The Crown in this statute

(1) 50-51 Vict. c. 16.

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means, of course, the Crown as represented by the Government of Canada.

The suppliant claims to be the proprietor of the Shubenacadie Canal, in the Province of Nova Scotia, and of the rights and franchises appertaining to the canal, and it is in respect of his interest therein that he brings his petition. I do not wish to be understood to express any opinion, one way or the other, as to the merits of his claim to be the owner of the canal, or as to the extent and nature of the rights that attach to such ownership. That, I think, is not necessary to the determination of the case before me. Assuming that his title is what he claims it to be, there is no evidence that the Crown has, during the time of his ownership, taken or expropriated for any public or other purpose any part of the Shubenacadie Canal, or any right therein. I also agree with the Official Referee that the suppliant has failed to show that he has suffered any damage by the injurious affection of his property by the construction of any public work. The only substantial ground of complaint was the construction, in 1878, of a new railway bridge over the Shubenacadie River at Enfield, the girders of which were lower than those of the old bridge on the site of which the new bridge was erected. But at that time the canal was not being operated, and up to the present time, the canal property has not been injuriously affected by the construction of the new bridge, and no damages have been occasioned thereby. Any just complaint that the suppliant might otherwise have had, is met by the undertaking filed by the Crown to raise the girders of the bridge whenever traffic through the canal shall be obstructed or in any way impeded by the bridge.

As bearing upon the question of costs, I see by the correspondence produced that a similar offer was made by the Minister of Railways and Canals in a letter from

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the acting Secretary of his department to the suppliant, of the 23rd of February, 1892, the receipt of which was acknowledged by the suppliant on the 4th of March following, of which day the petition in this case also bears date. This offer or undertaking was not, however, renewed in the statement in defence, but was filed subsequently, pursuant to leave reserved, at the hearing of the motion against the Official Referee's report.

There will be a declaration that the suppliant is entitled, whenever the Shubenacadie Canal shall be *bonâ fide* opened for traffic, and so soon as the traffic through the canal shall be in fact obstructed or in any way impeded by the railway bridge at Enfield over the Shubenacadie River, to have the construction of the said bridge so altered as to raise the girders thereof to the same height above the said river as the girders of the original bridge there were before the construction of the first mentioned bridge in 1878.

There will be no award of damages, and no costs to either party.

Judgment accordingly.

Solicitors for respondent: *Borden, Ritchie, Parker & Chisholm.*

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April 16.

ODILON FILION.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of right—Person killed on a public work—Negligence of servant of Crown—Liability—50-51 Vict. c. 16—Interpretation.

Under section 16, clause (c), of *The Exchequer Court Act* (50-51 Vict. c. 16) the Crown is liable for the death of any person on a public work resulting from the negligence of any of its officers or servants while acting within the scope of their duty or employment.

2. Within the limitation prescribed in sec. 16 of *The Exchequer Court Act*, 50-51 Vict. c. 16, the Crown is liable for injuries resulting from the negligence of its officers and servants in any case in which a subject would, under like circumstances, be liable.

3. While certain repairs were being made to the Lachine Canal, the superintendent of the canal had occasion to use a derrick for the purpose of such repairs. The derrick was borrowed from a contractor, and had been used by the superintendent before for similar work. The suppliant's son was, together with other labourers, working at the bottom of the canal under the derrick, but not in connection with it, while it was being erected by another gang of workmen under the immediate direction of the superintendent and his foreman. The work of setting it up was begun in the afternoon of the day of the accident and finished by electric light in the evening. The suppliant's son and the other men working with him were allowed to continue their labours at the bottom of the canal after the derrick was set up, and no notice was given to them by the superintendent or his foreman when they were about to put the derrick into operation. While the first load was being lifted (in weight much under the supposed capacity of the derrick) a portion of the derrick broke at a place where it had been cracked before and fell upon the men working at the bottom of the canal, injuring the suppliant's son so severely that he died a few days afterwards.

Held, that the superintendent and foreman, in failing to give notice to the men working beneath the derrick when they started to operate it, were guilty of negligence for which the Crown is liable.

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Statement of Facts.

PETITION OF RIGHT for damages arising out of the death of a person on a public work resulting from the negligence of the servants of the Crown.

By his petition of right the suppliant averred as follows:—

"L'humble requête de Odilon Filion, journalier, de la paroisse de la Côte St. Paul, dans le Comté d'Hochelaga dans le district de Montréal, dans la Province de Québec, expose respectueusement:—

"Qu'il est le père de feu Amédée Filion, en son vivant journalier du même lieu;

"Que le où vers le dix-neuvième jour de décembre mil huit cent quatre-vingt douze, le dit Amédée Filion était à l'emploi du Gouvernement Fédéral du Canada sur le Canal Lachine, l'un des canaux sous le contrôle du Gouvernement Fédéral du Canada;

"Que le dix-neuf décembre sus-dit, alors que le dit Amédée Filion travaillait au dit Canal Lachine pour le Gouvernement du Canada et sous les ordres et la direction des employés du dit Gouvernement du Canada, il lui arriva, sous les circonstances suivantes, un accident qui lui a couté la vie.

C'est à savoir:

"Une escouade d'hommes travaillait au dit canal et soulevait des fardeaux au moyen d'une grue (derrick), la propriété du dit Gouvernement:

"La dite grue, usée et défectueuse, se brisa tout à coup et le bras du palan s'abattit sur les ouvriers, le tout tandis que ceux-ci travaillaient sous les ordres et la direction des officiers du dit Gouvernement du Canada;

"Plusieurs d'entre les dits ouvriers furent blessés plus ou moins grièvement; le fils du requérant entre autres fut terrassé; on le transporta chez lui et malgré des soins assidus et intelligents il est mort cinq jours

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après des suites immédiates des blessures qui lui furent infligées par la dite grue usée et défectueuse;

"Que l'accident sus-dit est arrivé par suite du mauvais état de la grue en question;

"Que le vingt-sept décembre en l'an de grâce mil-huit cent quatre-vingt douze, une enquête fut ouverte afin de s'enquérir des causes de l'accident en question pour Notre Souveraine Dame La Reine, par son coroner Joseph Jones, dûment nommé pour remplir ces fonctions dans le district de Montréal sus-dit, et que le jury assermenté a rendu le verdict suivant: "Que lorsque le derrick (grue) a craqué la premiere fois, l'ouvrage aurait du être suspendu, et le derrick être essayé avec sa charge," tel qu'il appert à la copie du dit verdict dument certifiée et jointe à la présente requête;

"Que votre requérant est âgé de soixante ans, sans emploi, et sur le point de ne plus pouvoir travailler; qu'il lui reste encore quatre enfants qui sont des filles incapables de pourvoir à leur subsistance; que le défunt Amédée Filion était le seul soutien de la famille;

"Que sous les circonstances votre requérant est bien fondé à réclamer des dommages de votre Gouvernement sus-dit;

"Que la perte soufferte par votre requérant est inappréciable à prix d'argent;

"Que votre requérant consent toutefois à fixer le montant des dommages qui lui sont dûs par votre Gouvernement sus-dit à la somme de cinq milles piastres.

"Pourquoi votre requérant supplie humblement votre Très Excellente Majesté qu'il lui soit permis de se porter demandeur contre le dit Gouvernement de votre Majesté et qu'un *Fiat* lui soit octroyé en conséquence; que le dit Gouvernement soit enjoint de répondre à la présente humble pétition de droit dans les delais ordinaires et votre requérant conclut à ce que par le juge-

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ment à intervenir sur les présentes, en la Cour de l'Échiquier du Canada, il soit dit et déclaré que la mort du dit Amédée Filion advenue sur les travaux du dit canal Lachine est attribuable à la négligence coupable et à la faute des officiers du dit Gouvernement Fédéral du Canada ; que le présent requérant a encouru par la dite faute une perte ou un dommage s'élevant à au moins cinq milles piastres dont il a droit d'être indemnisé par le dit Gouvernement et enfin à ce que le dit Gouvernement du Canada doit payer au dit requérant la dite indemnité de cinq milles piastres."

Her Majesty's Attorney General for the Dominion of Canada filed a statement in defence to the above petition, pleading, in substance, as follows,—

2. The Crown admits that Amédée Filion was working as a labourer on the Lachine Canal under the orders and directions of an officer of Her Majesty at the time he met with the accident complained of in the petition of right.

3. That at the time of the accident, the said Amédée Filion was engaged, along with a number of other labourers, in repairing a breach in the slope-wall of the Lachine Canal above the waste-weir at St. Gabriel's Locks, which breach had been caused by a " washout "; and in carrying on the work of repair, it was necessary to erect a derrick near the breach in the wall, and the said Amédée Filion assisted at the erection of the said derrick.

4. That the work of repairing the breach was a work of emergency and had to be carried on night and day, and that about ten o'clock at night on the 19th December, 1892, while the said Amédée Filion and others were working as aforesaid, the derrick slipped and fell, and he was injured by such fall.

5. That the injury to the said Amédée Filion was not caused through the fault or negligence of the agents

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or officers of Her Majesty, who had the charge and control of the said work for and on behalf of Her Majesty, while acting within the scope of their duty or employment, and that Her said officers and agents were not negligent in the discharge of their duty in connection with the said work.

6. That the said derrick was not worn out or defective, or in a bad state of repair, as alleged in the said petition of right.

7. That the said Amédée Filion was well aware at the time he was so engaged upon the said canal of the character and condition of the derrick, and of the manner in which it had been placed and erected for the conduct of the work; and, in accepting such employment, accepted all the risks incident to or connected with the same, and that the slipping and falling of the derrick, in the manner described in the petition, was one of the risks incident to the said employment, and that the suppliant is not entitled to recover from Her Majesty, as the employer of the said Amédée Filion, any damages for the injury and death which, it is alleged, was caused by reason of the accident aforesaid.

8. That the accident and injury to the said Amédée Filion was due to and happened by reason of the negligence and carelessness of the said Amédée Filion while working in the immediate vicinity of the said derrick, and that if he had exercised ordinary care and caution the injury to himself would not have occurred when the said derrick accidentally fell.

9. That the falling of the derrick was a fortuitous event, beyond the control of Her Majesty's officers employed in connection with the said work, and was not the result of any act of commission or omission on their part, and that Her Majesty was not liable for any damages which may have been sustained by reason of such accident.

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10. That one of the causes of action alleged in the petition is based upon the worn out and defective condition of the said derrick, but no action will lie against Her Majesty on this ground, and the same benefit is claimed from this objection as if a formal demurrer was filed to the said petition.

11. That one of the claims and causes of action set out in the said petition, is based upon the negligence and carelessness of Her Majesty's officers and agents who had charge and control of the said work; but it is alleged that Her Majesty cannot be rendered liable to an accident, nor is the suppliant entitled to recover damages against Her Majesty for or in respect to the said causes of action.

12. That under no circumstances is Her Majesty, as representing the Dominion of Canada, answerable or responsible to the suppliant for or in respect to the claim for damages, and in respect to the said petition of right mentioned, and denies that the suppliant is entitled to the relief prayed for therein.

The material facts of the case appearing upon the evidence may be stated as follows:—

The Lachine Canal is a public work of Canada.

On the 19th of December, 1892, a break occurred in the slope-wall of the canal above the waste-weir at St. Gabriel's Locks, which required immediate repair. In order to facilitate the work, Mr. Kennedy, the superintendent of the canal, borrowed a derrick from a contractor which he had used before for a similar purpose. This derrick was supposed to be capable of lifting a weight of five tons. In his evidence the superintendent stated that he examined the several portions of the derrick by looking it over in a general way before it was set up, and did not discover anything wrong with them. There was, however, a crack in the iron-work of one of the parts which escaped his

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observation, and which subsequently caused the accident in respect of which this action was brought. The evidence showed that the crack in the iron could not have been detected without cleaning the rust from the sides of the metal, which was not done. The derrick was set up under the direction of one Huot, foreman of the work of repairs, but the superintendent was also present during the time of its erection. The work of setting it up commenced in the afternoon of the day of the accident and was completed by electric light the same evening.

The suppliant's son, Amédée Filion, since deceased, and some other labourers, were working at the bottom of the canal while the derrick was being set up. They were engaged in some work preparatory to making the repairs, at a place underneath where the derrick was being erected; but they had nothing to do with the business of erecting it, which was done by another gang of men. There was some evidence showing that a slight noise as of cracking had been heard, by the men employed in connection with it, while the derrick was being set up; but it is not at all probable, looking at the plate itself, that it was cracked or broken by any strain put upon it while it was being placed in position.

The suppliant's son, and the other men working with him were allowed to continue their labours underneath the derrick until it had been fully set up; and although both Kennedy and Huot were present when the men in charge of the derrick started to lift the first load, neither of them gave, or caused to be given, notice to the men working below of their intention to begin operations with the derrick. The first load attempted to be lifted was much under the supposed capacity of the derrick when it was in good condition; but, when the strain of the load came upon

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it, it broke at a place where it had been cracked before, and part of it falling upon the men working below injured the suppliant's son so severely that he died a few days afterwards.

Upon the evidence as to damages it was shown that the suppliant was at the time of the trial a man sixty years of age, that he had a wife and several children to support, to whose maintenance his deceased son had regularly contributed. That his son at the time of his death was twenty-two years old, unmarried, and was living with his father. That the deceased had been earning a sum of one dollar and twenty-five cents per day as a labourer.

Argument of Counsel.

The action was brought within one year after the death of the person injured, and by an ascendant relation of the deceased duly qualified to bring such action under the provisions of Article 1056 of the Civil Code of Lower Canada.

March 20th, 21st and 22nd, 1894.

The trial and argument of the case took place at Montreal.

Coderre, for the suppliant, contended that there was a clear case of negligence made out by the evidence, and that the Crown could not escape liability therefor in view of the provisions of clause (*c*) of the 16th section of *The Exchequer Court Act*.

There was negligence on the part of the superintendent in not making a careful inspection of the derrick he borrowed before it was set up; there was negligence on his part and that of his foreman in allowing the deceased and the rest of his gang to go to work underneath where the derrick was being erected; there was negligence in the manner and time of setting up the derrick. When the crack was heard by the men there should have been an immediate and ex-

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haustive examination of the whole machine. Notice should have been given to the men working below when it was intended to start operations with the derrick. The fact that something occurred calling for some examination, and the further fact that Huot was not called by the Crown, and that his answers were not explained, are matters which cannot be overlooked in coming to a conclusion on the question of negligence.

Monk, Q.C., following on the same side, cites *City of Quebec* v. *The Queen* (1); *Brady* v. *The Queen* (2). The superintendent was guilty of negligence upon the facts in evidence under Art. 1053 *Civil Code*, and by clause (*c*) of sec. 16 of *The Exchequer Court Act* the doctrine of *respondeat superior* is applied to the Crown in such a case. [He cites also Art. 1054 *C.C.L.C.*]

He contends that the respondent should be held liable for the following reasons: (*a*) the derrick was not examined before its erection, as it should have been; (*b*) when they began to operate the derrick the men working below it should have been, as they were not warned to leave their dangerous position,—especially was this necessary when the derrick was an old one such as this; (*c*) when the noise as of cracking was heard while the derrick was being erected, those in charge of it should not have neglected to exhaust every means of discovering its cause; (*d*) the mere fact of the derrick breaking in the manner and under the strain it did, shows it was not sound when put up, which fact the Crown's servants should have known.

The suppliant in this case is afforded a *locus standi* by Art. 1056 *C.C.L.C.* He is properly qualified, being the father of the deceased, to bring the action; and it has been brought within the prescribed time.

(1) 2 Ex. C.R. 252. (2) 2 Ex. C.R. 273.

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The suppliant is entitled to substantial damages. His deceased son was earning $1.25 per day and at least one-half of that amount was contributed by him towards the household expenses of the suppliant. A round sum of $1000 would not be an excessive award of damages. [He cites *The Canadian Pacific Ry. Co.* v. *Robinson* (1)].

Hogg, Q.C., for the respondent, contended that the evidence did not show negligence by an officer or servant of the Crown within the meaning of clause (*c*) of sec. 16 of *The Exchequer Court Act*. Kennedy, the superintendent, was an officer of the Crown, but Huot his foreman was not; and it was under the immediate direction of the latter that the derrick was put up. The superintendent cannot be charged with negligence in putting up the derrick when he secured the services for such work of a man of acknowledged skill and ability in matters of this sort. If the evidence shows any negligence it is the negligence of Huot, the foreman of the works appointed by the superintendent, and not the negligence of the superintendent himself, who, as an officer of the Crown, was the only person in this case whose negligence would bind the Crown. There was no duty upon him which he either totally failed to do or negligently performed.

He cites *Wigmore* v. *Jay* (2); *Municipality of Pictou* v. *Geldert* (3).

Monk Q.C. replied.

BURBIDGE, J. now (April 16th, 1894) delivered judgment.

The suppliant brings his petition of right to recover damages for the death of his son, Amédée Filion, which was occasioned by an accident that happened to the

(1) 19 Can. S.C.R. 292. (2) 5 Ex. 354.
(3) [1893] A.C. 524.

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latter by the breaking of a derrick beneath which he was working at some repairs to the Lachine Canal, in the Province of Quebec. The action is rested upon clause (*c*) of the 16th section of *The Exchequer Court Act*, and Articles 1053, 1054 and 1056 of the *Civil Code of Lower Canada*.

I have had occasion elsewhere to express my views at considerable length in regard to the Crown's liability, in Canada, for injuries resulting from the negligence of its officers and servants (1). On that subject I have nothing to add at present, except that I think it was the intention of Parliament that the Crown should, within the limitations prescribed in section 16 of *The Exchequer Court Act*, be liable in any case in which a subject would, under like circumstances, be liable.

As to the facts of this case, I find in favour of the suppliant and against the respondent the issues raised by the 5th, 6th, 7th, 8th and 9th paragraphs of the statement in defence. Whatever else may be said, I think this much may be said, that Kennedy, the superintendent of the canal, and Huot, the foreman of the workmen, ought not to have commenced work with a derrick procured and set up under the circumstances existing in this case, without giving some notice or warning to the men who were working in the canal, under the place where the derrick was being set up. In neglecting to give such warning before subjecting the derrick to the strain of its first load, they failed to do what I think might be fairly expected of a prudent superintendent or foreman reasonably careful of the limbs and lives of the men whose work he was directing. I think the case is within the section of *The Ex-*

(1) REPORTER'S NOTE: *See Brady* v. *The Queen*, 2 Ex. C. R. 273; *The Corporation of the City of Quebec* v. *The Queen*, 2 Ex. C. R. 252; *Gilchrist* v. *The Queen*, 2 Ex. C. P. 300; *Martin* v. *The Queen*, 2 Ex. C. R. 328; *Lavoie* v. *The Queen*, 3 Ex. C. R. 96; *Leprohon* v. *The Queen*, 4 Ex. C. R. 100.

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chequer Court Act relied upon, and that the claim is one arising out of the death of a person on a public work, resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duty or employment.

It was argued that the suppliant could not recover because the negligence which was the cause of the accident, was that of a fellow-servant of the deceased. At one time it appears to have been thought that such a rule formed part of the law of Lower Canada. In *Fuller* v. *The Grand Trunk Railway Company* (1), Mr. Justice Badgely, and in *Bourdeau* v. *The Grand Trunk Railway Company* (2), Mr. Justice Monk, expressed the opinion that a servant of the railway company had no action for damages against the company for any injury he might sustain through the negligence of his fellow-servant. But in the case of *The Canadian Pacific Railway Company* v. *Robinson* (3), in which the two cases mentioned were referred to on the argument, the present learned Chief Justice of the Supreme Court of Canada, [citing *Demolombe* (4), and *Sourdat* (5)], said that "according to the best French authorities, the rule of the modern English law upon which that defence is founded, is rejected by the French law, which governs the decision of such questions in the Province of Quebec." Sir Frederick Pollock holds the same view. Discussing the rule of the English law, as it stood before 1880, as to the master not being liable to his servant for the negligence of a fellow-servant, he says that "no such doctrine appears to exist in the law of any other country in Europe" (6).

There will be judgment for the suppliant for $1,000 and costs. *Judgment accordingly.*

Solicitors for suppliant: *Primeau & Coderre.*

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

(1) 1 L.C.L.J. 68.
(2) 2 L.C.L.J. 186.
(3) 14 Can. S.C.R. 114.
(4) Vol. 31, No. 628.
(5) Vol. 2, No. 911.
(6) Pollock on Torts, p. 88.

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April 6.

TORONTO ADMIRALTY DISTRICT.

THE "C. J. MUNRO" AND THE "HOME RULE."

Salvage—Limitation of action against a subsequent bonâ fide purchaser in Ontario—Notice of claim—54-55 Vict. c. 29 sec. 23 subsec. 4.

An action *in rem*, against a tug, was brought claiming $800 for salvage under an alleged agreement made in the Province of Ontario with the master of the tug at the time the salvage services were rendered. Subsequently, but before action was brought, the tug was sold by the Quebec Bank, under a mortgage held by the bank, to a purchaser who it was alleged had notice of the claim. The purchaser paid part cash and gave a mortgage on the vessel to the bank for the balance which remained unpaid.

The action was not begun until after ninety days from the time when the alleged claim accrued.

The purchaser claimed in his defence the benefit of section 14, subsection 5, of *The Maritime Court Act* (R.S.C. c. 137), re-enacted by section 23, subsection 4, of *The Admiralty Act*, 1891 (54-55 Vict. c. 29) as a bar to the plaintiff's claim.

Held, that as against a *bonâ fide* purchaser, the plaintiff's claim (if any) was barred, and the lien on the vessel (if any) destroyed, even though the purchaser had actual notice of the claim at the time of, or before, his purchase.

ACTION for salvage.

This action was brought by the owners of the tug *C. J. Munro* against the tug *Home Rule*, to recover $800 under an alleged agreement for salvage service, entered into at the time of such service with the master of the *Home Rule*.

The *Home Rule* was afterwards sold under a mortgage held by the Quebec Bank to a *bonâ fide* purchaser for value, who, however, it was alleged had actual notice and knowledge of the claim before and at the time of his purchase.

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After the arrest of the vessel, the purchaser intervened and filed a statement of defence which contained the following clause :—

" The defendant further alleges that in any event he is a subsequent *bonâ fide* purchaser of said ship and that the proceedings for the enforcement of the alleged lien or right or remedy *in rem* in respect of the alleged salvage services, were not begun within 90 days from the time the same accrued (if it ever did accrue, which the defendant denies) and the defendant claims the benefit of the statute in that behalf, and the protection afforded to such purchasers."

Subsection 5 of section 14 of *The Maritime Court Act* is as follows :

" No right or remedy *in rem*, given by this Act only, shall be enforced as against any subsequent *bonâ fide* purchaser or mortgagee of a ship, unless the proceedings are begun within ninety days from the time when the same accrued."

The action was tried before His Honour Judge McDougall, Local Judge of the Toronto Admiralty District, at St. Catharines, on 6th April, A. D. 1894.

J. C. Rykert, Q. C., for plaintiffs.

R. Gregory Cox, for the vessel and its owner intervening.

Rykert, Q. C.—The defendant purchased with actual notice and knowledge of the plaintiff's claim. It constituted a maritime lien on the vessel, and as the purchaser executed a mortgage to secure part of the purchase money, which is still unpaid, the lien can be enforced against the mortgage. To the extent of the money still owing on the mortgage, the property has not passed out of the hands of the mortgagees under whose mortgage the property was sold.

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Moreover the statute protects only purchasers who have no notice of the claim.

Cox, contra—These proceedings were not taken until more than ninety days after the claim, if any, accrued.

The statute omits the usual words to be found in a plea of purchase for value without notice, and notice is immaterial. The policy of the law in relation to merchant shipping is to favour the transmutation of property in vessels, as beneficial to commerce. [He cites : *Abbott on Shipping* (1).]

" Of ships which are built to plough the sea and not lie by the walls, commercial nations consider the actual employment as a matter not merely of private advantage to the owners, but of public benefit to the State." (2)

In pursuance of the same policy notice of trusts is not allowed to be registered. (3)

The Quebec Bank are not parties to the action, and no relief can be given against the bank, or the moneys due the bank under their mortgage.

At the conclusion of the case, the learned judge, while holding that on the merits the defendant was entitled to succeed, delivered the following judgment on the statutory defence.

McDOUGALL, L. J.—I think in this case it might be well argued that the services rendered were not properly salvage services, but a contract for towage from one point to another. If that view be correct this action must fail, because towage services do not constitute a maritime lien and therefore do not attach to the vessel. I think the initial difficulty which the plaintiff has to contend with is the barrier established by the clause in the statute which has been preserved

(1) Part 1 c. 1.
(2) Abbott, part 1, c. 3.
(3) *See The Merchant Shipping Act* 1854, sec. 43.

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in the new Admiralty Act. I take it the object of that clause is to render vessels more readily marketable, and to compel the people to be prompt in the assertion of their claims, so that would-be purchasers may be in a position to make a purchase without danger of the existence of maritime liens springing up after the date of their purchase, and to set a time limit within which such actions must be brought so far as they affect the vessel itself. That clause does not act as a statute of limitations as against the claim, because it leaves the right *in personam* undisturbed, but it does not affect the question so far as it relates to the remedy *in rem*; and I take it the scope of the statute is such that a would-be purchaser might very properly, with full notice of a dozen maritime liens against a vessel, refrain from making his purchase until ninety days had expired from the date of the last claim that even to his knowledge could be in existence; and then could take a conveyance of the vessel free from all claims, if the parties in possession of such claims had not chosen in the interval to institute proceedings against the vessel. In this case the facts are clearly admitted that the action was not commenced anterior to the ninety days. In my judgment the vessel was not liable to any such claim. I think the clause in the statute is very distinct. When you find a clause of limitation such as this, differently worded from those which are commonly used in other statutes, because it occurs in a maritime Act it does not require any new canon of construction to get at its proper meaning; the usual clause, as we all know, for a limitation of that kind to subsequent *bonâ fide* purchasers and mortgagees, is to say, *provided they have got actual notice*; but the statute leaves those words out expressly, and that must have been done intentionally. I cannot imagine it to have been thought that the legislature by omitting those words

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intended to give that clause the same force as if the words had been there. One must construe an Act of Parliament not as you think may have been in the mind of the legislature, but you must construe it according to the language of the legislature. Now, this peculiar clause of limitation is only partial and it is very distinct in terms; it says: "no right or remedy *in rem* given by this Act"—and "given by this Act" means all actions within the jurisdiction of the Admiralty Court—"shall be enforced as against subsequent *bonâ fide* purchasers or mortgagees of a ship unless the proceedings for the enforcement thereof shall begin within ninety days from the time when the same accrued." That does not say no action shall be brought for the claim, but it says no action shall he brought against the vessel.

In this case I am very clear in the view that I have that the vessel is freed from this particular claim which is sought to be established in this action. If the former owner of the vessel had been a party to this action, and a personal judgment sought against him, then I would have to determine the question probably as to the amount and the value of these services, and the question as to whether they were salvage or towage services. But it seems to me to be unnecessary to determine that point if this initial question is vital to the plaintiff's present action.

The action will be dismissed with costs.

Judgment accordingly.

Solicitors for plaintiff: *Rykert & Marquis.*

Solicitors for the ship and owner intervening: *Cox & Yale.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF; 1894

AGAINST Feb. 7.

THE SHIP "*MINNIE.*"

Pelagic sealing—Seal Fishery (North Pacific) Act, 1893, (56-57 *Vict.* [*U. K.*] *c.* 23) *secs.* 1, 3 *and* 4—*Judicial notice of order in council thereunder—Protocol of examination of offending ship by Russian war vessel, sufficiency of—Presence within prohibited zone—Bona fides—Evidence.*

By sec. 1 of the *Seal Fishery (North Pacific) Act*, 1893, it is provided that "Her Majesty The Queen may, by order in council, prohibit during the period specified by the order, the catching of seals by British ships in such parts of the seas to which this Act applies as are specified by order."

Held, That the court might take cognizance of such order in council without proof.

2. By subsec. 3 of sec. 1 of the Act in question the provisions of secs. 103 and 104 of *The Merchants Shipping Act*, 1854, giving jurisdiction to colonial Admiralty courts in actions for the condemnation of ships guilty of offences under such Act, are applied to offences against the first mentioned Act.

3. By the 3rd sec. of the Act in question it was provided that "A statement in writing, purporting to be signed by an officer having power in pursuance of this Act to stop and examine a ship, as to the circumstances under which, or grounds on which, he stopped and examined the ship, shall be admissible in any proceedings, civil or criminal, as evidence of the facts or matters therein stated."

Clause 2 of the order in council extended to the "Captain or other officer" in command of any war vessel of His "Imperial Majesty, the Emperor of Russia" all the powers conferred upon officers of the British Navy by subsec. 4 of sec. 1 of the Act, in relation to the examination and detention of an offending British ship.

Held, that where a protocol of the examination of an offending British ship by a Russian vessel did not disclose on its face that the person who signed the same was an officer in command of the examining vessel, or that the vessel was a Russian war vessel, the court, by reason of it being a matter involving international

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obligations, must apply the maxim *omnia presumuntur rite esse acta* and assume that the person who signed the protocol was an officer properly in command of the examining vessel, and that such vessel was a Russian war vessel within the meaning of the Act.

4. A ship, the master of which had notice of the prohibited zone, was found within the waters thereof fully manned and equipped for sealing, and having on board shooting implements and one seal skin. It, however, did not appear that the seal had been taken within the zone.

Held, that under the provisions of the *Seal Fishery (North Pacific) Act*, 1893, the presence of the ship within the prohibited waters required the clearest evidence of *bona fides* to exonerate the master of an intention to infringe the provisions of the Act, and that as his explanation of the circumstances was unsatisfactory, the ship must be condemned.

ACTION for condemnation under the *Seal Fishery (North Pacific) Act*, 1893 (56-57 Vict. [U.K.] c. 23).

The sections of the Act bearing upon the case are sufficiently stated in the head-note.

The case turned mainly upon two points:

(1) Whether the protocol of the examination of the offending ship satisfied the requirements of section 3 of the Act so as to make it evidence of the facts or matters therein stated;

(2) Whether the court could take judicial notice of the Imperial order in council provided for in section one of the Act and passed in pursuance thereof.

Copies of such protocol and of such clauses of the order in council as are material to the case are given below.

PROTOCOL OF THE EXAMINATION OF THE SCHOONER "*Minnie*."

"On this 5/17 day of July, in the year 1893, in latitude 54°, 21′ N., and longitude 168° 38′ E., at a distance of twenty-two miles from the southern extremity of Copper Island, a schooner under sail was seen at 9 o'clock in the evening, by His Imperial Majesty's Transport *Yakout*, cruising off the Commander Islands.

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"On nearing her, she was ordered by the transport to bring to, which was promptly done. A whale boat at once put off from the schooner to the transport with the mate, who explained that the schooner was English (that she was) from Victoria (that) her name was *Minnie*. For six days she had taken no observations."

"The Midshipman, Michaelof Raslovlef, was sent for the examination of the aforesaid schooner, who on his return to the Transport with the schooner's skipper, Julius Mohrhouse, brought with him the log-book and ship's papers, and reported (that) they had on the schooner 12 whale boats, 23 shot-guns and one rifle, and in the hold only a few seal skins and salt.

"After an inspection of the aforesaid log-book and papers, the ship's Commission, appointed by order of the commander of the Transport, on the 5th of July, in accordance with N. 42 consisting of the President Lieutenant Ginter, and of the members Lieutenant Dedenef and Midshipman Michaelof Raslovlef, found that the schooner *Minnie* (sailing) under the flag of Great Britain, belonging to Victor Jacobson, (and) under the command of Julius Mohrhouse, from Victoria, is sailing for the purpose of sealing by the way (i. e. is engaged in pelagic sealing) and called before her arrest by the Transport, at San Juan, Yakoutat and Sand Point, from which last port she sent the seal skins she had procured to Victoria.

"The crew on the schooner consisted of 25 men. In accordance with the finding of the whole of the aforesaid Commission, in compliance with the principle, ss. 9 of the instructions to a war cruiser in the year 1893 for the protection of the Russian maritime industries in the Behring Sea, it was decided that after having seized the ship's documents, a temporary certificate be given to skipper Julius Mohrhouse, with an inscription upon it of the number and description of the documents

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seized, and that he be ordered to leave the territorial waters at once and go to Yokohama and there present himself to H. B. M's Consul and inform him that the documents of the schooner *Minnie* would be forwarded to the authorities of Great Britain.

(Members Sgd.)

"MIDSHIPMAN MICHAELOF RASLOVLEF.

"LIEUTENANT DEDENEF.

Sgd. "PRESIDENT LIEUTENANT GINTER.

"I confirm this document.

Sgd. "CAPTAIN (2 Rapa) SCHMELEVSKY."

The clauses of the order in council bearing upon the case are as follows :—

"1. From and after the fourth day of July, one thousand eight hundred and ninety-three, until the first day of January, one thousand eight hundred and ninety-four, the catching of seals by British ships is hereby prohibited within such parts of the seas to which the recited Act applies, as are comprised within the following zones, that is to say (1) a zone of ten marine miles on all the Russian coasts of Behring Sea and the North Pacific Ocean, and (2) a zone of thirty marine miles round the Komandorsky Islands and Tulénew (Robben Island.)

"2. The powers which under the recited Act may be exercised by any Commissioned Officer on full pay in the Naval Service of Her Majesty, may be exercised by the Captain or other officer in command of any war vessel of His Imperial Majesty the Emperor of Russia in relation to a British ship, and the equipment and crew and certificate thereof.

The other material facts of the case are stated in the judgment.

January 20 and 22nd, 1894.

The trial took place at Victoria, B. C., before Mr. Justice Crease, Deputy Local Judge for the Admiralty District of British Columbia.

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Pooley, Q. C., for the plaintiff;

Belyea, for the ship.

At the trial Mr. Pooley, on behalf of the plaintiffs, tendered in evidence the Act and the order in council passed thereunder.

[CREASE, D. L. J. :—It is not necessary, Mr. Pooley, to put in evidence, as you now offer, the *Seal Fishery (North Pacific) Act*, 1893, and the order of Her Majesty in Council thereunder, dated July 4th, 1893. The court takes cognizance of them already, and sits now under these enactments.]

The case was then argued upon the evidence.

CREASE, D. L. J. now (February 7th, 1894,) delivered judgment.

This was an action for condemnation under the Imperial British *Seal Fishery (North Pacific) Act*, 1893, and the order in council thereunder, of July 4th, 1893, of the schooner *Minnie* (Victor Jacobson, owner, and Julius Mohrhouse, master) seized by the Imperial Russian Transport *Yakout* within the forbidden thirty mile zone around Kormandorsky Islands, manned and armed, and having shooting implements and seal skins on board, and otherwise fully equipped for hunting, or attempting to hunt or take seals within the prohibited waters aforesaid, in contravention of the above mentioned enactments.

The seizure took place in Lat. 54, 21° N., and Long. 168°, 38′ E., about 22 miles from the southern extremity of Copper Island.

The statement of claim sets forth the above facts, and charges that Victor Jacobson and Julius Mohrhouse had due notice not to enter the prohibited waters of the North Pacific nor to proceed within a zone of thirty miles round the Kormandorsky Islands; that Copper Island is one of the Kormandorsky Islands

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and that at the time of the seizure, the *Minnie* was fully manned and equipped for the purpose of hunting, killing and taking seals, and had on board thereof shooting implements and seal skins; that after the seizure and examination of the said ship and her papers by the official commission of the said *Yakout* it was decided to seize the said papers, and the said Julius Mohrhouse was directed to proceed with the *Minnie* to appear before Her Majesty's Consul at Yokohama, and a provisional certificate was given to the said Julius Mohrhouse; but that he did not proceed to the port of Yokohama, and report to H. B. M's Consul there, but sailed for the port of Victoria, where he arrived on the 24th August, 1893.

Whereon Captain Hughes-Hallett, R. N., Captain of H. M. S. *Garnet*, claimed her condemnation and that of her equipment and everything on board for such contravention, as laid, under the said Seal Fishery Act and order in council.

In the statement of defence, the defendant denies that the ship was seized in Lat. 54, 21° N., and Long. 168°, 38′ E., as claimed or at any other point within the prohibited zone; alleging that neither he, nor Captain Mohrhouse, had any notice whatever not to enter the prohibited waters in the North Pacific Ocean, nor to proceed within the prohibited thirty mile zone; also, while admitting that the *Minnie* at the time of the seizure was fully manned and equipped for the purposes mentioned in the statement of claim, alleging that she had but one seal skin on board when seized. He also denied that the master of the *Minnie* was directed to proceed with her to Yokohama by the Captain of the *Yakout*; but that officer merely "proposed" to him that he should leave the "said waters and proceed to Yokohama." In the alternative, defendant alleges,

that if it be proved that the *Minnie* was within the thirty mile zone when seized (which he denies), the schooner was not used or employed or intended to be used or employed therein in killing, hunting or attempting to kill, hunt or take seals therein, in contravention of the said *Seal Fishery (North Pacific) Act*, 1893, or otherwise, but that the position of the ship, when seized, was due wholly to stress of weather.

Upon which issue was joined, and the trial took place before me on the 20th and 22nd of January, 1894.

The Hon. Mr. Pooley, Q. C., for the Crown then brought forward the evidence for the plaintiff. The translation into English of the Russian protocol sent by the Captain of the *Yakout*, under the Act for the purposes of the trial, was proved by Mr. Clive Phillips Woolley, a gentleman certified to have passed in the Russian language, by Alexander de la Voye for the Director-General of Military Education, in the College of the Civil Service Commissioners, in the Military Education Division.

He proved the substantial accuracy of the translation, and in reply to questions from defendant's counsel, Mr. Belyea, as to the correctness of the signature of Captain Shemelevsky, the officer in command of the *Yakout*, that the words of confirmation of the protocol were "Oot-versh-doo," in the first person, "I confirm" (meaning this document) and he then adds his title as captain, following a contraction, "2 Rapa," before Shemelevsky, which the interpreter conceived might mean, Captain of the second rank or commander but he was not certain.

On being asked what Russian word was used, which had been translated "proposed" in the Russian-English memorandum of the seizure, endorsed by the Russian Officer in the *Minnie's* official log—he stated that it was

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"predpologite"—and was used in the same sense there as one would employ it in "turning a man out —directing him to walk out of the door," which I take it is equivalent to "ordering," which was the sense in which Captain Mohrhouse acted upon and showed he so understood it at the time. Also, that the Russian word used in expressing sailing for the purpose of sealing en route—which the interpreter had explained by—("is engaged in pelagic sealing") is "doroboo" "by the way." If the phrase had been left as "sealing on or by the way," it would, to my mind, have exactly expressed the sense intended, but I have left the interpolation there—that the translation of the protocol might go in entire, but be read with the interpreter's subsequent explanation, which I have just given.

Mr. Belyea objected on behalf of the ship to the admission of the protocol as evidence on the grounds: That it does not purport to be signed by the proper officer; that there is nothing in it to show it has been signed by the Captain of the *Yakout*,—nothing in the document itself to show who the Captain of the *Yakout* is; and therefore the signature of the Captain is no proper evidence that it is signed by the Captain of this particular vessel, the *Yakout*. True, he argued, the inference may be that it is, but the fact is not proved; and the Act being highly penal, must be construed strictly. The learned counsel moved for a non-suit on these grounds, citing *R.* v. *Lowe* (1), to show that as it was a penal statute, it should be construed strictly, and *The Queen* v. *Wallace* (2) where "the copy of the *Dublin Gazette* purporting to be printed by the Queen's Printers," being admissible in evidence, "a copy of the *Dublin Gazette* printed at the *Gazette* office, and published by authority," was declared inadmissible. I noted and over-ruled the objection, and refused to

(1) 15 Cox 286.

(2) 17 I. C. L. R. 206.

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order a non-suit on the following grounds: The power of seizing, etc., is under subsec. 5 of sec. 1, of the British *Seal Fishery (North Pacific) Act*, 1893, and sec. 2 of the order in council of 1893, which says: "The captain or any officer in command of any war-ship, may board, search and seize, etc.," and a statement purporting to be signed by such officer," as to the circumstances, etc., "shall be admissible," etc.

The Russian officers carrying out the Act must be considered in the same light as British officers carrying out the same duty. It is not only a point of law, but a matter of international obligation, to treat them so, and then the principle *omnia presumuntur rite esse acta* applies, and throws the onus of disproving on the other side, and as that, so far, has not been done, the presumption in its favour not being as yet displaced—the court admitted the protocol in evidence, and the trial proceeded.

The copy of the register of the ship was proved by Mr. Alexander R. Milne, the Collector of Customs, at Victoria. (The original was subsequently produced in court.) Mr. Milne, who has been both judicious and active in carrying out his portion of the duty in sealing cases, and has been zealously aided by Captain Hughes-Hallett, R.N., in enclosing and transmitting, through H.M.S. *Garnet*, letters containing warning of the present arrangement between England and Russia, and the continuation of the *modus vivendi* for distribution, warning the masters and owners of all sealers against proceeding within the prohibited waters of the North Pacific and the thirty mile Kormandorsky zone —addressing letters by that conveyance to the different masters, and including in each letter, a copy of the notices of William Smith, Deputy Minister of Marine, of 13th of April, 1893, and Captain Hughes-Hallett's notice of the 22nd May, 1893, among them,

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one such letter containing these notices, addressed to the master of the *Minnie*, no name, no port. This, however, Captain Mohrhouse did not get as it was returned unopened to the post office. He, however, got full notice in another way.

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The chief dependence of the master of the *Minnie* in the defence, which was admirably conducted in every respect by his counsel, Mr. Belyea—was on his ship's log, hereinafter called "the log," to distinguish it from the official log, which contained no entry beyond his appointment, at Sand Point, on the 27th June, 1893, as master in the place of Victor Jacobson, the owner, who had been previously acting as master, and the Russian-English memorandum of the ship's papers detained, and of the seizure by the Russians.

A little examination into the mode of making up this log, shows that very little dependence can be placed upon it.

Usually and properly the log is kept by the first mate, and dictated, checked, or countersigned, as the case may be, by the captain, or *vice versa*; and when there is no mate, then by some able seaman on board; but here, according to Captain Mohrhouse's evidence, whether by design or accident, the log was kept by him, as master and mate alone. His evidence also is that he kept the log according to *nautical time*, in his handwriting alone and unchecked. He says, "I kept the log of the vessel myself and entered merely the position of the vessel and the state of the weather."

The time he has to account for is from the 11th, July to the seizure off Copper Island on the 17th, six days, (during which the protocol says the captain had admitted, he had taken no observation). According to this log, on Monday, the 10th of July, 1893, the *Minnie* was by observation in Lat. 51, 33, N.; Long. 175, 25, E. On Tuesday, 11th July sighted Aggattu

Island, S. E. point bearing N. N. E., distant 2 miles, lat. 52, 18, N. ; long. 173, 23, E.

That gave them their position accurately on the 11th July, 1893, as a point of departure.

On the 12th of July (by dead reckoning) lat. 51, 54, N. ; long. 173, 5, E.

On the 13th, when he spoke the *May Belle* and compared chronometers with her, and found they tallied, the *Minnie* was in lat. 52, 08 ; long. 171,51.

On the 14th, (by dead reckoning) in lat. 52. 55, N. ; long. 169, 28, E.

On the 15th, she was in lat. 53, 26, N. ; according to this log, and long. 169, 75, E.

Sunday, 16th—In lat. 53, 30, N. ; long. 168, 33, E.

Monday, 17th—In lat. 53, 40, N. ; long. 168, 45 E. (The seizure was on the evening of the 17th, at 9 o'clock.)

The position of the *Minnie* was not marked in the log by the captain on Tuesday at noon, but she was supposed by him to be in the same position as the day before, as he thought she had not made any headway.

In the evening of Tuesday, at 9 p.m., he put her position at 53, 49, N., and long. 168, 41, E.

On reference to the chart in use on the ship, which consisted of three parts, Captain Mohrhouse says : "I marked the position each day with a dot ; most are marked, some are rubbed out," (and some marks rubbed out, I would add, present the appearance of being entirely new, and, being in a different place from some of the dots rubbed out, destroy its authority as a guide to positions marked on the chart at the time.) The seizure was at 9 p.m. (he says) on Monday, the 17th. He was detained until one o'clock a.m. on Tuesday, and then set free.

The weather during all that time that I have been speaking of, viz. : from the 11th of July to the seizure, had been cloudy, overcast and foggy, with occasional

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strong winds, from S. and W., so that no observation could be taken, and no land had been seen since sighting Agattu Island and taking her departure thence. Little, indeed, no allowance was recorded in the calculation in this log, whatever deduction he may have made in sailing, for the current known to the captain by two years previous experience, which there, in strong S. W. winds, goes very strongly to the N. E. with proportionate drifting in that direction—an element in fixing the *Minnie's* position which deserved a special notice. Moreover, Captain Mohrhouse, who claims that he used *nautical (or sea) time*, in compiling his log, diverges all through the log occasionally into *civil time*. Now the difference between the two kinds of time is so great that a short notice of it, becomes unavoidable. The nautical or sea day, begins at noon, or twelve hours before the civil day. It is divided into two parts of twelve hours each, the former being marked p.m. and the latter a.m.

This mode of reckoning arises from the custom of seamen dating their log for the preceeding twenty-four hours, the same as the civil day ; so that occurrences, which happen, for instance, on Monday, 21st, afternoon, are entered in the log, marked Tuesday, the 22nd—in short the noon of the astronomical day and the end of the nautical day, take place at the same moment.

As some of Captain Mohrhouse's observations in his log were made in harbour, (as in the port at Sand Point), it is necessary also to mention that in harbour work (i.e., remarks logged in harbour) the day is estimated according to the civil reckoning, as on shore, that is, from midnight to midnight; but at sea the day's work being made up at noon, is dated the same as the civil day, so that the day's work marked Monday, began on Sunday, at noon, and ended on Monday, at noon ; hence the day by the ship's reckoning, which is called the nautical day, begins twelve hours before the civil

day, the first twelve being p.m. and the other twelve hours a.m., or before noon. And this difference in calculating time has introduced an additional element of uncertainty into his log, and consequently in even the approximate accuracy of his conclusions and position.

For instance, as a sample of this: On leaving Victoria at noon on the last day of February, the entry is made as on the first day of March.

The boarding of the *Corwin* at noon on the 16th of June, is recorded on the 16th.

Sailing from Yakoutat, a port on the way up North, on the 28th May, although at one p.m., is entered on the 28th.

The arrival at Sand Point on the 17th of June, at 5 p.m., is entered on the log on the 17th.

The meeting with the *Viva* on the morning of the 18th July at eight o'clock, is entered on the log on the 19th, which according to the evidence, is incorrect.

The inference from all these considerations, and from the evidence, I find, is irresistible, that no reliance is to be placed on Captain Mohrhouse's account that, when seized, he was without the thirty mile zone.

Nor does Captain Anderson's clear and manly account of the mode in which he found himself in his schooner the *Viva* a few miles within the zone, and the speed with which he got out of it, and their sighting each other, and subsequent meeting, in the least strengthen Captain Mohrhouse's contention that he was outside when seized. And the inference is reasonable (though not certain, as he lowered his jib,) that when he (Captain Anderson) saw the Russian steamer, they also saw him, and if they did, considered him outside the zone, and so not seizable.

The protocol distinctly states the *Minnie* was 22 miles within the zone, in the latitude and longitude I have set out. The *Yakout* was only three hours out of port and being worked by steam, was independent of wind

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and tide, and its officers presumably, intimately acquainted with the current there, and the inference is that they could not be mistaken in their position; and the hasty memo. of 8 o'clock given by the Russian captain to Mohrhouse, on a tiny slip of paper, was, I think, clearly a mistake for 9 o'clock, and I therefore find that, beyond a doubt, the *Minnie* was taken at that particular spot, 22 miles south of Copper Island, within the zone.

And what was she doing there? Captain Jacobson, the owner, whose evidence was delivered in an eminently untruthful manner, which I think must have surprised the learned counsel who so steadily and earnestly advanced every possible argument for the defence—as it certainly did the court—knew perfectly well of the thirty mile zone, and even, though very roughly, pencilled out a zone of his own on the ship's chart, though not a thirty mile zone, as a thirty mile zone. Moreover, he had been on board the *Triumph* the well-known master of which, Captain Clarence Cox, had been furnished by Captain Hughes-Hallett with one or more copies of Mr. William Smith's and his own public warning to sealers for distribution, and had engaged to communicate the warning to all the sealers he encountered, and presumably must have done so to him; and it is a matter of common knowledge and has been before the court, that in several known cases, and on several occasions, during 1893 he had honourably discharged this obligation, so that it is in the highest degree unlikely that he would have omitted either Captain Jacobson or Captain Mohrhouse, when either came aboard his ship, from this friendly service.

Moreover, Captain Mohrhouse, in his evidence, confesses to knowing the danger of sealing near the thirty mile zone until he could get an observation, a practical admission which speaks for itself.

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Yet on the very day of seizure, he puts down all his boats, each with two expert persons in it, for Indian women are as good, if not better, canoeists than the men, under the pretense of washing decks, which to his shame, be it said, he avowed as a reason, had been dirty for some three weeks; and we have only his word for it, that they did not take guns with them, and not a single witness of the twenty-three or twenty-four who were there, was brought forward to corroborate him. It is sworn that Mohrhouse was picked out by the owner to redeem his previous ill-luck in sealing, Captain Jacobson well knowing that he (Captain Mohrhouse) had already brought other sealers into trouble in a similar manner.

It is well known, and is so stated in the negotiations which preceded the passage of the Act, that recent events in Behring Sea had sent a cloud of fleet and daring schooners, some of them making even eleven and twelve knots an hour, admirably manned and commanded, hovering like hawks, and covered with a cloud of canvas, all around the thirty mile zone about the Kormandorsky Islands. And it was necessary to guard against any of them, to whom the risk itself would be an attraction, slipping inside the thirty miles of feeding ground, set aside for the seals which might chance to frequent the Kormandorsky Islands, running the risk of capture, in order to secure a rich but forbidden harvest of seal skins.

The statement of claim alleges that in this instance, the *Minnie* at the time and place of seizure, was fully manned and equipped for the purpose of hunting, killing and taking seals, and it has been proved that, after due notice, she was so found manned and equipped for that purpose, within the thirty mile zone.

Section 6 of the *Seal Fishery (North Pacific) Act*, 1893, above cited, enacts that, "if during the period,"

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(that is between the 4th July, 1893, and 31st Dec., 1893 —here it was the 17th July, 1893) "and within the sea specified by the order in council," viz.: the thirty mile zone, "a British ship is found, having on board thereof, fishing or shooting implements or seal skins, or bodies of seal, it shall lie on the master or owner of such ship to show that the ship was not used or employed in contravention of this Act." And that has certainly not been shown to me as a jury by the evidence adduced by the defence. If Captain Mohrhouse had been sincere in his desire to keep outside of the forbidden waters, his vessel's head would have been put the other way, away from and not towards the island, until he had ascertained his position by observation. If such flimsy excuses as his, supported by such equivocal testimony, were to be allowed to prevail, sealers would only have, in that foggy climate (especially so on the south-west side of Copper Island) to allege stress of weather, to make the Act, framed to repel their intrusion within the zone, a dead letter; and thus render nugatory an honourable understanding between England and a friendly nation, whose officers, so far as we have seen, in carrying out the provisions of this particular Act (and I am guided solely in my consideration and decision by this Act) have treated British subjects with every courtesy and consideration.

As a jury, I find that the presumption which the portion of the Act I have cited raises of the liability of the defendant, has not been displaced.

The lesson which this law teaches has yet to be learned, and the present is a case, wherein from the total absence of *bona fides* in the defendant from first to last, it has become the duty of the court to enforce the provisions of the law.

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I do not take into consideration in forming the present judgment, the question of what may be deemed the disobedience of what I consider the order or direction of the Captain of the *Yakout*, that the master of the *Minnie* should report himself to H. B. M's. Consul at Yokohama, where there is a good and competent court to deal with the case, as no penalty therefor is sought to be enforced.

I pronounce, therefore, in favour of the Crown, and decree the condemnation of the ship *Minnie* and her equipment and everything on board of her, and the proceeds thereof, on the ground that the said ship, was, at the time of the seizure thereof, within the prohibited waters of Behring Sea or the North Pacific Ocean, that is to say, within a zone of thirty marine miles around the Kormandorsky Islands, as defined by the order in council, dated the 4th day of July, 1893, made by Her Majesty the Queen in pursuance of the *Seal Fishery (North Pacific) Act*, 1893, fully manned and equipped for killing, taking and hunting seals, and had on board shooting implements and one seal skin, and that the said ship was used and employed in taking, killing, or hunting, or attempting to kill or take seals within the prohibited waters aforesaid. The proportion in which the proceeds are to be distributed, I reserve for further consideration. No costs on either side.

*Judgment accordingly.**

Solicitors for plaintiff: *C. E. Pooley.*

Solicitor for ship: *A. L. Belyea.*

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* REPORTER'S NOTE: On appeal to the Supreme Court of Canada [*Present*, Strong, C.J., Fournier, Taschereau, Sedgewick and King, JJ.] by the owner of the condemned ship, this judgment was affirmed and the appeal dismissed, with costs.

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June 18.

GEORGE A. GRIER, OF THE CITY OF MONTREAL, IN HIS QUALITY OF CURATOR TO THE TATE ESTATE, HAVING BEEN DULY APPOINTED AS SUCH, ACCORDING TO LAW, TO WILLIAM WILBERFORCE TATE & GEORGE HENRY TATE, OF THE CITY OF MONTREAL, HEIRS AND REPRESENTATIVES OF THE LATE WILLIAM TATE AND GEORGE TATE, BOTH OF THE SAID CITY OF MONTREAL, IN THEIR LIFE TIME, NOW DECEASED..... PLAINTIFF;

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Lease by Crown—Proviso for compensation on cancellation—Building and Fixtures—Construction.

The Crown, represented by the Commissioners of Public Works for the Province of Quebec, in the year 1851, demised certain lands in the City of Montreal to the plaintiff's predecessors in title for the purpose of being used for the construction of a dock and ship-yard for the building, reception, and repair of vessels. The lease contained a proviso for its cancellation under certain circumstances, upon the lessors or their successors in office paying to the "lessees, their executors, administrators or assigns, *the then "value (with an addition of ten per cent thereon) of all the buildings "and fixtures that shall be thereon erected and belonging to the said "lessees.*"

Held, that the words "buildings and fixtures" in the proviso were large enough to include not only what were buildings, in the ordinary acceptation of the term, and the dock itself, but also whatever was accessory to, and necessary for the use of, such buildings and dock.

THIS was a claim for compensation arising out of a demise of lands and water-power.

The facts of the case are stated in the judgment.

On the 12th day of December, 1893, the case was sent to C. C. Gregory, Esq., as special referee for examina-

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tion and report. On the 4th January, 1894, he reported the value of the buildings and fixtures mentioned in the lease to be $80,474.56. From this report an appeal was taken to the court.

January, 29th, 1894.

A motion for judgment and a motion by way of appeal from the report of the Referee were now heard.

April, 9th, 1894.

It was ordered that further evidence be taken before the Registrar.

June, 4th, 1894.

Further evidence having been taken, the motion for judgment and that by way of appeal from the Referee's Report was now re-argued.

Hogg, Q.C., in support of motion, refers to *Woodfall on Landlord and Tenant* (1) and cases there cited.

Greenshields, contra, cites Arts. 379-380 and 567 to 582 *C. C. L. C.*; *Philion* v. *Bisson* (2); *Grand Trunk Railway Company* v. *Eastern Townships' Bank* (3); *Woofall on Landlord and Tenant* (4).

BURBIDGE, J. now (June 18th, 1894) delivered judgment.

The questions to be determined in this case have reference to the construction of the words "buildings and fixtures" occurring in a lease passed before notaries at the City of Montreal, in the Province of Quebec, on the 13th of March, 1851, between the Commissioners of Public Works, acting for Her Majesty, of the first part, and George Tate and William Tate of the said city, shipbuilders, of the second part. The main inquiry is: are the docks and other works accessory thereto, which the lessees constructed on the demised premises, within the meaning of the expression "build-

(1) P. 396.
(2) 23 L. C. J. 32.
(3) 10 L.C. J. 11.
(4) ed. 1889 pp. 646-649.

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ings and fixtures," and though these words are not perhaps the most apt or happy terms that could be chosen to describe a dock, the question must, it seems to me, be resolved in the affirmative.

By the lease in question the Commissioners of Public Works demised to the lessees, their executors, administrators and assigns a lot of land at Montreal, adjoining the Lachine Canal to be employed as a dock and shipyard for the building, reception and repair of vessels

"and other purposes with and forming part of the works of such "dock and shipyard, together with the use and enjoyment of so much "of the surplus water passing and to pass through the said canal as "should be sufficient for the working of the said docks, and also "to drive and propel four run of ordinary mill stones, for the purpose "of propelling saws and machines for dressing and preparing timber "for the use of the said dockyard, or for any other uses for which "that material may be applied."

The main object, apparently, of the lease was the construction of the docks, to which the mills for the sawing or dressing of timber were to be subsidiary. At the time the parties to the lease had in contemplation the construction of two docks and a basin. One dock was intended for the accommodation of sea-going vessels, and was to be constructed of a sufficient depth to admit of the largest class of vessels that might be expected to come to Montreal after Lake St. Peter should have been deepened. The second dock was to be of sufficient capacity to accommodate vessels of the largest class navigating the St. Lawrence canals. Connected with dock number two, as the latter was designated, it was proposed to construct a basin about two hundred feet square, and excavated to the same depth. Dock number two was to be commenced immediately and to be completed and ready for use by the first of September, 1851. If it should appear necessary to the Commissioners, dock number one should be built and be

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ready for use by September 1st, 1852, and the basin connected with dock number two not later than a year from the latter date. The general arrangement and disposition of the docks and basin should, it was agreed, be in accordance with a general plan annexed to the lease. The admission or entrance gates of the docks were to be forty-five feet in width, and were to be constructed in the same substantial and permanent manner as those of the canal locks, and in accordance with detailed plans to be approved of by the Commissioners, and under the superintendence of their engineer. The walls of the recess, for a distance of twelve feet at each end, were to be built of solid masonry of the same character as that of the locks of the canal. And the head gates, head and tail races, the conduits for discharging water from the docks and basin, and all other works mentioned in the lease were to be constructed by the lessees, at their own cost and expense, under the sanction and approval of the Commissioners and their engineer. The lease was made for a term of twenty-one years from the first day of January, 1851, renewable for ever by like terms of twenty-one years, subject on each renewal to the determination, in the manner prescribed, of the amount of the annual rent, and subject to the following proviso :—

Provided always that if at any time hereafter it shall be determined by the said Commissioners of Public Works, or their successors in office, that the said lot and flow of surplus water, or any part thereof are or is required for the use of the said canal, or for any public purpose whatever, thereupon, on reasonable notice (of not less than three calendar months) being given to the said lessees their executors, administrators, or assigns, by the said Commissioners or their successors, to that effect, this lease or the lease for the term then current, and all matters herein or therein contained, shall cease and be void and the said Commissioners, or their successors in office, shall pay, or cause to be paid unto the said lessees their executors, administrators or assigns the then value (with an addition of ten per cent thereon) of all the buildings and fixtures that shall be thereon erected and belonging

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to the said lessees their executors, administrators or assigns according to a valuation thereof, to be made by arbitrators, one of whom to be chosen by the said Commissioners or their successors as aforesaid, another by the said lessees their executors, administrators or assigns, and the third by the said arbitrators so nominated as aforesaid before entering on the said arbitration, and the decision of the said arbitrators, or a majority of them, shall be final.

On the 6th of June, 1892, an order in council was passed giving authority to the Minister of Railways and Canals, the successor in office of the Commissioners of Public Works, to determine the lease under an arrangement made with the plaintiffs, the person entitled to the term, that a new lease of a portion of the property should be granted to them, and that with respect to the assessment of the compensation to be paid to them, this court should be substituted for the arbitrators contemplated by the lease. The claim arising on that state of facts was, on the 9th September following, referred by the Minister to the court. On the 29th November, 1892, the lease was determined accordingly, and on the 1st of April, 1893, the plaintiffs filed their claim. The case came on for trial on the 27th of November, 1893, but as it appeared that the terms of the new lease to be made to the plaintiffs had not been settled, and as it was thought that such terms might be an element to be taken into account in determining the amount of compensation to which the plaintiffs were entitled, the hearing was enlarged to give the parties an opportunity to agree upon such terms. In the end they agreed that the Crown should resume possession of the whole property, the court to determine the value of the buildings and fixtures thereon in accordance with the terms of the lease of March 13th, 1851. That, it will be observed, is not in all respects the claim that was referred to the court, and some doubt might perhaps be entertained as to how far and in what capacity the court is seized of the

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matter. It is clear, however, that the claim arises out of a contract entered into on behalf of the Crown (1), and no doubt it is open to the parties to forego the award of arbitrators for which the lease made provision. As the parties are agreed, there is not, I think, any grave objection to the court exercising the jurisdiction it is invited to exercise, and resolving as best it can the questions now submitted for its determination.

If the substantive "building" had, in ordinary use and acceptation, as large a meaning as the verb "to build" the question raised would not be debatable. One may speak with equal propriety of building a dock, and a house. We build walls and fences. Nor is the use of wood or stone, or any like material, of necessity involved in the conception of building. We build dykes of earth to recover or defend lands from the sea, and earth works for many purposes. But the term "building" has commonly a more limited signification. *Worcester* defines it as "a structure or edifice"; *Webster*, as "a fabric or edifice constructed; a thing "built, as a house, a church, &c."; and the *Century Dictionary*, as "a fabric built or constructed; a struc- "ture; an edifice; as commonly understood, a house "for residence, business or public use, or for shelter for "animals or storage of goods. In law anything erected "by art, and fixed upon or in the soil, composed of dif- "ferent pieces connected together and designed for per- "manent use in the position in which it is so fixed. Thus "a pole fixed in the earth is not a building but a fence or "a wall is." The latter definition finds some support in *Rogers on Elections* (2) where it is stated on the authority of *Powell* v. *Boraston* (3) that though the words "other buildings" in the 27th section of *The Reform Act* 1832 (4), are not to be extended to their limits,

(1) *See* 50-51 Vict., c. 16, s. 15.
(2) P. 112.
(3) 34 L. J. C. P. 73; 18 C. B. N. S. 175; H. & P. 179.
(4) 2 & 3 Wm. IV. c. 45.

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which would include bridges, garden walls, and the like, yet if the building is adapted for the industry which the voter carries on, and has that degree of durability which is included in the idea of a building, it is sufficient. But it will be observed that the view that the word "buildings" would, unless restrained by the context, include "bridges, garden walls, and the like" must be taken to be that of the author, for there is, I think, nothing to that effect in the judgment of the court. In the *Lyme Regis* case (1), it was held that a limekiln excavated in a cliff to the depth of twelve or fifteen feet, the interior of which was lined with masonry, and which had no roof, but was open to the sky, was a building within the meaning of the section of the Act mentioned. Mr. Talbot in support of the challenged vote, argued that a roof is an essential part of a building only where it is necessary for the purposes to which the building is applied, and not where from the nature of the trade carried on within it, no such covering is required, or even possible; and he added that such a limitation of the word "building" as was contended for in that case would exclude no less an edifice than the Colosseum.

By the 33rd section of the Act of the United Kingdom, 3 & 4 Wm. IV, chapter 90, it was provided that owners and occupiers of houses and buildings and property (other than land) ratable to the relief of the poor, should be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land were rated. The class of property thus subjected to the higher rate was considered in *Peto* v. *West Ham* (2). The question to be determined in that case was whether of the 165 acres on which the Victoria London Docks were built, the 95 acres which formed the wet-dock, tidal basin and canal,

(1) Bar. & Aust. 486. (2) 2 El. & El. 144.

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were "property other than land" within the meaning of the section. The court were agreed that the word "property" should, in accordance with the general rule as to the construction of specific words followed by general terms, be limited to property of the same sort as houses and buildings, and that the locks, jetties and warehouses were of that class of property. There was however a difference of opinion as to the dock and basin, the majority of the court (Lord Campbell, C. J., Wightman and Crompton, JJ.—Erle, J. dissenting) holding that the latter also were within the statute. In a later case arising on the same section of the Act, it was held that a canal and towing path was not "property other than land" (*The Queen* v. *The Neath Canal Navigation Company*) (1). The canal, said Mr. Justice Blackburn in that case,

> cannot with any propriety be held to be part of the drydock. It is no more a building than a high road is a building. Would any one contend that a private road for which the owner might be licensed to collect rates from persons passing over it, was ratable as anything but land? The masonry on the sides of the canal is not sufficient to constitute it a "building;" this must always be a question of degree. Thus a London street, if it could in any way be rated, though paved and faced with stone work would yet be "land" whilst the Holborn Viaduct would be held to be a building.

In *Stevens* v. *Gourlay* (2), the meaning of the word "building" was discussed at some length. There the question was whether a structure of wood, sixteen feet by thirteen feet in size, laid upon timbers upon the surface of the ground and intended to be permanently used as a shop, was a building within the Act, 18 & 19 Vict. c. 122. This is what Mr. Justice Byles said:—

> And that brings us to the very difficult inquiry, what is a "building"? Now the verb "to build" is often used in a wider sense than the substantive "building." Thus, a ship or a barge builder is said to build a ship or a barge, a coach-builder to build a carriage; so birds

(1) 40 L. J. (N. S.) M. C. 197. (2) 7 C.B.N.S. 99.

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are said to build nests; but neither of these when constructed can be called a "building." It is a well-established rule, that the words of an Act of Parliament, like those of any other instrument, must if possible be construed to their ordinary grammatical sense. The imperfection of human language renders it not only difficult, but absolutely impossible, to define the word "building" with any approach to accuracy. One may say of this or that structure, this or that is not a building; but no general definition can be given; and our lexicographers do not attempt it. Without, therefore, presuming to do what others have failed to do, I may venture to suggest, that, by a "building" is usually understood a structure of considerable size, and intended to be permanent, or at least to endure for a considerable time. A church, whether constructed of iron or wood, undoubtedly is a building. So, a "cow-house" or "stable" has been held to be a building, the occupation of which as a tenant entitles the parties to be registered as a voter under the 27th section of *The Reform Act*, 2 W. 4, c. 45. On the other hand, it is equally clear that a bird-cage is not a building, neither is a wig-box, or a dog-kennel, or a hen-coop—the very value of these things being their portability. It seems to me that the structure in question, which was erected for a shop, and is of considerable dimensions, and intended for the use of human creatures, is clearly a "building" in the common and ordinary understanding of the word.

In *Thompson* v. *The Sunderland Gas Company* (1) it was held by the Court of Appeal that certain arches occupied by the plaintiff as cellars over which the road abutting his premises passed, were "buildings" within the meaning of 10 Vict. c. 15, s. 7, which provided that nothing in the Act should authorize the defendants to lay down or place any pipe or other works into, through or against, any building, or in any land not dedicated to the public use, without the consent of the owners and occupiers thereof. In another case, in *re Broadwater Estate* (2) the question was mooted as to whether a "silo" was a building within the meaning of the words "farmhouses, offices and outbuildings and other buildings for farm purposes" occurring in *The Settled Land Act*, 1882 (s. 25 (XI)). It was not necessary to decide the question, but Lord Justice Cotton said that

(1) L.R. 2 Ex. Div. 429. (2) 54 L.J. Ch. 1105.

possibly a "silo" might be a building within the meaning of the Act.

Of American cases, *Truesdell* v. *Gay* (1), in the Supreme Court of Massachusetts, is an instance of a more limited meaning being given to the word, and *Wright* v. *Evans* (2), in the New York Court of Common Pleas, of a wide construction of the term. In the former case it was held that a stone wall built near and around a furnace to protect it was not a building within the Massachusetts statute of 1851, c. 343, s. 1, which gave a lien for labour performed in erecting or repairing any building. "Taken in its broadest sense" it was said in that case (3), "the word building can only mean an erection intended for use and occupation as an habitation, or for some purpose of trade, manufacture, ornament or use constituting a fabric, or edifice, such as a house, a store, a church, a shed." In *Wright* v. *Evans* (2) in view of the intention of the parties "gathered from the whole instrument and subject matter" it was thought that a wooden fence twenty feet high was a building within the meaning of the covenant on which the plaintiff relied. "The law," says Bacon in a passage cited in support of the decision in the case, "will rather do violence to the words than break through the intention of the parties (4)."

The cases have been referred to at this length not because they assist us to a definition of the word "building" but because they show, I think, that the term is not one that by reason of any absolute or well-defined meaning attaching to it can be taken of itself to determine the intention of the parties to the coyenant in question in this case. I shall have occasion to refer again to what that intention appears to have been, as

(1) 13 Gray, 311.
(2) Abb. P.R. (N.S.) 308.
(3) 13 Gray at p. 312.
(4) Bacon's Abr. *Leases* (K.)

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collected from the lease as a whole, but at present, and before leaving the discussion of the word itself, it will be convenient to notice a circumstance, on which Mr. Hogg for the Crown relied, that the term "building" occurs elsewhere in the lease, and in each case, I think, in the more restricted sense that we have seen sometimes attaches to it. In one paragraph of the lease there was a covenant against erecting any building within ten feet of the dock, wall or towing-path, to which there was an exception in case the building projected over the passage way in such a manner as to leave the latter free. Then in the sixth paragraph of the lease there was a covenant that the buildings which the lessees might erect upon the lot of land leased to them should be commenced within twelve calendar months and completed within a reasonable time thereafter; other provision being made for the commencement and completion of the docks and basin. It was also provided that every such building should be subject in all respects to the municipal by-laws and regulations of the locality in which it should be situated, and should be made fireproof, built of brick or stone, and covered with metal with the exception of the sheds necessary to be built thereon. There can be no doubt that in these cases the word "building" was used in the common and narrower signification of the term, and, so far, I agree this affords an argument in favour of the defendant's contention.

Coming then to the word "fixtures" it will be noticed that it is a term that is used with diverse and contrary meanings. As used in law it is defined in the *Century Dictionary* as "a personal chattel annexed or fastened "to real property. In regard to the right of sever- "ance and removal the term is used in two directly "contradictory senses: (*a*) A chattel so annexed, "which has thereby become in law part of the real

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"property and cannot legally be severed and removed "without the consent of the owner of the real property. "This was the original use. (*b*) A personal chattel so "annexed but which remains in law a chattel, and "may be severed and removed at will by the person "who has annexed it, or his representative." The ambiguity of this word is of course the subject of comment by the text-writers [see *Brown's Law of Fixtures* (1); *Amos & Ferard on Fixtures* (2)]. Parke, B. in *Sheen* v. *Rickie* (3), discussing the term, said that it did not necessarily follow that the word "fixtures" must import things affixed to the freehold. It had not necessarily acquired that sense. It was a very modern word, and was generally understood to comprehend any article which a tenant had a power of removing; but even that was not its necessary meaning. It only meant something fixed to another. In *ex parte* Barclay (4), Lord Chancellor Cranworth, speaking for himself and the Lords Justices, Knight Bruce and Turner, said in that case the question was as to fixtures, trade fixtures, or, what he might call domestic fixtures, and that by the term "fixtures" they understood such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold, such as machinery, using a generic term, and, in a house, grates, cupboards and other like things. In other cases, and it is not necessary to refer to them, we find the word used with the meaning that first attached to it, *i.e.* things so affixed to the realty as to be deemed part of it. We speak of the landlord's "fixtures" and mean one thing; of the tenant's "fixtures" and mean another. Even when we use the word in its modern sense of things that may legally be severed from the freehold and removed, we

(1) Chapter 1.
(2) Pp. 1 & 2.
(3) 5 M. & W. 175.
(4) 5 De G. M. & G. 403.

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have to inquire in what relation the parties whose rights are in dispute stand to each other; and apply one rule to the landlord and his tenant, and another to the executor and heir at law, or to the vendor and vendee.

In the lease under discussion the word "fixtures" was not, it seems to me, used in the sense of the things which the lessees on the determination of the term might sever and remove, but rather in the earlier sense of things affixed to the freehold, and actually or constructively annexed thereto. The Commissioners of Public Works and their successors in office had it in their power at any time to put an end to a going concern or business of a kind that could not readily be removed to any other site; and it was intended, I have no doubt, that in such an event the Crown should take the docks and mills and their accessories in the condition in which they then were, making compensation therefor as provided in the lease. It was agreed that the Crown should pay for "the buildings and fixtures that should be thereon erected." Erected on what? Clearly, on the lot of land demised. What was to be erected thereon? As clearly, both buildings and fixtures It makes no difference, it seems to me, that fixtures would, as a matter of course, be found in the mills. Other works which the term "fixtures" is large enough to cover were to be constructed or erected on other parts of the premises. The main object of the lease was, as we have seen, to secure the construction of the docks and the basin. That would, to the knowledge of all parties, demand a large expenditure of money. Would it be reasonable under such circumstances to conclude that parties who were at great pains to provide for an indemnity, in the event that has happened, for the value of the buildings which it was proposed to erect as subsidiary to the principal

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undertaking, and omit to make like provision for compensation for the moneys to be expended on the latter? Whatever may be the conclusion as to the term "buildings," the word "fixtures" is large enough to include the docks and other works accessory to it, and taking the words "buildings and fixtures erected on" the land demised and construing them by the provisions of the instrument as a whole in which they occur, I am of opinion that they were intended to, and do, include the dock and its accessories.

The concessions granted to the lessees by the lease in question were purchased at public auction, one of the terms and conditions of the sale being that the Crown should have "the power of assuming the property at any time upon paying for all erections thereon at ten per cent. added to their actual value." If the word erections had been used in the lease when it was drawn up and executed it is not likely that any question would have arisen. It would, it is probable, have been conceded that the term included the dock as well as the mills. There is nothing to suggest any reason for the change in language. No hint that there was any new negotiation or that the Crown wished in any way to limit or narrow the condition that it had itself prescribed. Much less is there anything to suggest any reason for the lessees, having made what may be taken to have been a prudent and fair contract, voluntarily surrendering the advantages they had stipulated for and binding themselves to a bargain that would certainly be improvident, and perhaps ruinous. Of course if the words "buildings and fixtures" used in the lease had a certain and well defined meaning they would themselves best disclose the intention of the parties, and there would be no occasion or warrant for going outside of the provisions of the lease itself; and probably effect would have

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to be given to these words according to such meaning although one might be at a loss to see why they had been used. But we have seen that they are words, the meaning of which it is difficult, perhaps impossible, to define with accuracy. And there is not, I think, any ground in the present case for believing that they were used in any narrower or more limited sense than would have attached to the word "erections" had it been used in the lease in their stead.

The other questions debated present, it seems to me, no considerable difficulty. If the covenant to make compensation included the buildings proper and the dock it included whatever was accessory and necessary for their use. I agree with Mr. Gregory, the special referee, that the water wheels, shafting and machinery were fixtures. With regard to the excavation, it was necessary to the construction of the dock or other works for which it was made, and was represented in their value. The cost of any excavation for the cellars or vaults of a warehouse forms part of the value thereof, and there is in this respect no distinction between a building and a dock. As to this I also agree with the referee. As to the floating bridge, it was one of the things which the lessees bound themselves to construct, and for which they are entitled to be compensated. There is more room for doubt in respect to the wire sign-board. But Mr. Gregory had an opportunity to view the premises, to see in what manner this sign-board was put up, how it was annexed to the premises, and the use to which it could be put. I do not understand that it was anything that could be removed to another place for use there, or that if severed it would have been of any value to the plaintiffs. It was, as Mr. Gregory says, an adjunct or accessory of the property and a convenience and aid in the prosecution of the business contemplated by the parties to the lease, and

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so he finds that within the meaning of the latter it was a fixture, and I am not inclined to differ with the view that he has taken.

There is one other objection to the report to be considered. For the Crown it is argued that as several of the buildings have not been in use for a number of years for any purpose contemplated by the lease, their value should not be taken into account. While for many years, the referee reports, such buildings have been used as a nail factory, they were originally built for the purpose of constructing and repairing ships in connection with the dry-dock and were used for that purpose for several years prior to their use as a nail factory. There is no objection that such buildings were not constructed in conformity with the terms of the lease, and I assume that in that respect its conditions have been complied with. Otherwise it is possible that they would not have been within the covenant for compensation. But the objection in the form in which it is presented cannot, it seems to me, prevail. It does not propose the proper remedy for the act complained of, and it comes too late. During the time the buildings were being used for a nail factory, it was open to the Crown, if it had not waived its strict legal rights, to pursue the appropriate remedy for any breach of the condition to use the property for a given purpose. But this it did not do. On the contrary without any suggestion that the plaintiffs had forfeited any of their rights under the lease, it was agreed with them that the Crown should resume possession of a portion of the property, and afterwards of all the property, and the manner in which the value of the buildings and fixtures should be determined was made the subject of a new arrangement, applicable to all the buildings erected on the premises.

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The appeal against the report of the special referee will be dismissed and the motion for judgment allowed. The value of the "buildings and fixtures" mentioned in the lease was found by the referee to be $80,474.56. To that amount is to be added ten per centum thereon according to the terms of the lease, or $8,047.45, making in all $88,522.01. From this sum is to be deducted $5,500 admitted to be due to the Crown for rent. If that is not all the arrears of rent, proof of any additional sum may be made before the Registrar when the minutes of judgment come to be settled. Otherwise there will be judgment for the plaintiffs for $83,022.01 and costs.

Judgment accordingly.

Solicitors for plaintiffs: *Greenshields, Greenshields & Mallette.*

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

EMMANUEL ST. LOUIS.....SUPPLIANT ; 1894

AND Sept. 24.

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of right—Evidence—Omnia præsumuntur contra spoliatorem.

In an action to recover from the Crown a balance of moneys alleged to be due for labour and materials supplied in respect of certain public works, a question arose as to the correctness of a number of pay-lists or accounts rendered by the suppliant to the Crown. Before the completion of the works a Commission had been appointed to inquire into the manner in which they had been carried on. It was likely that the correctness of such pay-lists or accounts would come in question before such Commission. In view of the opening of the Commission the suppliant burnt his time-books and all the original papers and materials from which his accounts had been compiled as well as his own books of account, by which also the correctness of the accounts rendered by him might have been ascertained.

Held, that the fair presumption from the destruction of such time-books and books of account was that if they had been accessible they would have shown that the accounts rendered by the suppliant were not true accounts.

PETITION OF RIGHT for the recovery of moneys alleged to be due upon certain contracts to supply labour and materials for a public work.

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

June 15th, 16th, 19th, 20th and 21st, 1894.

The case came on for trial at Ottawa.

Geoffrion, Q.C., and *Emard*, in opening for the suppliant, reviewed at length the evidence in support of the suppliant's case.

Osler, Q.C., for the defence, contended that the petition of right must be dismissed because it was impossible for the suppliant to recover when he had des-

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troyed the only evidence upon which the court could properly arrive at the *bona fides* of the claim. His destruction of the documentary evidence leaves the case to be treated upon a *quantum meruit*, leaves the question at large. The suppliant's fraud wholly avoids the contract. The court cannot find in favour of the suppliant because it is unable to state that the labour he claims for has been supplied. *Omnia præsumuntur contra spoliatorem.*

He cites: *Taylor on Evidence* (1); *Lawson on Presumptive Evidence* (2); *Hanson* v. *Eustace* (3); *Hunter* v. *Lauder* (4); *The Attorney-General* v. *Dean of Windsor*; (5); *Harris* v. *Rosenberg* (6); *Bott* v. *Wood* (7); *Askew* v. *Odenheimer* (8); *Thompson* v. *Thompson* (9); *Johannes* v. *Bennett* (10).

Hogg, Q.C., followed, and dealt with the facts in evidence which made against the suppliant's right to recover.

Geoffrion, Q.C., replied.

Subsequently, by consent, counsel for the suppliant filed a memorandum citing the following authorities in answer to those cited by *Osler*, Q.C.: *Pothier on Obligations* (11); *Best on Presumptions* (12); *Best on Evidence* (13); *Barker* v. *Ray* (14); *Evans's Pothier* (15); *Dalloz Rep. vo.* "Exceptions" (16); *Cartier* v. *Troy Lumber Co.* (17); *Drosten* v. *Mueller* (18); *Wharton on Evidence* (19); *Bott* v. *Wood* (7).

(1) Vol. 1 p. 137.
(2) Pp. 138, 152.
(3) 2 How. 653.
(4) 8 C.L.J.N.S. 17.
(5) 24 Beav. 679.
(6) 43 Conn. 227.
(7) 56 Miss. 140.
(8) 1 Bald. 390.
(9) 9 Ind. 323.
(10) 5 Allen 169.
(11) Evans's Tr. p. 839; C.N. Arts. 1349 to 1353; C.C.L.C. Arts. 1238 to 1242.
(12) Par. 148.
(13) (Am. Ed.) par. 414.
(14) 2 Russ. 72.
(15) Vol. 2, p. 169, 339.
(16) No. 515.
(17) 138 Ill. 539.
(18) 103 Mo. 633.
(19) Sec. 1264.

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BURBIDGE, J. now (September 24th, 1894) delivered judgment.

The suppliant brings his petition to recover a balance of $63,642.29 alleged to be due to him on certain contracts made between him and the Crown, whereby he undertook to supply labour and stone for certain public works executed under the direction of the Minister of Railways and Canals, at the City of Montreal, and known as the Wellington Street Bridge, and the Grand Trunk Railway Bridge over the Lachine Canal, and Lock No. 1 of the said Canal. The total amount of the suppliant's claim is $284,192.50, upon which he has been paid the sum of $220,550.21. By the statement in defence the Attorney-General for Her Majesty alleges, among other things, that the pay-lists presented by the suppliant for payment were improperly and fraudulently prepared, inasmuch as many of them contain the names of large numbers of workmen who were not employed or engaged upon the work of constructing the said bridges, and who were never in fact supplied by the suppliant to Her Majesty for the purposes mentioned in the said contract; and he submits that by reason of the fraud, misrepresentations and illegal and improper dealing of the suppliant with such pay-lists an account should be taken of all matters between the suppliant and Her Majesty arising out of such contracts, and he charges that in case such an account is taken it will appear that the suppliant has already been largely overpaid for all the wages of workmen furnished by him under such contracts; and he claims that the amounts so overpaid should be repaid by the suppliant to Her Majesty.

The works to which reference has been made were commenced in January, 1893, and completed in June of that year. It was imperative that they should be executed with the least possible delay so that there

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should be no interruption of business when navigation opened in the spring. From January to the 13th of May, Mr. Etienne Parent was engineer in charge of the works and Mr. Edward Kennedy was superintendent. In May, Parent and Kennedy were suspended, and the works completed under the direction of Mr. Ernest Marceau, as superintending engineer, and Mr. John Conway as superintendent. While Parent and Kennedy were in charge of the works Patrick Coughlan was time-keeper, for the Government, of the labourers and workmen employed on the Wellington Street Bridge, other than the stone-cutters and stone-masons. For the latter, and for all the labour employed on the Grand Trunk Railway Bridge, and on Lock No. 1 of the Lachine Canal, it happened that there was no time-keeper for the Government. The time of the stone-cutters and stone-masons on the Wellington Street Bridge, and of all the labourers and workmen employed on the other works, was kept by, or under the direction of, Jacques Villeneuve, who was a brother-in-law of the suppliant and a clerk employed in the office of the Collector of the Lachine Canal. When navigation closed in the autumn, Villeneuve, we are told, was not required to attend at the Collector's office, but to hold himself ready to answer any call for service the Collector might make upon him. Under these circumstances he felt himself free, it appears, to engage himself to the suppliant as chief time-keeper for the latter. That Villeneuve was at the same time in pay of the contractor and of the Crown was not, I think, known to any of his superior officers, with the exception, perhaps, of Kennedy, the superintendent. It is possible that the latter was aware of the fact, but as to that I do not venture any opinion. It would be difficult to say, and it is not, I think, important to inquire, how far Villeneuve's presence on the works in the capacity

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of time-keeper contributed to the circumstance that, with the exception I have mentioned, no provision was made for keeping, on the part of the Government, a record of the time the men supplied by the suppliant were actually employed on the several works. The material fact is that Villeneuve was time-keeper for the suppliant and not for the Crown. It was said by Mr. Geoffrion, and on the evidence before the court I agree, that it was no fault of the suppliant that the officers of the Government neglected to appoint time-keepers. At the same time it affords him no excuse if he took advantage of the opportunity thus afforded him to render false accounts to the Government.

During the progress of the work, Coughlan made up lists showing the time of the labourers and workmen on the Wellington Street Bridge, other than the stone-cutters and stone-masons, and delivered the lists to Joseph Alfred Michaud, the suppliant's chief clerk and book-keeper. The time-books, lists and memoranda kept by Villeneuve and his assistants were also handed in to Michaud. From these materials a number of clerks, under the direction of Michaud, compiled pay-lists, of each of which several copies were made. Such lists when completed were submitted to and certified by Parent, Kennedy and Coughlan, and after May 13th, by Marceau and Conway, and by James Davin or Michael Doheny as time-keeper for the Government. The lists were then forwarded to the Minister of Railways and Canals, and on them the payments mentioned were made, and upon them, in the first instance, the suppliant now rests his claim to be paid the balance referred to.

With reference to the certificates, it appears that Mr. Parent had no knowledge as to whether the lists were correct or not, and he certified to their correctness because they had first been signed by Kennedy

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and Coughlan, whose duty it was, he thought, to know. Kennedy was not called by either party. He was said to be ill, and it does not appear on whom he relied, but it is clear that personally he had no means of knowing that the lists constituted true and just accounts against the Government. Coughlan had personal knowledge of the time of the men who worked on the Wellington Street Bridge, other than the stone-cutters and stone-masons, and so far his certificates are entitled to consideration. For the rest he signed the lists because Kennedy told him to do so, and of their correctness or incorrectness he knew nothing.

There is no controversy as to the stone. It was measured for the Government by Michael Doheny, and his measurements and certificates are not called in question. Neither is there any question as to the correctness of the lists certified to by Marceau, Conway and Davin or Doheny. Of the total claim of $284,192.50, some $80,394.57 is supported by certificates of Government officers upon which reliance may properly be placed. For the balance of $203,797.93 such certificates have been given negligently and improvidently, to say the least, and are utterly valueless.

Anticipating, no doubt, the weakness of a case resting upon such certificates, the suppliant has sought to support the pay-lists by other evidence. But here he is met by a difficulty of his own making.

Before the several works mentioned were completed the Government decided to appoint a Commission to inquire into the manner in which they had been carried on, and this coming, no doubt, to the knowledge of the suppliant he destroyed all the time-books and other original papers and material in his possession, by which the correctness of the pay-lists in question could be tested or verified. He also destroyed his

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books of account, his ledger, his journal, his cash-book, his bank pass-book and his returned cheques. Michaud, his chief clerk and book-keeper, selected the books and papers to be destroyed and left them on the table in the suppliant's office, and the latter took them away and burned them. If we had the time-books and other original materials from which the pay-lists were compiled, it would of course be a simple matter to see whether the lists are correct or not. In like manner if we had his books of account, showing, as they no doubt would show, how much money was from time to time paid by the suppliant to the men for whose labour he makes his claim, we would have the means of verifying such lists. But by the destruction of his books and papers the suppliant has rendered it impossible in either way to ascertain the correctness of the accounts that he has rendered.

In these circumstances he has called, so far as was possible, all the time-keepers and clerks who were engaged in compiling the lists to testify that they had done their work honestly and faithfully. There may be a question, though none was raised, how far, in such a case as this, such evidence is admissible for the purposes for which it was tendered. But whether admissible or not, the evidence was of necessity of a general character, not touching or directly supporting particular items in the accounts, and cannot, I think, be accepted as excluding all chance of fraud, and as being conclusive of the correctness of such accounts. Against them are facts well established, and fair presumptions arising from such facts that with reasonable certainty, at least, lead to an opposite conclusion.

In the first place it is clear that the works referred to have cost a very large sum more than under any circumstances consistent with the absence of fraud, they should have cost. Part of the excessive cost is

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no doubt attributable to the necessity of completing the works in a short time, and part to the difficulties incident to the season during which they were executed. But any fair allowance for such causes falls far short of accounting for the excess of cost that I have mentioned. Works that were estimated to cost some $170,000, and the cost of which, executed when and as they were, ought not at most to have exceeded $250,000, have in the end cost nearly $500,000. So far as this was attributable to the men employed idling away their time the suppliant is not at fault. That clearly was no concern of his. Such evidence, however, as we have on the subject tends to negative idling, though I must confess that I have great hesitation in accepting that conclusion. I fear there was a good deal of the slackness which is too apt to prevail when the eye of the master is absent. But be that as it may, it must, I think, be said that the evidence as a whole points rather to a falsification of the pay-lists as the principal cause of the excessive cost of labour employed on the works.

We know, of course, that the names of the clerks whom Michaud had in the office compiling the lists appear thereon as foremen, or in some capacity other than that in which they were engaged ; and that the suppliant in that way made the Government, without its knowledge, pay for their services. That, so far as the amount of money involved is concerned, is comparatively speaking, a small matter. The importance lies in the fact that it shows that the suppliant did not hesitate in that respect to falsify his accounts. Then we have the direct testimony of Michael Doheny, which, if credited, shows beyond doubt, that with respect to the stone-cutters, the suppliant has included in the pay-lists the names of a large number of men who were not employed on the works at or for the time stated in

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such lists. Doheny's evidence, it is argued, is open to adverse comment; but there is this to be said for it, that it fits in remarkably well with the facts of the case about which there is no doubt.

Then, too, there is the destruction by the suppliant of his books and papers. It is suggested that he burnt them because he feared the inquiry before the Commission would reveal some payments that he had made for purposes which he wished to conceal. That however would not account for the destruction of the time-books and memoranda from which the lists in question were complied. As the books of account and the time-books were destroyed at one and the same time, and so far as appears with the same object in view, the conclusion seems at least reasonable that the suppliant desired to conceal something that would appear as well from the one as the other. Now the question of the correctness of the accounts he had rendered was one that was likely to arise on the inquiry, in view of which such books and papers were burnt, and, if such accounts were not true but false accounts, that fact would no doubt have been ascertained by reference either to his general books of account or to the time-books and other original papers from which the lists or accounts had been compiled. It has not been suggested, and it does not occur to me, that there was anything else common to the two sets of books that the suppliant would think it necessary to conceal. The fair presumption to draw from this wilful destruction of the evidence is, I think, that if such evidence were accessible it would show that the pay-lists which the suppliant has furnished to the Government and upon which he makes his present demand do not constitute true and just accounts of the labour he supplied to the Crown under his contracts. The rule of law that justifies such a presumption is, I think, a most whole-

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some one, especially where the destruction of evidence is accomplished with the deliberation and thoroughness that distinguishes the present case. The petition will be dismissed with costs.

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With reference to the claim of the Crown to recover back a portion of the money alleged to have been overpaid to the suppliant, an application has, since the argument, been made to the court on behalf of the Crown to amend the statement of defence and to strike out so much thereof as sets up any counter-claim, but without prejudice to the right of Her Majesty to prosecute an action in respect of such claim. On the motion, counsel for the suppliant appeared and did not oppose the application, and I shall allow it with costs to the suppliant, and without prejudice to the right of Her Majesty to maintain an action to recover any moneys that may have been overpaid to him. The costs to the suppliant will include as well any additional costs of the trial occasioned by the counter-claim, as of the motion to amend, and the same may be set off *pro tanto* against the respondent's costs on the dismissal of the petition.

Judgment accordingly.

Solicitor for suppliant: *J. U. Emard.*

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

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

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HER MAJESTY THE QUEEN.....PLAINTIFF; Jan. 9.

AGAINST

THE SHIP *AINOKO*.

Pelagic Sealing—The Seal Fishery (North Pacific) Act, 1893—*Evidence—Admissibility of unofficial log—Presence within prohibited zone through mistake, effect of.*

Where the official log of a ship arrested under The *Seal Fishery (North Pacific) Act*, 1893, did not disclose the position and proceedings of the ship on certain material dates, an independent log kept by the mate was offered in evidence to prove such facts ;—

Held, not to be admissible.

The Henry Coxon (3 P.D. 156) referred to.

2. The mere presence of a ship within the prohibited zone, owing to a *bonâ fide* mistake in the master's calculations, is not a contravention of the Act.

THIS was an action for condemnation under the *Seal Fishery (North Pacific) Act*, 1893.

The condemnation of the British Schooner *Ainoko* was asked in this action for an alleged contravention of the provisions of the above mentioned Act and of an order in council passed thereunder on the 4th of July, 1893. By such Act and order in council the killing or hunting of seals, or attempting to kill or take seals, was prohibited within a zone of thirty marine miles round the Komandorsky Islands, as defined in the said order in council, on the Russian coast, during the period between the 4th July, 1893, and the 1st January, 1894.

The schooner *Ainoko*, owned by Captain Grant of Victoria, B.C., left that port in the spring of 1893, under Captain George Heater, as master, on a fishing and sealing voyage in the North Pacific. After taking on an Indian crew at Hesquiot and touching at various points, particularly the port of Sand Point,

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Shinigin group, where she received the official warning subsequently alluded to, the vessel proceeded northward and was seized on the 22nd July, 1893, within the prohibited zone, by His Imperial Russian Majesty's despatch boat *Yakout*, being then fifteen or sixteen miles off the southern point of Copper Island, one of the Komandorsky group, round which and Tulenew (Robben Island) the prohibited thirty-mile belt is drawn by sec. 1 of the said order in council.

She was at the time of the seizure fully armed and equipped for catching and killing seals in the North Pacific, and had then on board (as alleged in the Russian protocol) sixty-eight seal-skins.

The writ was issued on the 3rd November, 1893.

The statement of claim placed the seizure in latitude 54 deg. 23 min. 5 sec. north, and longitude 168 deg. 32 min. east, within 16 miles of Copper Island and within the prohibited zone round the Komandorsky Islands. The position of the place of seizure on the map was proved by Captain Hughes Hallett, R.N., of H.M.S. *Garnet*, the officer in command at Esquimalt.

The statement of claim further charged that Capt. George Heater was duly warned not to enter the prohibited waters of the North Pacific, and not to proceed within a zone of thirty marine miles round the Komandorsky Islands, of which Copper Island forms part.

After the seizure and search of the *Ainoko*, and the examination of the papers of the Russian official commission of the *Yakout*, it was decided to seize the *Ainoko's* papers ; and her captain was directed to proceed in the *Ainoko* to Yokohama, to appear before the British Consul there ; a provisional certificate (made under subsec. 1 of sec. 2 of the Act) being given to him to enable him to reach that port.

Besides the alleged sealing, or attempt to seal, the plaintiff's pleadings further charged that Capt. George

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Heater did not proceed to the port of Yokohama and report to the British Consul there; but sailed to the port of Victoria, in the Province of British Columbia, where he arrived on the 26th August, 1893; whereupon Capt. Hughes Hallett, R. N., of H.M.S. *Garnet*, claimed the condemnation of the *Ainoko* and everything on board of her, or the proceeds thereof, on the ground that she was at the time of the seizure within a zone of thirty marine miles round the Komandorsky Islands—as defined by the above mentioned order in council, made in pursuance of the above mentioned *Seal Fishery (North Pacific) Act*, 1893—fully manned and equipped for killing, taking or hunting seals, and had on board shooting implements and seal-skins. And that the said ship was used and employed in killing, taking or hunting seals, and had on board shooting implements and seal-skins. Also that the said ship was used and employed in killing, taking or hunting, or attempting to kill or take seals within the prohibited waters aforesaid.

To all which the defendants replied, admitting the seizure as averred by the statement of claim (paragraphs 1 and 2), and admitting having sailed fully manned and equipped, as alleged; but that the schooner left on the 25th January, 1893, for Hesquiot to obtain an Indian crew of hunters. That they arrived at Sand Point on the 17th of June, and on the 22nd of the same month she shipped all her seal-skins by the schooner *Borealis*, and continued her voyage from Sand Point. They admitted that Heater was duly warned not to enter the zone, as alleged in paragraph 4, and that Copper Island is one of the Komandorsky group. Also that when seized the vessel was fully manned and equipped as charged, but that they had at that time only forty-six seal-skins on board. They admitted (as charged in paragraph 6) that after the seizure of the ship and papers, and on the report of the official commission, George

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Heater was ordered by the captain of the *Yakout* to take his ship to Yokohama to appear before the British Consul there. And that a provisional certificate was given him to reach that port. They also admit so much of paragraph 7, as states that the schooner arrived in Victoria on August the 26th, 1893.

But in answer to paragraph 7, charging that Heater disobeyed the order given him by the captain of the *Yakout* to proceed to Yokohama, they say that he did obey such order until the 30th July, upon which date the captain of the *Ainoko* was obliged, on account of the objection made by the said Indian crew, who where fifteen in number, to proceed to Yokohama, to change his course and sail for the port of Victoria. And in answer to the whole of the plaintiff's statement of claim, the defendants aver that for some days prior to the 22nd July, the date of seizure, they were unable on account of the heavy weather to hunt for seals, and did not hunt for seals. That they were also unable during that period to take any observations, and that it was not until about three o'clock in the afternoon of the 22nd July, (Eastern time) the day of seizure, that the captain of the schooner sighted land, and found that his position according to dead reckoning was wrong, and on discovery of this fact, which he had been unable to discover sooner, the captain at once wore ship and made all possible haste to get outside the prohibited zone; but on account of the light wind and the heavy sea prevailing at the time, the schooner was unable to make headway when she was seized. And they add that during that time and up to the date of the seizure, the *Ainoko* did not kill, take, hunt or attempt to kill, take or hunt any seals.

They also alleged that at no time was the said schooner used or employed in contravention of the said Act.

December 22nd, 1893.

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The case was tried before Mr. Justice Crease, Deputy Local Judge for the Admiralty District of British Columbia.

Pooley, Q. C. for the plaintiff ;

Helmcken, for the ship.

CREASE, D. L. J. now (January 9th, 1894) delivered judgment.

[After stating the facts as on pp. 195 to 198, his Lordship continued:] Such were the admissions of the defendants, that much trouble was saved to the Crown in collecting and arranging evidence of a great part of the facts necessary to support the plaintiff's case ; and it is fair to remark, that these admissions were made before the defendants had an opportunity of seeing the protocol of the Russian commander, framed upon the report of the official commission he had appointed to seize and examine the *Ainoko* and her papers and report thereon to him, or of knowing what incriminating evidence that document would contain.

This protocol was only produced during the trial, and was made evidence in the case by sec. 3, subsec. 1, of the *Seal Fishery (North Pacific) Act*, 1893. But of course it was, like all other evidence, subject to explanation and possible rebuttal by other evidence of equal or superior weight. The correctness of the translation into English was proved by an interpreter, a Russian by birth, duly sworn to interpret the Russian into English ; but Mr. Helmcken, the counsel for the defendants, objected to its admission on the ground that the interpreter could not swear that the confirmatory signature of the captain of the *Yakout*, which appeared to have been written in the third person, was really his usual signature ; and that the proof of this part

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was necessary to the validity of the document before it could be said to "purport to be signed by the officer having power, in pursuance of the Act, to stop and examine the ship as to the circumstances under which, or grounds on which, he stopped and examined the ship."

This objection was overruled by the court on two grounds, viz., that such evidence was admissible under the Act, as if made by an officer of our own navy, and the principle *omnia præsumuntur rite esse acta* might, without straining the law, be applied; and, secondly, that the admissions of the defence, in the main, substantially covered the facts relating to the seizure, and the circumstances attending it, which the protocol purported to set forth. The protocol was then read. The only additions which it made to the facts already detailed were that it claimed to have found sixty-eight skins on board, whereas the evidence proved that only forty-six were there at the time, and the number of skins was not actually counted by the searching officer—a point of secondary importance; and that when seen the *Ainoko* was "without lights." And also that the crew consisted of, all told and all present, nineteen men; viz., fifteen Indians and only four whites—a circumstance which proved of some importance, in view of the subsequent change of the direction of the voyage from Yokohama to Victoria. And I observe that in the protocol the commission decided to seize the papers of the *Ainoko* "on the reason of her being found within the limits of" (Russian) "territorial waters," and no sealing or attempt to seal is therein alleged, and no examination on oath under sec. 3, subsec. 2, or cross-examination, appears to have taken place, or been reported under the protocol. The protocol, if the translation is correct, does not say that she was seized because she was found manned and equipped for sealing within a prohibited

zone und the English Act, but (although confessedly sixteen miles from land) for being within the territorial waters presumably of the Russian coast.

The court in this action in all its proceedings, and in the present decision, governs itself entirely and exclusively by the provisions of the Imperial Act of 1893, and the aforesaid order in council; and this without reference to the territorial and other rights mutually reserved to and by Russia and England in the correspondence of May last, between the late Sir Robert Maurier and Mr. Chickine on behalf of their respective Governments.

Taking, then, as proved the facts admitted by the defendants' pleadings, the presence and seizure of the *Ainoko* fully manned and equipped for sealing within the prohibited Kormandorsky group, by the Russian transport *Yakout* on the 22nd July, 1893, it remains to ascertain from the evidence under what circumstances she found herself, contrary to law, after notice, within the prohibited waters. Whether, while there, she attempted to kill or take seals, and, if so, under what circumstances. Why, also, when seized she was carrying no lights. What number of skins Heater really had on board, and whether he had truly reported the same. And lastly, the reason the defendant Heater had for disobeying Captain Chanouski's order to take the *Ainoko* to Yokohama by changing the direction of her voyage to Victoria, B.C., and the sufficiency or otherwise of such reason.

The evidence of Captain George Heater, which was given in a ready, straightforward manner, without concealment or equivocation, was: That on the 23rd January, 1893, the *Ainoko* started on a sealing and fishing voyage in the North Pacific. Took an Indian crew at Hesquiot, proceeded on her voyage to the port of Sand Point, where she remained from the 17th to 23rd

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of June, to refit. There Captain Heater received, both from Captain Grant, his owner, and from Captain Hughes Hallett, R.N., of H. M. S. *Garnet*, written notice forbidding him (amongst other things) to go within the thirty-mile limit round Kormandorsky Islands and Tulenew (Robben Island). That he sent all the skins he had taken (1,635) to Victoria by the *Borealis*, procured a proper clearance for hunting and fishing, and a bill of health from the United States authorities at Sand Point, and, with his coasting license of 23rd January, outward, foreign manifest of 15th March, 1891, certificate of registry, with the Articles called an agreement on account of the crew, and an official log (the papers afterwards seized by the *Yakout*) proceeded northward on his voyage, and on the 17th July found himself by observation in latitude 54 deg. 9 min. N. longitude 165 deg. 14 min. E, and from that time until the 22nd July, the day of seizure, thought himself outside the limits.

Under the circumstances I have detailed the *Ainoko* having (in the words of sec. 6 of the Act) been found during the period and within the seas specified in sec. 1 of the order in council before cited, having on board thereof shooting and fishing implements and seal-skins, it lies on the owner or master of the ship to prove that the *ship was not used or employed in contravention of the Act*, and unless that is done satisfactorily by showing that he was there ignorantly and by stress of weather, or some act of God beyond his control, the presumption under this section would become absolute against the ship and ensure its forfeiture.

But it is a presumption capable of rebuttal or satisfactory explanation, when the *onus probandi* would be changed, and to this the whole efforts of the defence were directed.

No evidence on behalf of the plaintiff was adduced beyond the protocol and what was elicited from the defendants' witnesses on cross-examination, except Capt. Hughes Hallett's proof of the position, on the chart produced in court, of the *Ainoko*, when seized, and the papers transmitted with the protocol.

The first point which had to be settled was: To account for the position and proceedings of the schooner between the 17th July and 22nd July (Eastern time), when she was seized. In this connection it becomes of importance, as showing one main reason of the captain of the *Yakout* and his commission's decision to seize, that he conceived that he could only look at the official log for a record of the *Ainoko's* course and position from day to day. These the official log did not pretend to give, though it marked important facts during the voyage, such as leaving and reaching port, or first seeing land, finding herself on such a particular day at such a place, but not the daily routine or position. That was only in the mate's log. This latter was written in daily at some usual or practicable hour, the captain and mate, after consultation, pricking the position of the schooner off upon the chart; and the mate, who was the better scribe of the two, recording it with other events of the day, such as change of wind, force and direction of sea, and the like, in the mate's (commonly recognized as the ship's) log. Indeed, Capt. Heater considered he had no right (as well as no room) to put such details on the official log, and it is not made compulsory by British law to do so.

On the authority of *The Henry Coxon* (1), though not directly applicable in this case, and upon the objection of the Mr. Pooley, Q. C., the counsel for the plaintiff, I declined to receive in evidence the

(1) 3 Prob., 156.

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so-called ship's log, which was carefully kept, though after proving the mate's memory, by several specific entries taken at random in different parts of the book, which he swore were made on the respective days to which they referred, reserving the right to him to refresh his memory by it, should he so require. But it was not so required; for both his and the captain's memory were substantially good for all the events of the days more particularly in question in this case. And the plaintiff's counsel freely used it in a very full cross-examination of both master and mate, as he had a perfect right to do, against the ship. It is in evidence, uncontradicted, for we have no record of any examination of the master by the officers of the *Yakout* or any other evidence than I have mentioned produced by the plaintiff, that when Captain Heater came on board the transport, as ordered, with his papers, he produced the ship's log, made up in the manner I have described; but the Russian officer (he presumed the 1st Lieutenant) would not recognize it. He wanted the official log. Capt. Heater told him the positions were not regularly laid down on the official log, that it was the practice in the branch of mercantile marine to which he belonged to enter these only in the mate's log, used as the ship's log.

"He told me," Captain Heater says, "to send for the official log. I got it for him. He was sorry, he said (speaking good English) that I had not my positions on the official log. *He was sorry, because if I had he could let me clear.* I told him I could not help it; the positions were all on the log," (meaning the ship's log.)

The master's evidence, confirmed by that of the mate, proved that on the 17th July last, when he spoke the *Dora Sieward* and a boat of the *Carlotta Cox*, he took observations by sextant, and found that they were in latitude 54 deg. 9 min. N., and longitude 165 deg. 14 min. E.–that is about 60 miles west of

Behring Island, and some 30 miles out of the prohibited zone, and some 95 miles from Copper Island.

The weather from the 17th July to the 21st (Eastern time) had been very heavy, with much rain and fog, with strong wind and heavy sea; the wind commencing from N.N.W., varying to W.S.W. and S.S.W., turning to a strong gale and high sea, and continuing with thick weather, day after day, from the 17th, with only brief occasional intervals of moderate wind; and this kind of weather lasted until the 21st (Western time), when, after a stormy morning, the wind fell, the sea being still high but going down; thick weather prevailing with intervals.

The truth of this account of the state of the weather during those five or six days, was incidentally confirmed by the Russian officer, who (as Wm. Heater, the mate, in his sworn evidence as to what occurred on board the schooner during the search states) then came on deck from below where he had been searching, and said:

"I suppose you know what we are at? (He spoke English with an English accent.) I said I did, we'd sighted land that afternoon. *I said you know how bad and stormy the weather has been; he admitted it, and said that was true.* We got driven in here (I added), it was not our fault we got here. I asked him what he intended to do? He said I guess we'll let you off."

A conversation to the same effect occurred between Capt. Heater and the 1st Lieutenant on board the *Yakout*, which I shall have to allude to when dealing with the current, which so greatly threw them out of their course. The account which the master of the *Ainoko* gives of this (to him) eventful day, also from his recollection, is in the same direction. It is that on 21st July (Western time) they had a strong wind from the S.W. with a high sea, the ship's head bearing westerly. "At 8 a.m.," he says, "I wore ship's head to the S. E. as the wind came more to the

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S.S.W. About noon there was a strong wind and a high sea, the wind veering to the S.E. About 3 p.m. the fog lifted a little, and I caught sight of the land, when the fog came down and covered all again. I judged from the glance that I had that the shore was fifteen to twenty miles off." He does not tell us in this part of his evidence what particular shore it was, but he was sure it was within the limits, for he says, "I immediately wore ship, set all sail and set her course at S.W.," a direction which the Admiralty chart and the ship's chart, which is also in evidence, show, would take her right off the island out of the forbidden waters. And it is very noteworthy that she was sailing with full sail towards the S.W., S. and S.W., presumably on her way out, when she was overhauled by the Russian transport late that same evening.

There is not even a suspicion that Heater knew of or saw the *Yakout* before she came on him. The presumption is fairly the other way. The change in the sails (of which we have much evidence) necessitated by the change in the course of the schooner, and her position as respected the direction of the wind, which remained about the same, help to show that she changed her course to S. W. from N.W., and was on that course when seized (as the protocol says) "under sail." For when she sighted the land (we gather from the evidence) she carried in lieu of the big mainsail, then closely furled, a storm trysail with a double-reefed foresail and a reefed forestaysail, her jib and her flying-jib being down and furled. When she wore round in order to be under full sail, she must have stowed away her storm trysail, hoisted her mainsail, shaken out the reefs in and hoisted her foresail, set her maintopsail, shaken out the reefs and hoisted fore staysail and hoisted her jib and flying-jib. And this is what she did.

But the difference in the sails set so entirely agrees with a change of course from N.W. to S. and S.W., as to form a coincidence, the more effective for being undesigned, with the change of course, to which he swears and corroborates his evidence in that particular.

"When I sighted land," he adds in cross-examination, "it was pretty nearly ahead or a little on the starboard bow. The same time I saw it I looked at the compass; that was pointing to the N.W. The sail we were under was trysail, reefed foretopsail and trysail. We wore ship because there was not enough wind to stay the ship, and we had small sail on. That the course adopted was the right and only right one to get out of the zone, and that was their real object, is proved by the evidence of the mate, who, in an ably conducted cross-examination, stated "the wind was light, there was a heavy sea on the land, we could not make much headway, the sea was too heavy. No; we could not have steered any other course to have got off shore."

The other white sailors corroborated this in every material particular.

An examination of the positions of the schooner from the 17th to the 22nd, as laid down on the chart of the *Ainoko*, goes to prove that they considered themselves all those days outside the forbidden zone, for that shows that on the 17th July, she was, by observation with sextant, at latitude 54 degrees 9m. N., longitude 165 degrees 14m. E., about sixty nautical miles from Behring Island and ninety from Copper Island, far outside the zone. On the 18th, by dead reckoning, in latitude 53 degrees 44m. N., longitude 166 degrees 15m. E., or one hundred miles from Copper Island. On the 19th, by same reckoning, latitude 53 degrees 41m. N., longitude 166 degrees 25m. E., or seventy-nine miles from Copper Island. On the 20th, by dead reckoning, latitude 53 degrees 21m. N., longitude 166 degrees 40m. E., or seventy-six miles from that island. On the 21st, (Western time), we know that when found by the steamer she was sixteen miles South West of Copper Island. During the five days following the 17th, the master of the schooner was unable to take a single observation. On

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the 17th they were certain of their position, but afterwards only by dead reckoning, making no proper allowances in making their reckoning for the strong current setting on shore, for the simple reason that Captain Heater did not know it, having obtained his first knowledge of it from the courtesy of the Russian officer on the *Yakout* after the seizure. This current sets strongly in a north-eastern direction when the wind is south and westerly on shore. Captain Bissett, of the *Annie Paint* sealing vessel, who had known this current well during three years sealing in the neighbourhood of these islands, stated in his evidence that from its blowing so much before from the south and south-west, the current was unusually strong this year with a strong set to the north-east, and, as one came closer in shore of some two miles an hour, he himself though deeper in the water, and his ship a better sailer than the *Ainoko* was driven by it, notwithstanding his previous experience of it—from forty-five miles off land, the regular cruising ground of sealers, to twenty-two or twenty-three miles from it, that is seven or eight miles within the zone, and although a schooner can generally sail $4\frac{3}{4}$ or 5 points off the wind, if the sails set well, the current would trend on to Copper Island by the south end of the island. When the wind was about south by west the drifting would be considerable. Some vessels drift more than others, less or more according to their depth in the water and other conditions, and the way they are sailed. The *Annie Paint* was deeper in the water than the *Ainoko* and therefore, holding her way better, was presumably somewhat less affected by it; yet under the influence of it she drifted, though a less distance than the *Ainoko*, some six or seven miles within the zone before a favourable breeze carried her out. That this current, acted upon by the stormy south and west winds and the high seas of those five

stormy days which preceded the seizure, had a most potent effect in driving the schooner towards the point where she was ultimately picked up by the steamer, notwithstanding her efforts against wind and sea, as appears from Heater's evidence in several places—and especially in his first interview with the Russian officer on board, of which he says:—

"He asked me to come on board and bring the ship's papers, which I did immediately. When I got on board one officer asked me if I knew I was within the limits? I think the first Lieutenant, as he did all the talking. I told him I did and spied land that afternoon, that's why I was trying to get outside. I said, you know what weather we have had lately; we didn't come here with our good will. We were driven here. He said: Yes, I know you had bad weather and drifted. I said: There must be a strong current in here, else we couldn't possibly be here? He said: *I admit a strong current here sets in north-east with southerly and south and west winds. I told him that was unknown to me; I had never seen it. Then he asked me for my log, etc.*

This makes the position in the mate's or ship's log of very little value as a guide to his position on the five days in question when they were nearing the island, although the schooner would be comparatively much less influenced by it on the 17th and 18th days, when they were furthest away than on any of the subsequent days.

Capt. Bissett's evidence, although it is subject to this remark—that he had himself had a talk with Capt. Heater the evening before, and is himself a sealer, and although not caught was from having been within the zone to a certain extent *in pari delicto*—is not to be thrown aside on that account alone. He was in no worse position than the other sealer witnesses who had been in court all the time, and whose testimony was received without objection, and if incorrect it was liable to be disproved by other evidence—and particularly because it was confirmed in the most material respect by the frank statements of the Russian officers which I have already given on the chief points. Capt.

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Bissett tells us that the general practice of sealers of that locality (and Heater tells us he adopted it at the period in question) was to cruise backwards and forwards well outside the thirty mile limit, three miles towards the islands and four miles away from them, keeping off at least forty-five (always nautical) miles from the land—and trying to keep on and west of this forty-five miles off, as their general position while hunting for seals, backing and filling to hold their own, in order to effect this object and keep well out of danger. And in this way sealing vessels go at times even sixty, seventy, one hundred and fifty, and even one hundred and eighty miles off the land. He substantially corroborates the account the *Ainoko* gave of her various positions from the 17th to the 22nd July by comparison with his own (generally) on those days, and also taken by observation on the 17th, and by dead reckoning only—for the same reason, inability to take observation—after the 17th, a period during which the *Ainoko* was frequently in sight, though five or six miles nearer to the island than the *Annie Paint*. On the 22nd he saw her three or four times; they crossed each other in sailing between the 18th and 22nd (including the 22nd), and he saw her on the 22nd and 23rd. The weather he describes as hazy; though it would lift at times when he saw quite a way, perhaps seven or eight miles, and then it would as suddenly close down.

"I think (this witness said) I saw the loom of the land about 3 o'clock in the afternoon; I could not see the loom of the land on the 21st, 20th or any of the previous days back to the 17th."

Here it is to be observed that when the various witnesses, speaking after the event, say they saw land, it does not follow, unless the fog lifts altogether, that they would stop to see more than the loom of the land to be assured of what land it is, for proximity to land

is likely to be avoided, especially by sailing vessels, in bad weather, and on a lee shore, from which, if they approached too close, they might not be able to claw off. And so it was here, for the official log of the *Ainoko*, which *is* evidence and was seen by the Russian officer, has an endorsement thereon from the Russian officers, in Russian and English, which proves that this was the case.

The orthography of the captain's entries in the official log is very phonetic; but the sense of it is like what I believe him to be, clear and honest. I tried and tested him in various ways, because the presumption, not only in law but in fact, was at first distinctly against him, and the *onus probandi* was upon him; and also because, the Russian officers not being present, it was the duty of the court to receive their testimony with the greatest faith and respect, as if they had been our own officers, subject of course, like all evidence, to be explained if the law called for it, possibly displaced upon that fuller inquiry under oath, which though allowed was not so convenient at sea, where surrounding circumstances were not so favourable for that full enquiry which has now taken place. But Capt. Heater has stood the ordeal well; and although uncultivated and plain in manner and speech, he has never varied in substance in his account of the explanations required of him, whether they were against him or for him, from first to last. The court therefore is compelled to regard him as a witness of the truth.

It is true (although he was not examined upon the point) that in the portions of the mate's or ship's log, on which he was cross-examined, and to which portions alone I considered myself—in the face of the plaintiff's recorded objection to its production as a whole—entitled to look, no mention is made of having sighted the land on the 21st (Western time).

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Probably this was because in the official log, which the Crown itself produced as evidence, we find it distinctly mentioned as one of the notable facts worthy of being recorded therein. For in that, under the head of July 22nd (Eastern time) the following occurs:—

"This day commenced with strong wind from W.S.W. At 2 p.m., wind abating, fog clearing up, saw the land. Made all possible sail to get outside of limits. At 11 p.m. overtaken by Russian cruiser who ordered me to heave to and bring my papers on board, which I did without delay. When arrived on board of cruiser was informed I was inside of limits. Told him that I was driven there by strong wind and heavy sea, and that I did not know that I was inside of said limits, and did not come there on my own accord, but distress of weather, *and was making my way out when he seen me, which he owns was true.* But he told me that he should take my papers from me and order me to Yokohama; went on board, made all possible sail for said port. Indian crew objected being carried to Yokohama, so I had to bring them to their home."

"Aug. 22, '93, at 1 p.m. arrived at Hesquiot for the purpose of landing my crew; no other remarks worthy of note."

"Aug. 24, '93, sailed from Hesquiot for Victoria; arrived in Victoria Aug. 24, '93.

(Sd) GEO. HEATER, Master.
(Sd) WILLIAM HEATER, Mate.

The only other entries in the official log worthy of note are:

"July 15, '93, fog prevailing and strong wind; no obs. of sun for four days.

"July 20, '93, strong gale from W. S. W. and heavy sea; ship's head to south; no obs. of sun.

"July 21, strong wind continues, with heavy sea."

(Sd) GEO. HEATER, Master,
(Sd) WILLIAM HEATER, Mate."

After a careful consideration of all the facts, the charts and the various bearings of the case now fully before the court, I have a clear opinion on three points: 1st. That until he espied the land as the fog lifted for a short while at 3 p.m., on the 22nd (Eastern time) he

had no idea that he was within the forbidden waters; 2ndly, that the moment he did espy land he wore ship, set all sail to the S. W. to get out of the forbidden zone as quickly as possible by the only course then available for the purpose, and was honestly carrying out this intention to the best of his skill and ability when he was overhauled by the Russian steamer and sent into port; and 3rdly, that when overhauled, although the weather had moderated, he was clearly not actually sealing or attempting to seal.

There remain therefore only three points to be considered, one of which only is of specific importance to enable me to apply the law as applicable on a consideration of all the findings—to which the evidence must be my guide—for a determination of the whole case.

These three points are:—1st. The fact of the attempt to kill or take seals on the 18th; 2nd. the position of the lights of the ship when the steamer approached her; and 3rd. the statement of the master on board the *Yakout* and endorsed on the protocol in his own handwriting, apparently at variance with not only his own evidence on the point, but that of all the witnesses from his own ship, speaking of 68 instead of 46 skins.

And first, as to the attempt to hunt seals on the 18th, Captain Heater made no concealment whatever of the fact that he on that day let down the stern boat with himself and two sailors with guns, trying to catch seals ahead of the schooner for (he thought one, his mate said two) two and a half hours, when, on account of the heavy weather, he returned completely unsuccessful. This makes the presumption of law against him under the Act; and unless he discharges that presumption by sufficient evidence, and shifts the *onus* to the plaintiff, the condemnation of his ship is certain.

But what are the facts? It has already been proved beyond a peradventure, and it is not for a moment

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denied, that on July 17th the *Ainoko* was, by observation by sextant, in latitude 54 deg. 9 min. N. and longitude 165 deg. 14 min. E; in other words, by the dividers, sixty miles off Behring Island and fully ninety-six miles off Copper Island.

It is in evidence, and none is adduced to the contrary, that the weather on that occasion had moderated so much as even to induce the captain to lower the stern boat for sealing; the wind was strong but fine all day, and the ship we are told heading W.N.W., whether they knew it or not—somewhat against the easterly trend of the current, and the ship laying up to the W.N.W., and that had been her course the greater part of the day before when the observations were taken. The current, Capt. Bissett testifies, has the least influence upon a ship the further it is away from Copper Island, towards the east end of which it sets. They had, therefore, some thirty or forty miles to veer and haul upon before they were drawn within the limit of the forbidden zone. It is more than probable, therefore, that from 4 to 6 o'clock on the 18th they were well outside the limits, and if so, were entitled to fish there without let or hindrance. But, assuming it were not so, I think the evidence is irresistible, that he was under the honest and complete conviction that they were well beyond those limits at the time; and if wrong, was under an honest mistake at the time, and so has fairly discharged the presumption of law against him as to this particular point—and the more so that no evidence has been adduced by the plaintiff to the contrary.

The marking on the ship's chart on that day shows this; and the captain swears positively, as the ship's chart on inspection itself shows,—that not a single marking on it, though of course much used, was rubbed out or defaced on it,—and I believe him. That gives

the position at noon as in latitude 53 deg. 48m. N., longitude 165 deg. 23m. E., or further away from Copper Island, whither the current trended, than on the day before. That was, in all probability, not exactly correct; but that was their honest conclusion to the best of their experience and judgment, qualities in which they appeared by no means deficient, and as their calculations were founded on accurate observations at noon on the previous day, and on the course and progress of the ship and the weather in the interval, I consider the fair and reasonable presumption, one which sitting as a jury I ought to entertain, is that they were at the time still outside the forbidden limits.

The next question to be disposed of is as to the lights the *Ainoko* carried at the time she was overtaken.

In the Russian protocol it is stated that the *Yakout* at 11 p.m. saw the British schooner *Ainoko* under sail and carrying no lights. From this it would naturally be inferred that, contrary to the universal requirements in mercantile marine, she was taking advantage of the darkness to screen herself from observation; especially after Captain Heafer's evidence that at 3 p.m. of the same day he had caught sight, in however transient a manner, of Copper Island, and consequently knew he was within the prohibited limits. No evidence appears to have been taken by the Russian authorities on that point, as might have been done under sec. 3, sub-sec. 2 of the Act. He was, therefore, closely examined by the learned counsel for the plaintiff on that point.

Q. "What were you doing without lights?

A. "The lights were out (which, he explained to the court meant were exhibited in their proper position and manner). That's the way they (the Russian vessel) picked the vessel out. If they say none, the statement is incorrect. We always have lights out. The lights were out that night. I don't know when they were put out. The steamer could not see."

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In another part of the evidence it was stated that she passed first astern of the schooner, and then after going some little distance rounded to, and crossed the schooner's bows, and then must have seen the lights.

"Then she whistled and brought her to, and ordered her to send a boat on board. They were out when she crossed ahead of us if not before. It was just getting dark then in that latitude. It was in the month of July."

(Another witness places the time of the *Yakout's* hailing at half an hour earlier, viz.: 10.30.) No further cross-examination thereon was made or any contrary evidence adduced, and the explanation of how the *Yakout* did not see the lights at first was quite probable and satisfactory—and the statement that the schooner was without lights was disproved.

As to the number of seal-skins. This was stated in the protocol as sixty-eight, but the evidence goes to show that the Russian officer who was searching the vessel did not count the skins or the number of them. He was told that only forty-six had been caught, and those he did examine were salted and dried and old, and he made no note of what was told him while on the schooner, and when called on for the number on coming on board, no doubt by mistake, put sixty-eight. He had been informed that none had been caught within the prohibited limits or since the 16th July, when there was no question that the *Ainoko* was well without the zone round Copper Island. Against this conclusion was adduced the endorsement put by Capt. Heater in his own handwriting on the back of the protocol: "Only 46 seal-skins taken on this coast, having 68 on board, some taken on way over, George Heater, Master," and construed as a distinct admission in writing on a document which he knew was "the paper which was to go against him," and formed an admission which he could not now contradict, and

was cited as an indication that his other evidence was not to be relied upon.

But I do not so view it, but consider that his explanation was true and satisfactory.

He knew that none had been taken within the limits and that the only skins taken were, on the 12th July one; on the 13th, ten; on the 14th, five; on the 16th, thirty. In all forty-six, and every one taken well outside the limit created by the Act. Capt. Bissett proved that the weather for the five days was not fit for hunting seals and that he put no boat down. They could not therefore hunt. The only short attempt to do so on the 18th was abortive.

The reason Capt. Heater gives for making that note on the back of the protocol respecting the number of skins was, that he thought it just possible that as the Russian officer reported they had searched and found sixty-eight skins, the Indians might possibly have concealed twenty-two in some place he had no knowledge of; if so, being anxious to assure the Russian commander, as the truth and fact was, that the vessel had not taken a single skin within the proscribed limits, and on the supposition that they had found the extra twenty-two, desired to note that they could only have been taken on the way up the coast, and before the forty-six (of the taking of every one of which he swore to the date) were obtained. The Russian officer did not want him to write anything at all on the back of the protocol, and in the hurry and confusion of the arrest, being as we see, however good and honest a sailor, a very poor scribe, he put it down as we find it. Had he put, "If there are sixty-eight on board, some must have been taken on the way over," he would have been exactly right; and not a word could have been said. And that I think is the true and simple explanation and does not really affect his credibility.

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As to the change from Yokohama to Victoria, it is observable that the section of the Act on that point which makes him as well as the owner each finable in £100 (which in this instance has not been asked) contemplates also a possible change of direction under circumstances easily conceivable, though it retains his liability in all other respects. In this instance the real reason, no doubt, is given. The Indians would not allow him to carry them to Yokohama. They were fifteen to four, carried knives and were experts in the use of arms, and spoke a language they only understood, and which favoured secret combination. Capt. Clarence Cox tells us they never go or will go to Yokohama, and gives one instance within his knowledge, where they took the command of a vessel and forced her back to their homes; and the Hesquiot Indians, as we know by experience in this court in the case of *The Queen* v. *Anaytsachist* when I was attorney-general, are a bold and daring race if their blood is once aroused and their fears excited lest they should not be able to return home. It is impossible not to consider that under the circumstances Capt. Heater did what was most prudent and even necessary for their safety, although there was and is a competent court for the purpose of trying the case at Yokohama as well as at Victoria.

From the frank and courteous manner in which the *Yakout* conducted the seizure, it is not too much to infer that had they anticipated the danger which afterwards arose from the Indians in ordering the vessel to Yokohama, they might have insisted on Capt. Heater bringing his schooner to this port. Capt. Heater, under the circumstances, was amply justified in the course he took in this particular; and I am of opinion he could not, with safety, have adopted any other course.

The Act itself does not confine the direction to proceed to one particular port for adjudication. The

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words in sec. 2 are directory "may direct the ship by an addition to the provisional certificate, or to the endorsement, to proceed forthwith to a specified port" (the real condition of this part of the section is contained in the words following) "being a port where there is a British court having authority to adjudicate in the matter"—a condition which Victoria fulfils. Yokohama is not named in the Act, though it is quite within its purview. The breach of the direction is punishable by a heavy fine, £100—$500 *each*, on the owner and master, who would not without pressing necessity incur such a penalty. The payment of this fine for such a change of direction is without prejudice to any other liability, such, for instance, as the liability of the ship and her equipment to forfeiture in case it should be so adjudicated. And I am clearly of opinion that it is within the intent and meaning of this portion of the Act, that in case of some emergency, such as stress of weather, danger to life or to the ship, or other circumstances of equal importance arising, beyond the master's control, good faith would still be kept with the Russian authorities by taking her to some attainable British port, having a court with the indispensable requisite, the jurisdiction to adjudicate in the matter.

The plaintiff's counsel suggested that Yokohama was probably the most desirable port for the Russian authorities for collection of evidence; but experience hitherto has not shown that, and in this case all the evidence was on the *Ainoko* and *Yakout*. The witnesses were within their reach, open to them for examination right on the spot (under sec. 2, sub-sec. 2 of the Act), which would have made their examination evidence, when embodied in or annexed to the protocol; and the officers spoke excellent English.

Two cases, one under this Act, that of the *Maud S.* (decided in an able judgment by the court at Yokohama) and that of the *Oscar & Hattie*, (1) decided here

(1) 3 Ex. C. R. 241.

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under the *Seal Fishery (Behring Sea) Act*, 1893, were referred to —but the circumstances of each of these cases were different in several respects from the present one ; and, as the learned counsel for the plaintiff justly observed, each case must be tried on its own merits.

We may gather from the reported statements of the officers seizing and searching the *Ainoko*, that they quite recognized the stress of weather, inability to take observations for determining position, which have been sworn to, and the unsuspected current forcing them silently towards Copper Island, as the real causes of the vessel being within the zone prohibited by the Act. They leave it indeed to us to infer that they base the report of the commission and the subsequent decision of the captain of the *Yakout*, to which the report forms the preamble, upon sec. 9 of His Imperial Russian Majesty's Government's "Instructions" (an instrument which, with any explanation of its purport or importance was not laid before the court) for they make no specific mention of our Sealing Act or order in council in the protocol ; although for the purpose of seizure, search and sending the *Ainoko* for adjudication they use the powers these enactments confer—but they base *their* decision of seizure expressly on the reason of her (the *Ainoko*) being found within the limits of "territorial waters." And when Capt. Heater is sent away he is directed to leave, without delay, the limits of the "territorial waters," and not the limit of the thirty mile zone prohibited only to British subjects by the British Act and order in council of 1893.

I only note this to show that the court acts and decides in the present case solely and exclusively under the provisions of those two enactments, and recognizes them, as interpreted by the law, as the sole guide, upon the evidence adduced, to its decision.

I have entered into the particulars of this case at considerable length because of the issues involved,

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and the numerous points which have arisen during the trial. Upon a careful consideration of all the circumstances of the case, I am of opinion that the master, of whose truthfulness I have no doubt, has given an honest account of the matter, and that he was under a *bonâ fide* mistake in his calculations, as to his real position on, at least, the last four days before the seizure ; and that this mistake was owing to the continued stress of heavy weather, and the unsuspected influence of a heavy current setting him on to the south end of Copper Island ; and this was the reason, and none other, of his involuntary presence within the prohibited zone, and that he did not discover or had not the means of discovering his mistake, until he caught a glimpse of the land on the 22nd ; and that such a *bonâ fide* mistake is not in the law a contravention of the Act. Also that immediately on making this discovery he wore round and made all sail out of the prohibited waters, and had seven hours battling with the wind and sea in order to get out when he was overhauled by the *Yakout*.

The several questions of lights, number of skins on board, dropping a boat on the 18th for a couple of hours to seal, and the change of route to Victoria were all satisfactorily explained. I am, therefore, of opinion on a full review of the facts, and a proper construction of the law applicable thereto, that neither Capt. Heater nor the *Ainoko* was, according to the true meaning of the Act, within the prohibited zone, sealing or attempting to seal, or otherwise there in contravention of the Act. I, therefore, pronounce in favour of the ship and dismiss the action, and order that each party do pay their own costs.

Judgment accordingly.

Solicitor for plaintiff : *H. D. Helmcken.*

Solicitor for ship : *C. E. Pooley.*

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Jan. 19.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

J. O. DUNSMUIR.....PLAINTIFF;

AGAINST

THE SHIP *HAROLD*.

Maritime law—Agreement to tow—Suppressio veri by person making agreement on behalf of ship in distress, effect of—Quantum meruit.

A ship, having been stranded, was set afloat again by her crew. She was leaking badly when boarded by the master of a tug who made an offer to the mate of the ship to tow her into port for a specified sum. In making this offer to the mate the master of the tug was under the impression that the former was the captain of the ship, and in accepting the offer, without authority therefor, the mate allowed himself to be addressed and treated as such by the master of the tug. Apart from this *suppressio veri* on the part of the mate he did not, although he was aware of it, disclose the dangerous condition of the ship at the time of entering into the towage agreement.

Held, that the agreement was void, and that the tug was entitled to be remunerated upon a *quantum meruit* for extraordinary towage services.

THIS was an action for salvage.

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

December 28th, 1893.

The case came on for trial at Victoria, B.C., before the Honourable Mr. Justice Crease, Deputy Local Judge for the Admiralty District of British Columbia; Captain Hughes-Hallett, R.N. and Lieutenant Blair, R. N. sitting with him as Nautical Assessors.

E. V. Bodwell, for the plaintiff;

P. Æ. Irving, for the ship.

CREASE, D. L. J., now (January 19th, 1894), delivered judgment.

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There was a great deal of irrelevant evidence taken which has to be disregarded in coming to a decision on the facts.

For instance, it is immaterial to the issue how the accident happened, except so far as it forms part of the *res gestæ* and helps to explain or measure the extent of the damage thereby occasioned, and the nature and value of the services rendered, for which compensation is sought.

The claim for salvage arose out of the following circumstances:

At a quarter past four in the afternoon of the 15th November, 1893, the *Lorne*, a powerful and efficient steam-tug belonging to the plaintiff,—Locke, master,—hailed the *Harold*, a ship of 1299 tons—King, master,—well found in every respect, built of steel, with steel masts, and thoroughly sound, as she was entering the Strait of San Juan de Fuca, by Cape Flattery, carrying with her a strong breeze and flood tide, on her way to Esquimalt.

The *Lorne* offered her a tow to the Royal Roads, an anchorage outside of Esquimalt Harbour.

This offer, under the circumstances, Captain King was quite justified in declining.

As the breeze slackened the *Lorne* followed her in; and, proceeding between the Race Rocks and the land, anchored for the night inshore, between the Race Rocks and Albert Head.

On looking out before dawn in the morning of the 16th, the *Harold* was descried from the *Lorne*, in by no means a safe position near the Race Rocks Lighthouse.

The tug steamed up to the Race, and around it, as it was dark, to get a better view of the ship and her condition, and observed all her sails clewed up and the ship apparently in an eddy, near the lighthouse,

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with rocks on three sides of her, with no headway, but in deep water, and no wind to speak of. She made no signal to the *Lorne* requiring any assistance, so, as it was still dark, the captain of the *Lorne* prudently resolved not to risk his ship, which was deep in the water, among strong tides on each side of the lighthouse and dangerous rocks; and so, 'lay to' till morning.

About 6 a.m. on the 16th when there was more light, he went up and hailed the ship; and seeing her in such a position, asked "if she had been ashore"? "A. Yes." "Q. Any damages"? "A. Don't know."

He then went on board and saluting two officers on the poop, "good morning gentlemen"—asked for the captain. One of these, the second mate, in reply pointed to the first mate, who, Captain Locke says, answered, "I am the captain," but the mate states that he added the words "for the time being" but even if he did the addition is immaterial, inasmuch as then, and all the time afterwards, Captain Locke regarded, dealt with, and treated, him, and was treated by the mate, in all respects as if he were the Captain of the ship, until their arrival in Esquimalt, when on Locke addressing him as 'captain,' he found it necessary to disabuse him by informing him, "I am not the captain."

In the further conversation which occurred between them, at the time of making the tow, and which I give somewhat *in extenso*, as it is around the circumstances of this contract that the chief interest of the case centres and radiates:—

Captain Locke said: "Do you want a tow"? A. Yes; what, will you tow me for"? "Are you leaking"? To which the mate replied "O, well there may be a little trickling in." "I have'nt noticed anything yet." To which Locke responded "all right" and

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agreed to tow to Esquimalt for $50 and a promise of inside towage. To this specific statement, under a long, trying and severe cross-examination, Captain Locke from first to last substantially adhered.

The first mate, with the rest of defendant's witnesses from the ship, who, be it remembered, must, however unconsciously, have been influenced by the fact that they were going home in the *Harold* again, under the command of the same officers in whose favour they were now called upon to testify (and, a captain while at sea, is an absolute, almost irresponsible autocrat) were present in the court during the examination and cross-examination of the plaintiff's witnesses and heard some of the arguments of counsel, before they themselves were called to the stand.

When put in the box, the first mate wished to convey the impression that he told Capt. Locke that the ship was "making water slowly," an expression which, while it appears to mean the same thing as "trickling in," conveys to a sailor's mind a very different idea of the quantity of water flowing in, and the consequent extent of injury incurred by the ship.

As an instance of this, when Captain Locke, on boarding the *Harold* in Esquimalt, and looking down the forehatch saw a great quantity of water there, he went in alarm direct to the first mate, whom he believed to be the captain, and exclaimed, "Captain! your ship is making water."

The first mate in his evidence, besides erring in the statement that the ship was only half an hour on the rocks, whereas she was distinctly proved to have hung there more than three hours, was an adept at picking words, e. g. He "called the captain," which for a moment was taken in its common sense, like calling a man to take his turn on deck—but by an accidental further question, turned out to mean, called

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him, but could not make him hear; the fact being he could not wake him.

The second mate who was standing by the first mate and Capt. Locke during the conversation on the poop when arranging for the tow, confirms the words of the contract—but does not, although asked, confirm the expression—"making water slowly" which, if used at such a crisis, must have struck him.

Looking at, and as a jury weighing all the evidence, the whole of which I have gone over with great care, and, after considering all attendant circumstances on both sides, and the manner of the several witnesses, including that of the first mate, I am convinced that Captain Locke's version of this part of the evidence is the correct one.

He looked around the decks and saw no water from the pumps, the hatches were all on, as far as he could see, and consequently thought the ship *was* all right.

He could not possibly know that there were, at that very moment, in the ship 14 inches of water amidships, and 6 inches over the ceiling in the forehatch—of which the first mate (Gill) to whom the soundings of the pumps were regularly reported by Anderson, the carpenter, was perfectly well aware.

That was the suppression of an important fact which, I think, according to *Akerblom* v. *Price*, (1) materially affected the contract entered into with the tug, the purport of which I have already given.

Now Dr. Lushington, in the *Kingalock* judgment (2) lays down a rule which may be well applied here, whereby to ascertain the chief ingredients of a valid agreement.

He says:

An agreement to bind two parties must be made with a free knowledge of all the facts necessary to be known by both parties; and if

(1) 7 Q. B. D. 129. (2) 1 Spks. p. 265.

any fact, which, if known, could have any operation on the agreement is kept back, or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary in order to vitiate an agreement that there should be moral fraud; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance, if there should be misapprehension, accidently or by carelessness. We all know that there may be what in the eye of the law, is termed "Equitable fraud."

The real captain of the ship, Capt. King, within a quarter of an hour after the ship struck and appeared resting quietly on the rock, after giving orders to clew up everything, and sound the pumps—which gave first nothing, then 2 inches, then 4—overcome with the fatigue of a stay on deck on his feet, from 5 a.m. on the previous morning to that time, acting on a frame enfeebled by a severe illness from which he had been for some time in hospital—and other causes, which need not here be further referred to—went below for a short nap; but soon fell into a dead sleep from which he could not easily be awakened. So that he was unable to take an active part in the working or management of the ship; or appear on deck until she got into port—though, the mate says, he awoke sufficiently to suggest and sanction the contract, to the extent of $100. But he could not possibly have been cognizant, in the state of illness in which he then was, of the surrounding details.

At 7.20 a.m., on the 16th, the tug put her hawser on board the ship and commenced the towage—and anchored in Esquimalt at 8.30 a.m.

The ship also anchored there at the same time, Capt. Locke, going on board, looked down the forehatch and seeing the water and being much alarmed sought out the mate at breakfast with the officers, and addressing him still as "captain," said "Captain, your ship is making water."

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The first mate then for the first time told him—"I am not the captain." Thereupon Captain Locke answered, "Oh, this is all false representation made then." That statement is borne out by the evidence of the second mate, one Rowland Brooks, whose manner of delivering his evidence inspired confidence. He stated that Capt. Locke said on coming into the mess-room, "This appears to be a case of misrepresentation all round,"—then asked to see the captain, and after Locke waiting some length of time, he did see him on the poop.

There is considerable conflict of evidence on both sides, as to what was stated then and there, on the ship; but Capt. Locke swears positively that he overheard the first mate, for whom, it is in evidence, Capt. King had sent, ask what the bargain was?—as if he had never heard of it before—and was answered, $50, which Capt. Locke swears he then and there repudiated. Be that as it may, there is no doubt he repudiated it to the captain himself, on the ground of misrepresentation, in the cabin of the *Lorne* when they went up directly after, on the same morning, to the ship's agents, at Victoria. to make arrangements for towing the *Harold* into dock.

During the conversation in the cabin of the *Lorne* on the way up, upon the repudiation of the $50 contract (on the ground of misrepresentation by the mate that he was captain) and the concealment of the real state of the water in the ship, and the consequent injury they had sustained, Capt. King says that Capt. Locke offered to compromise matters for $1,000, of which he offered him $500 for himself if he would agree to it, and that he indignantly repelled it—concluding with the words—"a bargain is a bargain"—alluding to the $50, and that he repeated this to another gentleman shortly afterwards.

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But of this conversation Capt. Locke, in his evidence, taken before Capt. King's, and which Capt. King heard before he gave his own evidence—gives a very different version :—

I invited the captain into my room, says Capt. Locke. I was washing myself, and I said, captain you understand that I repudiate this bargain ; but I think that you could settle it at our office—meaning Dunsmuir & Sons—for about a thousand dollars. He hesitated a little, and I said : "Do you want anything yourself"? The reason I asked him that, I might state (this reason he was not allowed to give, as not part of the conversation itself and not evidence). Capt. King said : "No ; he could not do it ; that a bargain was a bargain," to which Locke answered "all right," and no further conversation on the the subject ensued.

Capt. Locke in cross examination distinctly denied King's version ; and as there was no other witness on the point the rule of law in such cases is *detur pro neganti*.

But there are several considerations which make it probable that Capt. King was mistaken in a very material portion of his allegation. Capt. King denies, and the captain of the tug as strongly avers, that he spoke of referring the settlement of the difficulty to his owners, where it is needless to say, how, with honourable men like his employers, such a proposition as that laid to his charge, would have been received. The preposterous amount of the alleged bribe, $500 out of $1,000, is itself an argument against it. There would have been no way of passing so shameful an account ; and it could not have been concealed. The state of Capt. King's health and nervous system at that period, and his confessedly defective memory, to say the least of it, add to the probability of a misapprehension of any specific proposition having been made in the manner alleged ; and the fact that confessedly he did not immediately report such an extraordinary proposal to his ship's agent, Mr. Robert Ward, who receiv-

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him with the highest consideration and sympathy, and with whom he was on terms of the greatest confidence, runs strongly in the same direction. There was every reason why he should have instantly told it to so earnest and powerful a friend, and none, that I can think of, against it—and not have waited until he had told this tale to a comparative stranger—and so felt compelled to mention it to so sympathetic a friend as the ship's agent.

All things considered, I think there was such an antecedent improbability about such a proposal, as, in the face of Capt. Locke's emphatic denial and explanation under oath, would require a great deal of specific evidence to surmount, and none such was even attempted.

Such a practice as that suggested cannot be too strongly reprobated, and that this comment is called for, though it has no bearing on the decision of the present case, is clear; for it was stated by a most trustworthy and respectable witness who had been in Victoria for thirty years, and engaged in seafaring matters nearly the whole of that time,—that he had been told of a captain of a steamer handing back part of the towage charge to the master of the tow; and had seen several cases of that kind. Capt. King himself also stated that he had had frequent offers of that kind made to him. If such a mode of defrauding owners should grow into a custom, it would be one more honoured in the breach than in the observance.

But to return to the condition of the ship—

When she reached Esquimalt she had three feet six inches in the forehatch and twenty-two inches of water in the main pump.

Up to that time there had been no pumping, and the towing had increased the pressure and presumably

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the water, and so possibly would sailing in have done by increasing the speed and consequent pressure.

Before leaving the ship to go to Victoria, the *Harold* was seven inches by the head, and though she had been ballasted level, she had then a slight list to port. When the captain returned from Victoria to the ship "there was a good lot of water in the forehold."

While he was away, at half-past nine a.m., the crew had manned the pumps and continued pumping till 1 p.m., but the water still gained on them. The pumps were double and in good condition and working order, and capable, both together, of throwing twenty tons of water an hour. Yet the list to port steadily increased.

Admiral Stephenson kindly lent from the *Royal Arthur* a relief party of his men to assist the *Harold* generally, heaving the anchor and getting the ship into the dock. Lending also a steam pumping machine to help in getting the water out.

With the aid of the dockyard appliances and men, and particularly with his own crew, the captain succeeded, on the morning of the 17th, in placing the *Harold* on an even keel on the blocks, and to facilitate the exit of the water, had some of the rivets knocked out of the bottom of the ship, but not before she had got a list; and heeled over to an angle of thirty-two and this in spite of the fact that a double gang of men from the shore had been pumping all night; this angle of list having also prevented one of the pumps from sucking water for a considerable time.

As to the injury to the ship, the evidence of Captain Clarke, Lloyd's surveyor, who twice surveyed her in dock, shewed that she had suffered a great deal of damage on the outside, "quite a number of plates" having been injured. When the ballast was removed and the ceiling lifted, so that the damage could be plainly observed from the inside—it was seen that one

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plate in particular (she was a steel built ship) on the starboard side, about abreast of the forepart of the main hatch, "had quite a slit in it—one could see the Dry-dock through it." It was split about seven or eight inches long; and there was "a punctured hole" in it, made when the ship settled down on the rock, through which the water had flowed.

There were quite a number of steel plates to come off on the port side, and quite a number of garboards —and part of the stem was turned around.

Mr. Thompson, Inspector of Machinery, who also inspected the ship, but only after the four rivets had been knocked out of the bottom of the ship, found two on the port, and two on the starboard side; out of which he saw the water was coming in a solid stream.

He could not say for how long before he saw them the rivets had been knocked out, and this stream of water flowing out of them.

They were knocked out in the next tier below the "punctured hole" in the bottom, but, as the ship was practically level, he considered it was probably at the same level; and as there was at that moment no water coming out of the hole itself—the hole being by some means blocked—it could only have been that the water had been coming in at some other point. There is no doubt, from the evidence, that the whole time she was afloat, the water was coming into the ship in large quantities; and, in spite of the vigorous pumping, I have described, had so increased as ultimately, in about some thirty odd hours, to give her a list to the dangerous point of thirty-two degrees.

He considered that in six hours, from what he called that "punctured hole" alone, and irrespective of any other weak places in the ship, with *both pumps going all the time and drawing*, she would have made one hundred and fifty-seven tons of water. There was no estimate

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of the quantity of water which had got into the fore compartment where the forepart had been damaged— nor as to what quantity of water had got into the ship by the plates damaged (and afterwards replaced) on the port side. And no reason whatever could be assigned for her list to port, which shewed itself directly she got into harbour, nor for her being seven inches down by the head at that time, *unless the water got in forward.*

And as to the list—it is in evidence, that once started, it would go on increasing, in a gradually accelerated ratio, the deeper she got in the water, and as the consequent pressure from the outside increased.

Mr. Robert Ward, the agent of the ship, in his evidence, pointed out that when he inspected her bottom, there was kelp in the hole, and this was confirmed by another witness; and counsel suggested that kelp must have blocked the hole as she slipped off the rock into a mass of it, and must have so blocked it not only while in dock but also while she was afloat, and so lessened the risk.

But if that be so—and it is very probable—then, as it is beyond a doubt that the water was coming in all the time, it must of necessity have come in at other points of the hull, which makes the damage to the ship all the greater.

Having thus reviewed, as far as the space of a judgment will allow, the leading evidence in the case, the whole of which I have gone over with the greatest care, and used in forming my opinion, there only remains to draw from it the deductions which the law, as fairly, though not completely, laid down by the learned counsel for the ship directs, and to ascertain the conclusions of the court on the following points.

1. Was the $50 contract a complete and binding one on the tug as an ordinary towage contract?

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2. Was the service rendered by the tug a purely salvage service, or not ?

3. Was the ship in danger of loss, if left to her own resources ?

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4. If not, what was the service rendered and was it beyond an ordinary towage service. If so, what was its value ?

On the first point, I don't think there can be any reasonable doubt; for I find, that the contract was made by the first mate, who represented himself as the captain at the time and allowed himself to be called and treated in all respects as the captain of the ship and in all respects conducted himself as the captain until, when so addressed in Esquimalt harbour, he was obliged to undeceive the master of the tug. Capt. Locke was not till then aware who the captain of the ship really was. The mate did not declare the authority, which he says he had from the real captain, or the fact of his existence; and purposely concealed a most material fact from the master of the tug, viz., that he had in the main hold at that very time, which he must have known, eighteen inches of water in the well and six inches over the ceiling forward. As a jury, I have no doubt that the statement of the master of the *Lorne* on that point, was substantially correct.

And apart from that, I have little doubt that, had Capt. Locke known that fact, he would never have towed her in for $50.

The contingent inside towage fell with it. King also, if in his condition, he, with any clearness knew, even approximately, the full position, (and this as a jury, I am by no means satisfied he did know) went as high as $100 for the job, with other contingent inside towage —an amount (if $50 was, as stated in evidence, the fair and ordinary price for that distance) which showed that Capt. King, even from his cabin, and ill as he

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was, considered the service was worth more than double the ordinary rate.

I am, therefore, clearly of opinion, and find, that the contract was not a binding one, and must be treated as null and void.

The second point—Was the service rendered to the *Harold* a purely salvage one? I find must be answered in the negative; and for the following reasons:

(And here it must be remembered that I base all my reasoning and conclusions throughout this judgment, on the position of, and circumstances which surrounded, the *Harold* at the time the tug took her in tow, and not on anything that happened before that).

In the first place the *Lorne* ran no risk or danger in order to assist the ship. That course was prudent and in his (Capt. Locke's) judgment, which I do not impugn, necessary with a ship too deep in the water, to go in, in the night among a cluster of rocks. But he can base no claim for salvage or extra reward on the score of having incurred any risk or danger on her behalf.

Now, I will suppose, for it is necessary to do so, that she had not taken the tug; but had trusted only to her sails and seamanship.

If, in such a case it had been found that there was any probability of the *Harold* being again placed in a position of danger by the ebb tide, she could have anchored anywhere, although the chart shows forty fathoms thereabouts, and the tide runs strong. And it is proved beyond a peradventure that all her tackle, cables, anchor and every other part of her equipment, were in perfect order, and the crew well in hand and presumably willing.

She was, when taken in tow, in a position of safety, with a prospect of fine weather and a hope of a breeze.

She was then making water it is true, but not, com-

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paratively speaking, fast; with no immediate prospect that the leak would materially increase, unless she went fast through the water under sail. But then she would be getting nearer, perhaps into, port.

What light air there was, was in a favourable direction.

She was in the flood stream, which, even in the event of no wind, would have set her in the direction of Esquimalt—at least somewhere near to Albert Head within a few miles of Esquimalt, from where it sets off, partly towards Esquimalt but mainly towards the Bell buoy, to the eastward—when she could have anchored during the short ebb and taken her chance of getting into Esquimalt.

The crew, when once the alarm and confusion on getting on the rock was over, was well under command of the first and second mates.

Under these circumstances, no one in charge of the *Harold* would have been justified in employing a tug at a purely salvage rate of payment.

On the third point. Was the ship then in danger of loss (that is, of being lost) if left to her own resources by the tug?

Of course, at sea, as most unexpectedly befell the *Harold* in this very case—it is frequently that the unexpected does happen. But in answering this question, I am obliged to answer it, according to the reasonable probabilities, as they appeared—from the evidence—at the time.

I do not think that the services of the *Lorne* saved the *Harold* from loss. There is evidence which attributes a sudden, large and somewhat dangerous, influx of water which took place after being taken in tow, but not with certainty, to the increased pressure caused by her being towed by a vessel lower than herself, in the water; and though this increase of danger

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according to the cases, is not to be attributed to the tug towing—as she did here—in the ordinary course of her duty, as a fault, or a reason for diminishing her remuneration, still, towing at eight knots an hour had its natural effect in creating a certain danger of its own. It forced the kelp, then partially blocking up the principal leak, right through the hole and up against the ceiling, where it remained acting as a non-return valve, allowing the water to flow in freely until the ship was docked, when, the pressure being removed, it was forced back into the hold, preventing the water from coming out, even though there were four rivet holes in the same, or next, tier of the bottom, out of which the water had an unrestricted flow.

From the nature and position of the leak, this danger could have been minimized where there was no tug; because it could have been to some extent choked, after ascertaining the position, with a sail or thrum mat in case she was making water too quickly for their pumps. That would have prevented the danger of loss.

And this brings me to the last point: what was the service rendered, and what should be its remuneration?

I need not say how deeply I am indebted to the valuable assistance of the Assessors, who have throughout furnished me with the results of their nautical experience, and the suggestions they have so cheerfully afforded, in a somewhat difficult case, on nautical points whenever the occasion required.

In estimating the service actually rendered by the tug, and in weighing the varying evidence taken on the point, it is impossible to forget the position of the ship and the injury and damage which actual experience proved she had received. These remained the same whether she was towed in by the tug or came in under sail. All the observations I have made

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in considering previous special points, have assumed, as it was a calm day, every reasonable condition which could be thought of in favour of the ship, and I have the advantage of being fairly well able to do so, after the event.

But at the time of taking her in tow, which I have adopted exclusively, in a salvage case, as the proper legal point of departure for my consideration, it is impossible in dealing with so mutable an element as the sea, and particularly at this stormy season of the year, not to be conscious that great and pressing danger to the ship might at any moment have arisen, when the men would either have been obliged to neglect the sails in order to work the pumps, or neglect the pumps, as they did when they slipped off the rock, to work the yards.

As I have stated, the ship at the time of taking the tug was not in actual danger; although she did subsequently appear in danger, it was not immediate, nor was it such that the crew, provided they had their hands free to do so, could not have somewhat reduced it, even if they could not keep it under. The ship, however, was not in a seaworthy state after having been on the rocks, from the damage to her bottom, although this was not apparent at the time.

It is true that under the circumstances of wind, weather, tide and the like, under which the services of the *Lorne* were rendered, she could not be said to have saved the *Harold* from being lost, yet the fact remains, that the services of the *Lorne*, rendered when they were, removed any possibility or probability of loss; and, from a calm setting in, were of considerable value to the *Harold* in bringing her at once into a place absolutely safe, whatever might occur; and which she could not have gained, in a reasonable time without risk by her own resources.

This, in my opinion as a jury, constituted a service of more than ordinary towage.

The decision of the Court of Appeal in *Akerblom* v. *Price* (1) is a good guide in arriving at a correct conclusion here; for that applies to a case where those who represented the ship in making the towage contract did not disclose to the other party material facts affecting the danger of the ship, or the danger or difficulty of the required service, in view of which, it would be, in the language of the same judgment "manifestly unfair and unjust" to expect the performance of the service to be undertaken for remuneration at a mere towage rate.

And that is certainly the case here. I have found that the towage contract in this case was void for misrepresentation and the concealment of a material fact affecting the safety of the ship—the concealment of the large quantity of water then in the ship—and, consequently of the extent of the injury and damage, so far as then known which the ship must necessarily have sustained; and there being no contract for such towage, I am of opinion that a fair and moderate amount of remuneration for an extraordinary towage, adapted to the facts of the case as proved in evidence, should be paid to the tug for the service rendered. The circumstances of no two of the various cases reported, which I have examined, exactly agree. It is therefore the duty of the court, acting upon the principles laid down most nearly suited to the circumstances, and the benefit rendered in this particular case, to apportion the sum allowed to the benefit rendered to the particular ship, as in justice and good conscience is right and equitable.

After much and careful consideration and having regard to the rates in common use and the unusual cir-

(1) 7 Q.B.D. at p. 133.

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cumstances of the case before me for decision, I have fixed upon the sum of $250 as the amount of the remuneration to be paid to the *Lorne* for the whole of her services to the *Harold* (inclusive of all towage) on the present occasion; and as the difficulty and consequent expense incurred arose entirely by the default of one of the officers of the *Harold*, the ship should also pay the costs of the action.

I pronounce therefore and adjudge that the *Harold* do pay to the plaintiffs $250, and costs to be taxed.

It is satisfactory to be able to add that the Nautical Assessors who sat with me and who gave so much attention to the case, concur in the judgment now rendered.

Judgment accordingly.

Solicitor for plaintiff: *C. E. Pooley.*

Solicitor for the ship: *P. Æ. Irving.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

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Oct. 10.

WILLIAM CURTIS WARD AND FREDERICK PEMBERTON..... } PLAINTIFFS;

AGAINST

THE SHIP *YOSEMITE*.

Maritime law—Collision—Burden of proof—Mutual negligence, effect of—Mortgagee's right of action.

Where a collision occurs between a moving vessel and one lying at anchor, the burden of proof is upon the moving vessel to show that such collision was not attributable to her negligence.

The *Annot Lyle* (11 P.D. 114) referred to.

2. Where a collision is attributable to negligence on the part of both vessels, the loss must be equally apportioned between them notwithstanding the fact that the negligence of one contributed to the accident in a greater degree than that of the other.

3. The mortgagee in possession may maintain an action for damages arising out of a collision.

THIS was an action for damages by collision.

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

July 10th, 1894.

The case came on for trial at Victoria, B.C., before the Honourable Mr. Justice Crease, Deputy Local Judge for the Admiralty District of British Columbia; Commander Blair, R.N., and Lieutenant Moggridge, R.N., sat with him as Nautical Assessors.

A. L. Belyea, for the plaintiffs.

P. Æ. Irving, for the *Yosemite*.

CREASE, D.L.J. now (October 10th, 1894) delivered judgment.

This was an action for damages by collision of the steamer *Yosemite* with the tug-boat *Vancouver*, a little

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after two o'clock in the morning of the 15th of May 1893, in Miner's Bay, Mayne Island, Plumper's (or Active) Pass.

The *Vancouver* was lying at anchor with a scow laden with iron moored to her, about a hundred yards from the shore, and I am disposed to think, some three hundred yards from the wharf.

The *Yosemite*, a very long, fast paddle wheel steamer, when she ran into the *Vancouver*, was swinging round E. by N. to S., for the purpose of landing at the wharf.

A very dangerous thing to do at night in a narrow pass, full of tide rips, and varying currents at the best of times, and especially so with an unaccustomed captain and an unaccustomed ship.

The night was clear overhead, but dark from the reflection of the trees along the shore, especially under the high ground inshore; in the shadow of which, both ships were at the time of the accident.

The tide was about three quarter flood, and the evidence on both sides showed that the *Yosemite* struck the *Vancouver* on the port quarter, a few feet from the stern, nearly immediately over the propeller, cut through her guard, and considerably damaged her.

The defence was, that the *Vancouver* was anchored in the fairway and carried a dim light, not a proper shipping light, at her masthead—kept no look out either on the steamer or on the schooner *Bonanza* which was fastened to her.

On the opening of the case, a contention arose between the parties to determine upon whom the *onus* of commencing should fall.

The court decided that from the facts disclosed in the Preliminary Acts, assuming the plaintiffs' right to sue, the burden was on the defendant to show that it was no fault of his, and upon the following authorities:

Marsden on Collisions (1) lays it down that as soon as plaintiff has made out a *primâ facie* case of negligence on the part of the defendant, the *onus* is shifted, and the defendant will be liable unless he proves that his negligence in no way contributed to the loss.

It is notably the case in collision actions where certain inferences of fact have been established by numerous cases, they become to a great extent of the same authority as if they were propositions of law. In support of this position the following authorities were cited:—In the *Batavia* (2) Dr. Lushington, in his judgment, declared it to be a presumption of law, that the *onus* was on a vessel underweigh to show that the collision occurred by no negligence of hers. A vessel at anchor cannot get out of the way. The *onus* is on the vessel doing the damage, whether the injured vessel is well or ill anchored. The same in *The Victoria* (3), although the vessel was lying in a track frequented by other ships. In all cases, the *onus probandi* is on the vessel which comes into contact with another vessel which is stationary and helpless.

Lord Chancellor Herschell in *The Annot Lyle* (1) (Esher and Frye, L. JJ., concurring) placed the *onus* on the vessel in motion.

Mr. *Irving*, for defendant, contended, on the authority of *The Telegraph*, (5) that as the collision took place at night, and the *Vancouver* was not well lighted, the vessel at anchor should prove she was properly lighted and anchored. She ought not to have been moored at the entrance of the port, except from necessity, and from the long delay in bringing the action on a collision which occurred fourteen months ago, the *onus* ought to be on the *Vancouver*. It was the com-

(1) 3rd Ed. p. 31.
(2) 2 Wm. Rob. 407.
(3) 3 Wm. Rob. 49.
(4) 11 Prob. Div. 114.
(5) 1 Spks. 427; and Pritch. Ad. D. 290.

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plainant's delay (*vide* the *John Brotheric*) (1) and he should therefore have the *onus* thrust upon him.

The court decided that the plaintiffs should first prove property, that is, prove their right to sue, and then the *onus probandi* would be shifted upon the *Yosemite* to discharge the presumption of her negligence being the cause of the injury.

To prove property and the right to sue, one of the plaintiffs, Frederick Pemberton, testified that he and William Curtis Ward, his co-plaintiff, are the executors of the will of the late Joseph Despard Pemberton, the mortgagee of the *Vancouver*, probate of which was granted to them on 27th December, 1893.

The *Vancouver* was registered at New Westminster in the name of Robert Couth, as owner.

The register of course is not evidence of title.

On the 10th September, 1889, the *Vancouver* was mortgaged by the owner to the late Joseph Despard Pemberton, before the present action was brought. It was intended that the action should have been brought before, but on the 11th November, 1893, the said mortgagee suddenly died, and probate was not granted until the 27th December, 1893, the requirements of the new Act respecting succession duties requiring time for their fulfilment.

The mortgage was produced, and it was shown that money was still due to the mortgagees on that mortgage.

The mortgagees took possession of the *Vancouver* on the 1st July, 1892, and she has been in their possession ever since.

The mortgagees had agreed to insure the vessel for $2,600, but had originally insured for more. They had the bill of sale from Henderson to Cook.

The certificate of registration from the Custom House, at New Westminster, was produced, dated the

(1) 8 Jur. 276.

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2nd March, 1893. On it was an endorsement of Greenleaf, as Master, dated the 18th March, 1893, by Peter Grant, the then acting registrar. This endorsement was afterwards cancelled, as he turned out to be an American citizen—*but that took place after the collision*—and that charge consequently has no bearing on the present case.

The appointment of Greenleaf as Master was made through the instrumentality of the mortgagees.

The plaintiffs do not sue as registered owners; the registered owner (Couth) cannot be found.

They sue as mortgagees in possession under an unsatisfied mortgage. The plaintiff Pemberton, besides being executor, was partner with his father, the late Joseph Despard Pemberton, when this business and mortgage were transacted, and it was all done as part of the firm business.

The authorities which support this proposition are as follows:

Dicey on Parties to Actions (1) lays down the rule that any person entitled to a reversionary interest in goods is entitled to bring an action for their possession.

There are other authorities:

Dickenson v. *Kitchen.* (2)

Keith v. *Burrows* (3), where the mortgagor remains in possession until the mortgagee takes possession, then, in right of that, the latter becomes the owner. (4)

In *Mears* v. *London & South Western Railway Co.* (5), where a barge let out for hire was damaged, the owner was held to have the right to maintain an action for permanent damage.

European and Australian R'way Mail Co. v. *Royal Mail Steam Packet Co.* (6). This was a very full case, and

(1) Am. Ed. 388.
(2) 8 El. and B. 789.
(3) 2 App. Cas. 646.
(4) *Ibid.* see Lord Cairn's judgment.
(5) 11 C. B. N. S. 850.
(6) 30 L. J. C. P. 247.

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established that mortgagees in possession are equivalent to owners.

On the other side, Mr. *Irving* quoted section 70 of *The Merchant Shipping Act* 1854. The corresponding section to which in the Canadian Statute is section 36, Cap. 72, Revised Statutes of Canada, as expressly declaring that the mortgagee shall not, by reason of his mortgage, be deemed to be the owner of the ship, and cited *Simpson* v. *Thompson* (1) in support.

There, the underwriters contended they had a right to maintain an action for damages in their own name, in respect of goods insured in the ship. But there was no possession before she was lost—no possessory right. The cases are not parallel, and the difference makes a very wide distinction. He cited also the *Ilos* (2) a case of collision. There, George Tanner, up to a late period of the case, appeared as registered owner. The ship was condemned, and reference for the amount of damages after decree was ordered.

The real owner, one Redway, afterwards turned up. Dr. Lushington refused to substitute the beneficial owner as he had already decreed in favour of the registered owner, but directed the amount to be paid into the registry, and threw on the party claiming it the *onus* of establishing his ownership.

To this argument, rather implied than direct, of defendants' counsel, plaintiff gave a complete reply drawn from *Dickerson* v. *Kitchen*, followed in *The Feronia* (3). There the limited construction and true meaning to be placed on section 70, of *The Merchant Shipping Act*, repeated in our own statute, section 36, was clearly brought out.

(1) 3 App. Cas. 279. (2) Swab. 100.
(3) 2 L. R. A. & E. 65.

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The latter was a suit, by a master who was also part owner, against ship and freight for wages and disbursements.

The master's maritime lien on these was deemed to be in priority to the claims of the mortgagees in possession, and not affected by his being part owner.

And the reason why the master's maritime lien was preferred to the mortgage, was that the maritime lien does not require possession to make it good. The rights of the mortgagee must be made good, or better, by possession. Those two cases established that rule.

And the endorsement of the mortgage is not on the certificate of registry, for the simple reason that when the mortgagee has once taken possession, registration becomes immaterial.

Keith v. *Burrows* (1) establishes the point that an unregistered mortgage passes the ownership on the mortgagee taking possession (subject of course to the equity).

Non constat, but that there may be another registered mortgagee in existence. The register itself has not been produced, but that consideration does not affect the plaintiffs' right to sue as they are first mortgagees and in possession.

The proof of the registration of their mortgage is certified on the mortgage itself, and it is in evidence that it was registered on the 19th September, 1889, as avouched by the signature of George C. Clute, the registrar of shipping.

Influenced by these considerations, the court determined that the plaintiffs had clearly established their right to sue for the damage occasioned to the *Vancouver*, and that the *onus* was thereby cast on the *Yosemite* to satisfy the court that she was not at fault in the collision which took place between them.

(1) 1 C. P. D. 722.

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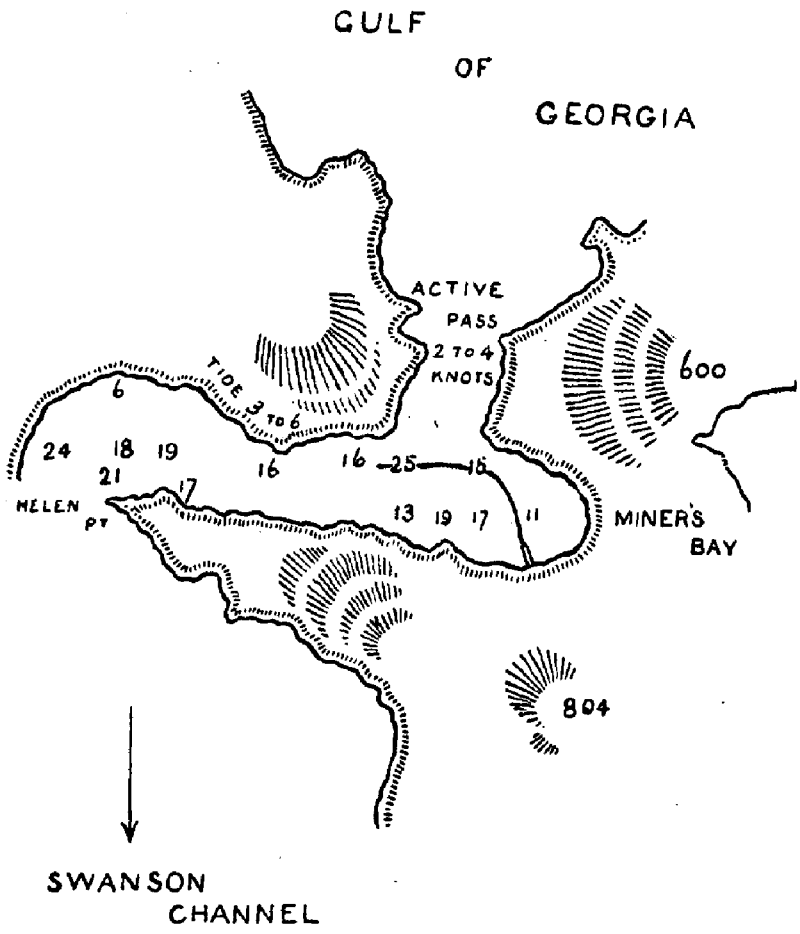
Thereupon numerous witnesses were examined on both sides; and, as usual, in collision and running down cases, there was a considerable conflict of testimony.

The relative position and distances of the vessels from each other, from the shore, and from the wharf, before, and at the collision, were carefully gone into. The state of the tide, and the existence or non existence (for, two witnesses, a father and daughter, residing near, attempted to prove a negative) at the critical time, of the lights which vessels are required by law to exhibit at night, the pilotage regulations, and all the other incidents which might be naturally expected to accompany collisions at night, close in shore, in a locality where the currents are strong and variable, were detailed at great length by the numerous witnesses who were examined on both sides.

In the discussions on these subjects, and the elucidation of the several points as they arose, and the nautical deductions to be drawn from them, I have to acknowledge the great assistance I have derived from the Nautical Assessors, who aided the court during the trial with their ready and valuable experience and suggestions.

All the maps, pilotage regulations and authorities on the various points which arose during a lengthened trial were carefully examined and applied: and it is satisfactory to add that the final conclusions at which the court arrived, after the different views of the Nautical Assessors had been fairly heard and weighed, met with their concurrence.

To understand these conclusions, it is necessary to have some idea of the locality of Plumper's or Active Pass and its waters generally, and then of Miner's Bay—the part of it in which the collision occurred—as shown by the following sketch:



Active Pass is a narrow and tortuous passage through which, on the flood, the waters of the East Coast of Vancouver Island rush and whirl, as one witness expressed it, to join the waters of the Gulf of Georgia.

Captain, afterwards Admiral, Richards, the Admiralty Hydrographer, who, with his officers, spent many years here, from 1858 onward, in surveying the coast of the Island, and the Main, embodied the results of these in the *British Columbia Pilot*, 1888.

This work, which is now before me, on page 284 says :

Active Pass takes an E. N. E. direction for 1½ miles, and then turns N. for the same distance fairly into the Straits of Georgia.

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The average breadth of the channel is about ⅛ of a mile, and its general depth about 20 fathoms. There are no hidden dangers with the exception of a small rock off Laurel point, &c.

The great strength of the tides, together with the absence of steady winds, renders it unfit for sailing vessels, unless indeed, they be small coasters.

MINER'S BAY, on the south side of Active Pass, where it takes the sharp turn to the northward, affords anchorage, if necessary : but a vessel must go close in to get 12 fathoms ; and then it is barely out of the whirl of the tide.

The *Vancouver* was anchored in from ten to twelve fathoms, and was therefore "close in shore" and certainly not in the "fairway" or ordinary passage-way of ships to the wharf, as suggested by the defendants.

If she had been, it would have been the *Yosemite's* duty, if practicable, to have steered clear of her.

The flood tide in Active Pass sets from west to east : or from the Swanson Channel to the Straits of Georgia.

Velocity, &c., sometimes 7 knots, at ordinary tides from 3 to 5, &c. It is recommended to pass *through in mid channel; no favourable eddy or less strength of tide will be found on either side, unless inside the kelp which lines the shore.*

[This is full notice to the *Yosemite* of the strength of the tide at all times and throughout the Pass, except inside the kelp.]

It is high water full to change at 4 h. a.m. which is one hour later than at Port Townsend Admiralty Inlet (1886.)

Such were the waters into which, on that Sunday night, the *Yosemite*, emerging from the Swanson Channel, steamed from Victoria intending to land at the Miner's Bay wharf, a not very pretending wooden structure, down at the bottom of Miner's Bay.

Captain Roberts was totally unaccustomed to the *Yosemite*, whose usual pace is fourteen knots, but of her exact speed at such a conjuncture, none but an experienced master, like her regular master Captain Rudlin, or one equally accustomed to her, could be sure. It

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appears that, when under weigh, she slips through the water like a knife.

The evidence of the then master, Captain Roberts, shows she is very long, some 280 feet—draws very little water—is 39 feet broad—her side lights were 40 to 50 feet apart—she takes 300 yards at least to swing—he could not say at what distance from the wharf the *Yosemite* was when he began to swing. As an instance of unconscious speed, and how he overshot the mark in swinging round to the wharf, the captain says, "I had to *go back to get into the line of the wharf.*" If the *Yosemite* had swung a few feet further round, she would have been clear of the *Vancouver* he thought; could not say how far the *Vancouver* was from the land when he struck her, as he had never anchored there. It was his first trip in the *Yosemite*. He made another collision, the same day, at the entrance of the Fraser River. At the time of the collision, now under inquiry, there was little wind, and a slack flood tide (the general evidence, made it about ¾ flood)—he saw the light of the *Vancouver*—it was a dim light, and not what he called a light, at all—a small lantern, all smoked up—small lantern of some sort, "when I backed off, it seemed like a light in the trees—as high as a man's head."

The lantern in its existing state was produced and examined by the court and Assessors, and compared with one which Captain Roberts considered a proper light, under the rules. Did not report the accident on Sunday evening; not until Tuesday.

When asked for entries in the log, the captain said he had done so; but there was no official log kept in the steamer. The entries he made, on that day, were on paper. These original papers were destroyed. The entries that he did make were copies from slips of paper, into a small book, after he got down to his office.

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This small book was produced but, under the circumstances, is of no authority here.

The mate did not notice any light on the steamer at the time of striking. Asked why—replied "his" attention was drawn "otherwise." At the wharf he says he did not notice the light on the *Vancouver*, and, "could not say whether he looked for it or not."

To the Assessors. Q. "After the engines stopped, how long did she run?

"A. Half a mile."

She was going about 2½ miles an hour, when she struck. The mate adds, "the engines were backed and stopped, and she was going astern when we struck the *Vancouver*." [The engineer's evidence differs from this, and he had charge of the handles.] "As to the wharf—it is a very hard wharf to make."

"Under any circumstances, that night, I would not have gone inside the *Vancouver*," and that shows how close she was anchored to the shore.

The quarter master of the *Yosemite*, Charles Douglass Clarke, who appeared to be a straight-forward witness, and gave his evidence carefully, but without any appearance of undue restraint—was in the wheel house—which is 20 to 25 feet above the level of the water (the windows being open)—up to the time of the collision,—stated:—

> I saw two lights on the wharf, and a light I supposed to be on shore, I could not say if the same was the *Vancouver*'s light, but the *Vancouver*'s light loomed up a little later.
>
> When we saw the light we ported the helm (which was already ported) still more. * *
>
> We were 300 or 400 yards away then, (speaking of the time of the collision) from the wharf.
>
> The *Vancouver* was lying in the gloom of the land.

Captain Greenleaf of the *Vancouver* described her position as from 450 to 500 yards from the wharf, and 100 yards from the shore.

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Mr. Robson's house (which was about in a line with the position of the *Vancouver* and the *Bonanza* as seen from the western entrance of the Pass) was three hundred and fifty yards off and on the land.

Clarke, in one part of his evidence, says that "on making the entrance of the Pass we saw the light, and mistook it for Robson's, a light, which was kept burning all that Sunday night, in a window in his boarding-house, as a guide to the lodgers, the window being screened only by lace curtains.

The damage caused by the *Yosemite* was not made the subject of much inquiry; as that was acknowledged by both sides as a suitable object for subsequent reference and inquiry before the Registrar, as a matter of detail.

Upon a careful review and consideration of the whole evidence, I have come to the following conclusions:—

The collision was almost entirely due to the *Yosemite*, a long paddle-wheel vessel, being handled at night in close waters, and with strong and variable tides running at the time of the collision.

The "Pacific Coast Tide Tables" show that, on the 15th of May, 1893, the date of the collision, the tide was still flowing and running to the North-eastward. All this, the *Yosemite* was bound to have considered.

This is not the only misapprehension of Captain Roberts. He gives the speed, at the time of the collision, at two and one half knots. Several considerations, from the facts, show that it must have been much more than that.

The engineer says that the engines were practically never stopped, that the "backing" bell was rung immediately after the "stopping" bell; and the captain in his conclusions must have overlooked two well-known peculiarities of paddle-wheel ships.

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1. That on stopping the engines, the vessel very soon loses all her way, and that then :—

2. The helm has little or no effect on her when stopped.

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Now, no captain would allow his ship to become unmanageable in such a place as the Active Pass, therefore, with her own speed, for she is a fast vessel, and the flood tide under her, she must have approached the *Vancouver* very rapidly, and, though it may have been necessary, and I can easily conceive it was so, to keep that speed for the proper handling of the ship, still, a steamer coming into an anchorage, fast, does so with the *onus* on her of keeping clear of every vessel in that anchorage.

And, until they came upon the *Vancouver*, they do not seem to have thought that the Robson light (seen on entering the Pass) might have been the light of a vessel at anchor. If so, the Robson light was certainly not an aid to mariners.

Much was said about the light of the *Vancouver* not being of the regulation size, and capable of throwing a light the full regulation distance, and that, not fulfilling that requirement, it was legally, "no light at all." Probably that was what Captain Roberts meant when he used the expression.

But the *Vancouver's* light, though not of the regulation size, would, from its construction (Dioptrical), more than make up in brilliancy what it lacked in diameter, and, even, if indifferently trimmed would meet the requirements of the Board of Trade, as regards visibility.

Considerable stress was laid by counsel for the defendants on the *Vancouver* being in the fairway; but I am satisfied and find that the *Vancouver* was not anchored in the fairway, but in a proper and suitable

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anchorage, and in a position where a ship entering the Pass might expect to find a vessel berthed.

I consider, too, that the *Vancouver* was also in a measure to blame; for, the weight of evidence goes to show that her light was burning dimly, and no proper look out was being kept. This was negligence on her part. But it was far and away overbalanced by the negligence, in which I include want of nautical skill, exhibited by the temporary captain of the *Yosemite*.

A question was raised as to whether there should not have been an anchor light on the tow *Bonanza* as well as on the *Vancouver*; but I have not thought it expedient to extract the evidence on that point, because the court is of opinion that not only was it not necessary for the tow to have an anchor light but that it would have been decidedly wrong if she had borne an anchor light, as well as the *Vancouver*.

Captain Greenleaf also thought that the *Yosemite* should have stood by the *Vancouver* after the collision; but I consider that under all the circumstances of danger around her, the *Yosemite* was quite right in going on to the wharf. Indeed, the captain of the *Vancouver* could hardly expect to be sent back at once to his ship when he had deserted her with such prompt alacrity upon the collision taking place.

These considerations may be condensed into the following conclusions:—

I consider that the *Yosemite* is principally to blame for the collision and damage which occurred.

But I also find that the *Vancouver* is also to blame in a smaller but yet distinct proportion for the collision and loss.

But the law, in such a case, where both vessels are at fault, as in this instance, is quite settled and undisputed, and the rule of Admiralty—is that if there is blame on

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both sides causing the loss, they are to divide the loss equally.

I pronounce, therefore, the collision to have been caused by both ships, and decree that the damages from such collision to the *Vancouver*, together with the costs of suit on both sides, be equally borne by both parties.

And that the amount of such damages be referred to the Registrar to ascertain the same, for the above purpose.

Solicitor for plaintiffs : *A. L. Belyea.*

Solicitor for the ship *Yosemite* : *P. Æ. Irving.*

ALEXANDER MacLEAN AND JOHN CHARLES ROGER. (MacLEAN, ROGER & CO.)..... } CLAIMANTS; 1894 Oct. 17.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Practice—Appeal by the Crown—Extension of time to appeal—Special grounds—50-51 *Vict. c.* 51.—53 *Vict. c.* 35.

Where an application was made by the Crown for an extension of time for leave to appeal a long time after the period prescribed therefor in section 51 of 50-51 Vict. c. 16 (as amended by 53 Vict. c. 35), had expired, and the material read in support of such application did not disclose any special grounds or reasons why an extension should be granted, the application was refused.

THIS was an application for an extension of time for leave to appeal to the Supreme Court of Canada.

On the 30th May, 1890, a judgment of the court was granted by consent and arrangement of the parties to give effect to an agreement for the submission of certain matters in dispute between the parties to arbitration which had become impossible to be carried out. By the submission, and by the judgment, the contract and the several breaches thereof set up by the claimants were apparently admitted, and the only question which it was proposed to refer to special referees of the court was that of the amount of damages resulting from such breaches. The reference was proceeded with, and the referees made a report with respect to the damages to which the claimants were entitled but without fixing an amount. This report, against which both parties appealed was subsequently confirmed by the court, and the amount for which judgment should be entered was ascertained by an accountant to be $24,090.82. On the 23rd day of April, 1894, on motion

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made by the claimants, judgment was rendered for that amount.

April 30th, 1894.

Argument of Counsel.

Hogg, Q.C., for the Crown, took out a summons for an order to extend the time within which to appeal from both the consent judgment of the 29th May, 1890, and the judgment pronounced herein on the 23rd April, 1894.

May 1st, 1894.

An order extending the time to appeal from the judgment herein of 23rd April, 1894, was made on this date by consent of parties. The motion for an order extending the time for appealing from the judgment of the 29th May, 1890, was allowed to stand over pending negotiations for a settlement which eventually fell through.

September 17th, 1894.

The motion for an extension of time to appeal from the last mentioned judgment now came on to be argued.

Hogg, Q.C., in support of the motion, read the following affidavit:—

"I, William Drummond Hogg, of the City of Ottawa, in the County of Carleton, Barrister-at-law, make oath and say:

"1. That I have acted as solicitor and counsel in this action on behalf of the respondent.

"2. The judgment pronounced herein on the 29th day of May, 1890, referred the claims of the claimants to three referees to ascertain the damages suffered by them by reason of the alleged breaches of the contracts in the pleadings mentioned.

"3. The final judgment herein was pronounced in this court on the 23rd day of April instant, and the

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Argument of Counsel.

Crown is now desirous of appealing from the said judgments to the Supreme Court of Canada.

"Sworn, etc.

(Sgd.) "W. D. HOGG."

He also cited the following authorities: *The Queen* v. *Clark* (1); *Annual Practice* 1893-94 (2).

Gormully, Q.C., *contra*, read the following affidavit:—

"I, Robert Victor Sinclair, of the City of Ottawa, in the County of Carleton, in the Province of Ontario, Esquire, make oath and say:

"1. I am a partner in the firm of Gormully & Sinclair, the solicitors for the claimants herein.

"2. The matters in question in this suit were referred to arbitration by Deed of Submission dated the twenty-eighth day of March, A.D. 1890, a copy of which said deed is set out in the decree herein dated the twenty-ninth day of May, A.D. 1890.

"3. After the arbitration proceedings had gone on for some time and a large amount of expense had been incurred therein the said decree for reasons appearing in same was pronounced by this court on the twenty-ninth day of May, A.D. 1890, all parties consenting thereto as appears upon its face.

"4. No special circumstances are alleged or shown whereon to justify the present application for an extension of time to appeal from said decree.

"5. Since the pronouncing of said decree a very long and expensive reference before referees, the costs of which will amount to several thousand dollars, has been proceeded with and continued to completion.

"6. The respondent appealed to this court from the report of the said referees herein, and on the ninth day of April, A.D. 1894, by a judgment of this court the report of said referees was confirmed.

(1) 21 Can. S. C. R. 656. (2) pp. 63, 210, 211.

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"On the twenty-third day of April, A.D. 1894, on motion for judgment, judgment was given in favour of the claimants for the amount found due by the said referees' report.

"8. On the eleventh day of September, A.D. 1894, notice was served on the claimants by the respondent that an appeal had been taken to the Supreme Court of Canada, a copy of which notice is hereunto annexed.

"9. In January, A.D. 1893, the claimants relying on the finality of the said decree of the twenty-ninth day of May, A.D. 1890, obtained on the faith thereof certain advances from the Bank of Montreal, giving to said bank as collateral security for their then indebtedness and said advances an equitable charge on the moneys that might thereafter become payable to claimants by the respondent under said decree, which said charge is still in full force and virtue.

"Sworn, etc.

(Sgd.) "R. V. SINCLAIR."

He referred to the following authorities: *Seton on Decrees* (1); *Moss* v. *Leatham* (2); *Annual Practice* 1893-94 (3).

Hogg, Q.C. replied.

THE JUDGE OF THE EXCHEQUER COURT now (October 17th, 1894) delivered judgment.

I think, so far as this is an application for an extension of time in which to prosecute an appeal from the judgment herein of the 29th May, 1890, that I should refuse it.

In respect to the judgment of the 23rd April, 1894, an order has been made and the appeal, I understand, is being prosecuted, so I have nothing to do with it at present.

(1) pp. 111, 732.

(2) 2 Moo. P. C. 73.

(3) p. 1023.

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With reference to the judgment of the 29th May, 1890, I express no opinion as to whether or not an appeal would lie because it was a judgment by consent of parties. I do not think that is directly involved in the question now before me, and I treat the matter as though it were a case in which an appeal would lie. I refuse the application simply upon the ground that no special circumstances are shown to exist, or any reason given for the extension of time asked for, and such an extension should not be granted unless special circumstances are shown to exist. Upon reference to the affidavit read in support of the application I find it merely states that judgment was delivered on a certain date (29th May, 1890), and that the Crown is desirous of appealing therefrom. That much might be urged in any case, and if allowed to be sufficient it would be difficult to suggest a case in which the limitation in the statute should be observed. Then, I think, there are special circumstances shown in the affidavit read in answer to the motion which make against extending the time. In this connection I think it is a matter to be considered that the judgment was a judgment by consent, arrived at entirely by arrangement between the parties; and so far as it was a final judgment the claimants are now, I think, entitled to the benefit of it.

The application to extend the time to appeal from the judgment pronounced herein on the 29th May, 1890, is refused with costs.

Judgment accordingly.

Solicitors for claimants: *Gormully & Sinclair.*

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

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THE TORONTO RAILWAY CO.....PLAINTIFFS;

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Customs-duties—Importation of steel rails for street railways—Tariff Act, 50-51 Vict. c. 39, items 88 and 173—Construction.

The word "railway" as used in (free) item 173 of the Tariff Act of 1887, 50-51 Vict. c. 39, does not include street railways.

2. In construing a revenue Act regard should be had to the general fiscal policy of the country at the time the Act was passed. When that is a matter of history reference must be had to the sources of such history, which are not only to be found in the Acts of Parliament, but in the proceedings of Parliament, and in the debates and discussions which take place there and elsewhere. This is a different matter from construing a particular clause or provision of the Act by reference to the intention of the mover or promoter of it expressed while the Bill or the resolution on which it was founded was before the House, which cannot be done under the rules which govern the construction of statutes.

THIS was a claim for the return of moneys alleged to have been improperly paid for customs-duties.

The case was heard at Toronto on the 19th and 20th of April, 1894.

C. Robinson, Q.C., for the plaintiffs:

The question here is: What is the meaning of the term railways as used in the statute 50-51 Vict. c. 39? To answer that question we must have reference to the statutes *in pari materia*. We have to trace the legislation on this subject throughout, and see the change of language which has been adopted by the legislature, and then see if it is possible to assign to that change of language any other meaning and intention than the meaning and intention which the plaintiffs claim will admit their rails free of duty. (He here discusses the legislation on the subject in question from 1879 until the Act 50-51 Vict. c. 39).

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Argument of Counsel.

It is a principle of construction that a change of language imports, *primâ facie*, a change of intention. The legislature showed in 1885 and 1886 that when they wished to exclude street rails from the free list they knew how to do it, using the appropriate expressions; they did it specifically. Why did they drop that exclusion altogether? Why did they omit from the statute governing this case any exclusion of street rails from the free list? If the legislature here intended to continue the exclusion of street rails from the free list, why did they not use the same words they had previously used in two successive Acts for that purpose, words which could have left no doubt? It must be inferred that their intention was to make these rails free.

(He cites *Elmes on Customs Laws* (1); *United States* v. 200 *chests of tea* (2); *Hardcastle on Statutes* (3); *Bell and the Master in Equity* (4); *Maxwell on Statutes* (5); *Endlich on Statutes* (6); *Aerated Bread Company* v. *Gregg* (7); *Doughty* v. *Firbank* (8); *Swansea Improvements Co.* v. *Swansea Urban Sanitary Authority* (9); *MacFarlane* v. *Gilmour* (10); *Ex parte Zebley* (11); *Gyger* v. *Philadelphia City Passenger Ry. Co.* (12); *Hestonville Passenger Ry. Co.* v. *City of Philadelphia* (13); *Millvale Burough* v. *Evergreen Railway Co.* (14); *Pennsylvania Railroad Co.* v. *Pittsburgh* (15); *Lumley* v. *Guy* (16).

B. B. Osler, Q.C., followed for the plaintiffs. He cited *Nix* v. *Hedden* (17); *Conmee* v. *Canadian Pacific Railway* (unreported).

(1) Sec. 880.
(2) 9 Wheat. 430.
(3) 2d ed. p. 93.
(4) 2 App. Cas. 565.
(5) P. 394.
(6) Pp. 382 to 385.
(7) L. R. 8 Q. B. 355.
(8) 10 Q. B. D. 358.
(9) [1892] 1 Q. B. 357.
(10) 5 Ont. R. 302.
(11) 30 N. B. R. 130.
(12) 136 Penn. 96.
(13) 89 Penn. 219.
(14) 131 Penn 1.
(15) 104 Penn. 529.
(16) 2 El. & Bl. 216.
(17) 39 Fed. Rep. 109.

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Argument of Counsel.

F. E. Hodgins, for the defendant:

The plaintiffs are estopped by their sworn entries at the Customs from denying the correctness of such entries now. In the affidavits it is stated that the descriptions of the goods in the invoices are correct.

The Customs Act (1), secs. 13, 35, 58 and 63, requires that the invoices should correctly state the description of the goods imported, and the court must be influenced in its construction of the Act by the terms used by the manufacturer or exporter of the goods in question. (He cites *United States* v. *Sarchet* (2); *Ross* v. *Fuller* (3); *Elmes on Customs Laws* (4).

But apart from this, the statute will in no way permit entry of these rails free of duty. The plaintiffs, to bring themselves within the free entry item 173, must clearly show that these are rails for railway tracks such as are contemplated by that section. Due consideration must be given to the fact that the duty item stands first in the statute. The duty is there clearly and expressly imposed. It is quite certain that were it not for the words, "not elsewhere specified" the duty so imposed would cover the rails in question here. Then in the free list the admission of rails thereunder is limited to those for use in railway tracks. [THE JUDGE OF THE EXCHEQUER COURT: You say the effect of these two things is to get rid, on your part, of the rule that requires a tax to be imposed by clear words. To state your proposition in another form, you say the court has to construe not the positive enactment but the exception, and it is for the plaintiffs to bring themselves within the exception?] Yes, my lord; and the authorities sustain the position I take. (He cites *Hogg* v. *The Parochial Board* (5); *Elmes on*

(1) R. S. C. c. 32.
(2) Gilp. 273.
(3) 17 Fed. Rep. 224.
(4) P. 24.
(5) 7 Rettie's Rep. 986.

Customs Laws (1); *Phillips on Tramways* (2); *Clarke on Tramways* (2); *Roberts and Wallace on Employers* (4); *Spens and Younger on Employers* (5); *Wood on Railways* (6); *Re Brentford & Islesworth Tramway Company* (7); *Swansea Improvement Company's Case* (8); *Louisville Railway Company* v. *The Louisville City Railway Company* (9); *Clement* v. *The City of Cincinnati* (10); *Williams* v. *The City Electric Ry.* (11): *Matson* v. *Baird* (12); *Doughty* v. *Firbank* (13); *The Birmingham Mineral Railway Co.* v. *Jacobs* (14); *Commonwealth* v. *Central Passenger Railway Co.* (15).

Then, in order to find the intention of Parliament in regard to the exclusion of rails such as these in question from free importation under item 173 of the Tariff Act, I refer the attention of the court to a statement made by the Finance Minister, during the passage of the free item through the House, to the effect that "tramway" was intended to include "street railway." (He cites on this point *Hardcastle on Statutes* (16); *Reg.* v. *Bishop of Oxford* (17); *South Eastern Railway Co.* v. *The Railway Commissioners* (18); *Best on Evidence* (19); *Taylor on Evidence* (20); *Brant* v. *Midland Railway Co.*(21); *Hill* v. *East and West India Dock Co.* (22); *Smiles* v. *Belford* (23); *Roots* v. *Snelling* (24); *Mersey Docks* v. *Lucas* (25); *Mayor of Southport* v *Morris* (26); *Woodward* v. *London & North Western Railway*

(1) Sec. 880.
(2) P. 2.
(3) Pp. 4, 5, 6, 7 and 15.
(4) P. 289.
(5) P. 248.
(6) P. 1.
(7) 26 Ch. D. 527.
(8) [1892] 1 Q. B. 357.
(9) 2 Duv. 175.
(10) 16 W. L. Bull. 355.
(11) 41 Fed. Rep. 556.
(12) 3 App. Cas. 1082.
(13) 48 L. T. 530.
(14) 92 Ala. 187.
(15) 52 Penn. 506.
(16) P. 143.
(17) 4 Q. B. D. 525.
(18) 5 Q. B. D. 236.
(19) 7th ed. 231.
(20) 8th ed. 61.
(21) 2 H. & P. 89.
(22) 9 App. Cas. 448.
(23) 1 Ont. App. 436.
(24) 48 L. T. 216.
(25) 8 App. Cas. 902.
(26) [1893] 1 Q. B. 359.

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Co. (1); *South Eastern Railway* v. *Railway Commissioners* (2); *Hickman* v. *Birch* (3); *The Dunelm* (4); *Wandsworth* v. *The United Telephone Company* (5); *Fleming* v. *The Toronto Street Railway* (6).

C. Robinson, Q.C., replied. (He cited *The Queen* v. *The Bishop of Oxford* (7); *South Eastern Railway* v. *Railway Commissioners* (8); *Julius* v. *Bishop of Oxford* (9); *Rankin* v. *Lamont* (10); *Bray* v. *Justices of Lancashire* (11); *Endlich on Statutes* (12); *Sutherland on Statutory Construction* (13); *Warrington* v. *Furbor* (14); *The Queen* v. *The J. C. Ayer Co.* (15).

THE JUDGE OF THE EXCHEQUER COURT now (October 29th, 1894) delivered judgment:

The plaintiff company operates a street railway in the city of Toronto. At different times in the years 1891, 1892 and 1893 it imported steel rails, weighing sixty-nine pounds per lineal yard, to be used in relaying and extending the tracks of its railway there. On such rails there was paid, under protest by the company, customs-duties amounting to some fifty-six thousand dollars, which it now seeks to recover from the Crown. During the years mentioned the Duties of Customs Amendment Act, 50-51 Vict. ch. 39 was in force. By the 88th item in the first section of that Act a duty of six dollars per ton was imposed upon "iron or steel railway bars and rails, for railways and tramways, of any form punched or not punched not elsewhere specified." By the second section of the

(1) 3 Exch. D. 121.
(2) 6 Q. B. D. 586.
(3) 24 Q. B. D. 172.
(4) 9 Prob. D. 171.
(5) 13 Q. B. D. 920.
(6) 37 U. C. Q. B. 116.
(7) 4 Q. B. D. 245, 525; 5 App. Cas. 214.
(8) 5 Q.B.D. 217; 6 Q.B.D. 586.
(9) 5 App. Cas. 214.
(10) 5 App. Cas. 44.
(11) 22 Q. B. D. 484; 8 App. Cas. 501.
(12) Pp. 41 and 479.
(13) P. 384.
(14) 8 East 242.
(15) 1 Ex. C. R. 270.

Act (item 173) "steel rails, weighing not less than twenty-five pounds per lineal yard, for use in railway tracks" were made free of duty, and the question to be answered is: Does the term "railway" in this clause include a street railway or not?

The first Act by which duties of Customs were imposed, passed after the Union, came into force on the 13th of December, 1867. From that date to March, 1879, "railway bars" were not dutiable (1). In the latter year an Act was passed to alter the duties of Customs and Excise (2), one object of which was, as every one knows, to afford a measure of protection to Canadian products and manufactures. By this Act a duty of fifteen per centum ad valorem was imposed upon "iron rails or railway bars for railways or tramways," and ten per centum ad valorem on steel "railway bars or rails" to be levied on and after the 1st of January, 1881 (3). The date upon which the duty would be leviable on steel railway bars or rails was extended from time to time (4) until 1883 when they were placed upon the free list (5). The only other change which it is material to notice occurs in the Act of 1885, when the item under which steel railway rails were admitted free of duty was so amended as to read as follows:—"Steel railway bars or rails not including tram or street rails (6)."

Now it is clear that the expression "railways and tramways" in the 88th item of 50-51 Vict. ch. 39, sec. 1, by which, as we have seen, a duty of six dollars per ton was imposed on iron and steel railway bars and rails not elsewhere specified, included street railways.

(1) 31 Vict. c. 7, Schedule C; and 31 Vict. c. 44, Schedule C.

(2) 42 Vict. c. 15.

(3) Acts of 1879 pp. 127, 133 and 141.

(4) Acts of 1880 pp. 64 and 66; 1881 pp. 67 and 69: 1882 pp. 69 and 70.

(5) Acts of 1883 p. 156.

(6) Acts of 1885 p. 148. See also R. S. C. c. 33, items 217 and 770.

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There may be a difference of opinion as to whether they were so included by force of the word "railways," or of the word "tramways"; but that they were covered by the language used was conceded by Mr. Robinson, and does not, I think, admit of any doubt. Steel rails for street railways were dutiable then at the rate of six dollars per ton unless they were in the Act elsewhere specified. It is contended for the plaintiff company that they were so specified in item 173 which makes free "steel rails," of not less than a given weight, "for use in railway tracks." It is obvious that under the amendment of 1885 rails for street railways were dutiable; but it is pointed out that apt words were then used to indicate the intention of the legislature. Steel railway bars or rails in the schedule of free goods were not, it was then provided, to include "tram or street rails." In the Act of 1887 these words were omitted, and it is argued that the change of language must be taken to import a change of intention on the part of the legislature, and that the only fair conclusion is that the word "railway" in item 173 of the Act of 1887 was used to denote railways generally, including of course street railways.

The terms "railway" and "railways" in their largest sense include no doubt all classes of railways. Commonly, however, they have a narrower signification, and if anyone desired to refer to a tramway or to a marine, ship, electric, street, or other railway, he would, I think, ordinarily use the word *tramway* or prefix the appropriate qualifying term. If he should use the word *railway* without any qualifying words or circumstances, he would, I think, be taken to mean one of the ordinary railways of the country which transport passengers and freight, and upon which, in general, locomotive engines have hitherto been in use. Not that the use of steam as a motive power is an

essential incident. Such railways would, I think, be railways in the same sense of the word, if electricity were substituted for steam. In the same way a street railway would be none the less a street railway although it should be operated by locomotive engines.

Confining the attention for the moment to the words used in the 88th and 173rd items of the Act of 1887, and reading the two items together, it would appear that the words "railways" and "railway" are not therein used in a sense large enough to include tramways. The use of the latter word in the 88th item would seem to make that tolerably clear. But what are the tramways that are not to be understood as being railways within the meaning of the clauses that have been cited? In England, the word "tramway" includes and is generally used to denote a street railway. It is of course a larger term. There are tramways which are not street railways, but all street railways are tramways within the meaning of that term as commonly used in that country. The word has also found its way into the French language, with, I think, substantially the same meaning (1). In Canada the word is sometimes, though not generally, used to designate a street railway. When so used no one has, I think, any difficulty in knowing what is meant, and among importers of rails there are, I should think, few if any persons who do not know that tramway rails include rails for street railways. It will have been observed, however, that in the Act of 1885, in the item under which "steel railway rails" were made free of duty, it was declared in terms that the expression should not include tram or street rails, using both words, the second of which was clearly

(1) Dictionnaire de Littré vo. *Tramway*:—Dictionnaire de l'Académie Française, 7ième edn., vo. *Tramway*:—Dictionnaire de Bescherelle, vo. *Tramway*.

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superfluous if the term "tram rails" included "street rails." But for that circumstance I should have thought that the word "tramways" in the 88th item of the Act of 1887 included, and that the word "railway" in the 173rd item did not include, a street railway. As the matter stands however, and if there were no legitimate aids to assist in discovering the intention of the legislature other than the language used in the Acts of 1885 and 1887, I should think the question to be, to say the least, so involved in doubt that the plantiffs should succeed in this action.

But there are other considerations that lead, it seems to me, to an opposite conclusion. Among such considerations I do not include, and I do not rely upon, what was said by the Minister of Finance, when in 1887 he moved the House into Committee of Ways and Means, or in the debates that occurred when the resolutions on which the Tariff Act of that year was founded, were before the Committee. I do not agree with Mr. Hodgins that that is permissible, except perhaps so far as the resolutions and the debate show, what may, I think, be gathered from the Act itself, that one object which the legislature had then in view, was to give a larger measure of protection to the production and manufacture in Canada of iron, and the products of iron. In construing a statute relating to the revenue, one must, I think, have regard to the general fiscal policy of the country at the time when the statute was enacted. That may be a matter of common knowledge, or of history; and if of history, he who seeks to know the truth must go to the sources of history, and they, so far as the fiscal policy of a country is concerned, are to be found not only in Acts of Parliament but in the proceedings of Parliament and in the debates and discussions that take place there and elsewhere. But that is a different matter from construing a particular

clause or provision of a statute by reference to the intention of the mover or promoter of it, expressed while the Bill or the resolution on which it is founded was before the House. The latter course is one which under the rules governing the construction of English statutes one may not adopt.

The primary object of an Act imposing duties of Customs is ordinarily, of course, to raise a revenue. But that was not, I think, the end which the legislature had principally in view in imposing a duty on railway rails whether of iron or steel. Its main object was apparently to encourage the production and manufacture in Canada of iron and steel. But a protective tariff is of necessity a complex affair. The finished product of one man's labour is the raw material which another uses in the industry in which he is engaged. A tariff in which the protection of the labour of the country is an element, must consist of a series of adjustments. To ascertain the particular adjustment aimed at will often afford a key to the construction of the language used in such a tariff. That is one thing. Then it happens sometimes that there are other interests to be guarded, or promoted, and here again there must be a compromise or an adjustment. For instance, during the time when what was called the national policy was being developed, there was in Canada great activity in the construction of railways, and that activity was stimulated by Parliament by large subsidies in money or grants of land or by both. I do not refer especially to the Canadian Pacific Railway, but to a great number of other railways. In the Act of 1882, authorizing such subsidies, we find the names of four lines of railway (45 Vict. c. 14) : in the Act of 1883, eleven (46 Vict. c. 25) : in the Act of 1884, twenty-five (47 Vict. c. 8) : in the Act of 1885, seventeen, (48-49 Vict. c. 59) : in the Act of 1886,

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thirty-one (49 Vict. c 10) : and in the Act of 1887, thirty-eight (50-51 Vict. c. 24). An examination of the several Acts will show, too, that the bounty of Parliament and the aids granted by it during the years mentioned, were not limited to railways and railway undertakings within its legislative authority. Railway companies incorporated by Acts of the several provinces were also the object of that bounty and received such aid in prosecuting the enterprises for which they were created. But it will be observed, and I think it is important to observe, that in no case was any aid given by Parliament to any street railway.

Coming back then to the 173rd item of the Act of 1887 respecting duties of Customs, let us see if, in the light of what has been said, it is possible to discover the intention of Parliament. In the first place rails to have been free of duty must have been made of steel. Iron rails were, and had since 1879 been dutiable. Then in the second place they must have weighed not less than twenty-five pounds per lineal yard. Why ? Because steel rails of a light weight were then being made in Canada, and Parliament desired to protect and foster that industry. But why make steel rails free at all ? Why not, as proposed in 1879, put a duty on them and encourage their manufacture in Canada ? Because at this point two policies came into conflict and Parliament did not wish to impose any such burdens upon those who were with its aid, constructing new railways, or without it maintaining or extending lines of railway already built. That consideration did not however apply to tramways or street railways. In the Act of 1885 they had been expressly excepted from the benefits arising from the importation of rails free of duty. The amendment of that year was intended, I think, to remove doubts that may have arisen as to the proper construction of the Act of

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1883. I do not think that the words "steel railway bars or rails" on the free list in the latter Act were intended to include steel rails for tramways or street railways. But doubts may have arisen and the Act of 1885 quieted them. I admit that when we come to the Act of 1887, a difficulty is created, and some doubt, by not continuing the very explicit and clear language of the Act of 1885. That, under the circumstances, does not appear to me to be conclusive, and I see no other indication of an intention on the part of Parliament in 1887 to alter its policy in the direction of enlarging the free list, and of making rails for use in street railway tracks free. On the contrary, the railways referred to in item 173 of the Act of that year were, it seems to me, railways of the same class as those which had hitherto been the objects of the care and bounty of Parliament; and street railways were not, it is clear, of that class.

I have been referred to a considerable number of authorities, which I have examined with some care, but there is nothing in any of them, I think, which stands in the way of arriving at the conclusion that I have stated. Possibly I should except the case of *Ex parte Zebley* (1). A majority of the Supreme Court of New Brunswick in that case, (Allen, C.J., Wetmore, Palmer and Fraser, JJ., Tuck, J. dissenting, and King, J. taking no part) held that The Saint John City Railway Company, which operates a street railway in that City, is a railway company within the meaning of the Act of the Assembly of that Province, 33 Vict. c. 46, and exempt from Municipal taxation under the provisions of that Act. That was not, I think, a stronger case than this, and it is the decision of a court to which every one, whether bound by its decisions or not, is ready to accord the highest respect and consid-

(1) 30 N. B. R. 120.

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eration. It is, therefore, with great deference to the opinion of the majority that I add that I think Mr. Justice Tuck, who dissented, presented the true view of the case. I do not see that any sufficient answer was given, or can be given, to the reasons stated by him for the conclusions to which he came.

Judgment for the defendant, with costs.

Solicitors for plaintiffs: *Kingsmill, Saunders, Symonds & Torrance.*

Solicitor for defendant: *F. E. Hodgins.*

ANGUS SINCLAIR AND WILLIAM DOHENY..... SUPPLIANTS; 1894 Oct. 29.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Customs-duties—R. S. C. c. 32 sec. 13—50-51 Vict. c. 39, items 88 and 173—Steel rails imported for temporary use during construction of railway—Rate of duty.

Steel rails weighing twenty-five pounds per lineal yard to be temporarily used for construction purposes on a railway and not intended to form any part of the permanent track cannot be imported free of duty under item 173 of The Tariff Act of 1887 (50-51 Vict. c. 39).

2. In virtue of clause 13 of *The Customs Act* (R. S. C. c. 32) the court held that such rails should pay duty at the same rate as tramway rails (under 50-51 Vict. c. 39 item 88) to which of all the enumerated articles in the Tariff they bore the strongest similitude or resemblance.

THIS was a petition of right for the return of certain moneys alleged to have been improperly paid in respect of customs-duties.

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

The case was heard at Montreal on 22nd March, 1894.

W. P. Sharpe for the suppliants;

W. D. Hogg, Q.C., for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (October 29th, 1894) delivered judgment.

The suppliants were contractors for the execution of certain works connected with the double tracking of a portion of the Grand Trunk Railway. To facilitate the work of widening the permanent way of that railway, they, from time to time, laid down alongside thereof a temporary track or way on which were

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hauled, with horses, cars loaded with material taken from the excavations. As one piece of work was finished the rails on such temporary track or way were taken up and used for a like purpose on another portion of the railway, and so on during the progress of the work. For the purpose of making these temporary tracks or ways, the suppliants, in the year 1891, imported a quantity of steel rails weighing twenty-five pounds per lineal yard. They were not intended for use in the permanent track or way of the Grand Trunk Railway or of any railway. They were too light in weight to be useful for that purpose, and they were in fact never so used. The suppliants, in the first instance, passed the rails through the Customs as being free of duty. Subsequently they were called upon to amend their entries and to pay duty. This they did under protest, and they now bring their petition to recover the amount of duties so paid ($1,276.87).

At the time of the importation the duty leviable on steel rails for railways and tramways was regulated by the Act 50-51 Vict. c. 39, to amend the Act respecting the duties of Customs. By the first section of the Act, item 88, a duty of six dollars per ton ad valorem was imposed upon "iron and steel railway bars and "rails for railways and tramways, of any form, punched "or not punched, not elsewhere specified"; and by the second section, item 173, it was provided that "steel "rails, weighing not less than twenty-five pounds per "lineal yard, for use in railway tracks" should be free of duty.

The question to be decided is:—Were the rails in question for use in the track of the Grand Trunk Railway? I am of opinion that they were not. This temporary track or way in which they were used may

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or may not have been a tramway. I express no opinion on that point; but it clearly was not a railway. It is equally clear that it formed no part of the permanent way owned by the Grand Trunk Railway Company. The company owned, I assume, the way on which the rails were by its license laid for a temporary purpose; but it had no right or interest in the rails, which remained the property of the suppliants, to be by them removed. The rails were undoubtedly imported to be used, and they were used, in the construction of a railway track in the same sense that the shovels and picks and other tools and appliances used by the men employed by the suppliants were so used, but they were not for use in the track either of the main line or the sidings of the railway. That was not either their immediate or ultimate destination.

There may be some question as to whether they were rails for a railway or tramway at all within the meaning of the 88th item referred to. If the words "for railways or tramways" in that provision are not merely descriptive, but indicate the use to which the rails are to be put after importation, there may be some doubt whether the rails in question were dutiable under that provision of the Act. That perhaps would depend upon the character of the temporary way laid down,—whether or not it was a tramway within the meaning of the Act. If not, then it might be that the rails were not dutiable under item 88, but under the clause prescribing the duty on unenumerated articles. The difference is not great, but such as it is it would be in favour of the suppliants.

I shall reserve leave to them to amend their Statement of Claim, and to move for judgment for such difference, the motion to be made within thirty days.

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If no such motion is made within that time there will be judgment for the respondent, with costs.*

Judgment accordingly.

Solicitor for suppliants :—*J. S Hall, jr.*

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

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* NOTE :—On the 28th November, 1894, the suppliants moved in pursuance of the leave reserved.

The following is a transcript of the stenographic report of the motion :

A. F. May in support of motion.

W. D. Hogg, Q.C., *contra*.

Mr. May: This is a motion to amend the petition of right under leave reserved in your lordship's judgment, and to move for judgment for the difference between the duty on the rails that were seized under item 88 of the Tariff Act and that which would be payable under the clause that prescribes the duty on unenumerated articles. I now move under the reserve.

(THE JUDGE OF THE EXCHEQUER COURT : What have you to say, Mr. Hogg ?)

Mr. Hogg: If I have the right to do so now, I would submit that under the similitude clause of *The Customs Act* (R. S.C. c. 32 s. 13) the similitude which these rails, looking at the use to which they were put, bear is that of tramway rails, but as your lordship has given judgment I don't suppose it is open for me to argue this point.

(THE JUDGE OF THE EXCHEQUER COURT : I have not given judgment upon the amendment. I have merely given leave to amend.)

Mr. May reads from concluding clauses of judgment : " I shall " reserve leave to them to amend " their Statement of Claim, and " to move for judgment for such " difference, the motion to be " made within thirty days.

" If no such motion is made " within that time there will be " judgment for the respondent, " with costs."

(THE JUDGE OF THE EXCHEQUER COURT : That only reserves leave to amend and to move for judgment. I did not give judgment on the amendment. The clause now referred to by Mr. Hogg was not relied upon at the trial. It is raised now for the first time).

Mr. Hogg : I submitted at the trial that it was a tramway, and still do so. It embraces all the elements of a tramway.

(THE JUDGE OF THE EXCHEQUER COURT : The suppliants claimed the rails were used for railway tracks. I was of opinion at the trial that they were not).

Mr. Hogg : The mere question of permanency cannot be taken into consideration here, because that would make against their character as a " railway " as well as against their character as a " tramway." The rails were never used for a railway in the proper sense of the term. They were used for the carriage of dumping

cars in construction work. They might have been here for one month and away the next week. But there is this to be said about their permanency that they were permanently used for tramways during the whole construction, in one place or another. It seems to me to be a case as near a tramway as you can get with the exception of permanency, and I submit under the similitude clause in *The Revised Statutes* (Clause 13 of *The Customs Act*) that as they could be used for tramway purposes they must be rated for duty in the same way that rails to which they bear the closest resemblance are rated. Your lordship in your judgment holds that whether it was a tramway or not would, perhaps, depend upon the character of the temporary way laid down. I was under the impression that all the elements of a tramway were there.

(THE JUDGE OF THE EXCHEQUER COURT: I did not intend by my judgment to express any opinion one way or another whether the duty had been properly levied or not.)

Mr. May: I submit to your lordship that the rails in question should not be charged for duty under the rate provided for tramways. These rails were moved about from place to place as they were required on construction, and were simply part of the contractor's tools or utensils. These parties were engaged in double-tracking the Grand Trunk Railway. In putting down these temporary double tracks they had no right to make a permanent way so far as we know, and it is fair to assume that they had no right to lay down a "tramway" as we understand it. They were not an incorporated company having power to do so. The rails should therefore be considered as contractor's tools such as derricks, &c.

(THE JUDGE OF THE EXCHEQUER COURT: But what do you say as to the clause of *The Customs Act* on which Mr. Hogg relies?)

Mr. May reads clause 13. "On "each and every non-enumerated "article which bears a similitude, "either in material or quality, or "the use to which it may be appli-"ed, to any enumerated article "chargeable with duty, the same "rate of duty shall be payable "which is charged on the enumer-"ated article which it most res-"embles in any of the particulars "before mentioned."

(THE JUDGE OF THE EXCHEQUER COURT: The rails in question in this case bear at least a similitude to rails for tramways in material and quality as well as in respect of the use to which they were applied.)

Mr. May: As to the question of what value should be taken as the value for duty, I might say that the statute directs that it shall be the cost price at the place where the goods are exported. Here the Customs' officers have added the freight and insurance on the goods to the cost price. The invoice shows this.

THE JUDGE OF THE EXCHEQUER COURT: That question was not raised or reserved, and you cannot go into it now. The leave reserved to you in the judgment does not cover that. I will allow the suppliants to make the amendment and you will have the advantage of it in case of appeal, but there will be judgment for the respondent with costs.

Judgment accordingly.

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Oct. 29.

QUEBEC ADMIRALTY DISTRICT.

THE HONOURABLE AUGUSTE C. P. R. LANDRY (DEFENDANT)..... APPELLANT;

AND

WALTER J. RAY, THOMAS CONNOLLY AYLWIN, JAMES BOSWELL, VEASEY BOSWELL AND HENRY HAVELOCK SHARPLES, (PLAINTIFFS)..... RESPONDENTS.

THE BERNADETTE AND THE MURIEL.

Appeal from Local Judge in Admiralty—The Admiralty Act, 1891 (54-55 *Vict. c. 29)—Interference with finding of fact.*

On appeal from a judgment of a local Judge in Admiralty under section 14 of *The Admiralty Act*, 1891 (54-55 Vict. c. 29) the court will not interfere with a finding of fact by the local judge unless it is satisfied beyond a reasonable doubt that the evidence does not warrant such finding.

APPEAL from a judgment of the Local Judge in Admiralty for the Quebec District (1).

The case on appeal was argued at Quebec on March 13th, 1894.

T. C. Casgrain, Q.C. (Attorney-General for Quebec), for the appellant, cites the By-laws and Regulations of the Quebec Yacht Club Nos. 34 and 36; Imperial regulations for preventing collisions at sea, arts. 14 and 25 (2).

I. N. Belleau, Q.C., followed for the appellant. He cited rule 32 of the By-laws and Regulations of the Quebec Yacht Club.

(1) Reported *ante* p. 94. (2) *See* R. S. C. c. 79.

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Pentland, Q.C., for the respondent cites the *Carlotta* (1); the *Clara Killam* (2); the *Eliza Keith* (3); the *Martha Sophia* (4); the *Lake St. Clair* (5); the *Mary Bannatyne* (6); *Broom's Legal Maxims* (7); *Matthew* v. *Boyce* (8); *Marsden's Collisions at Sea* (9); *Lownde's Collisions at Sea* (10); *Lawrence* v. *Blake* (11); *Swan* v. *Blair* (12); the *Roslin Castle* (13).

Mr. *Casgrain* replied.

THE JUDGE OF THE EXCHEQUER COURT now (October 29th, 1894) delivered judgment.

This is an appeal by the defendant and a cross-appeal by the plaintiffs from the judgment of the Local Judge in Admiralty for the Quebec Admiralty District, finding both parties in the wrong, the one for a breach of the sailing rules, the other for the violation of the general rules of the Quebec Yacht Club, of which all parties were members.

It is admitted that, judged by the regular sailing rules, the *Bernadette* was wrong in not giving way in time to prevent a collision, the only question on that part of the case being whether or not the defendant was justified, under all the circumstances of the case, in assuming that the *Muriel* would keep clear of the *Bernadette*, and the learned judge of the court below has found as a fact that he was not so justified. If I had heard the evidence, and it had left on my mind the same impressions that I have derived from reading it, I should, I think, as a judge of first instance have had some hesitation in coming to the same conclusion,

(1) 4 Jur. 237*a*; Pritchard's Adm. Dig. vol. 1 p. 221.
(2) 2 Q. L. R. p. 56.
(3) Cook's Adm. Rep. 111.
(4) 2 Stuart's Adm. R. 17.
(5) Cook's Adm. Rep. 48.
(6) 1 Stuart Adm. Rep. 354.
(7) P. 695.
(8) 1 Starkie 425.
(9) P. 349, 495, 471.
(10) P. 67.
(11) 8 Cl. & Fin. p. 552.
(12) 3 Cl. & Fin. 631.
(13) 1 Stuart's Adm. Rep. 307.

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although it must be, of course, admitted that before one departs from the ordinary sailing rules, he should be very sure that he has good and clear reasons for doing so. The learned judge who heard the parties has decided that in this case such reasons did not exist, and there is, I think, no sufficient ground for a judge sitting in appeal to reverse that finding.

With reference to the *Muriel*, I have no difficulty in agreeing with the view taken by the Local Judge in Admiralty. By his want of candour and straight-forwardness, and by persisting in going round the course contrary to the rules of the club, Mr. Ray, in a measure, brought the accident on himself, and I fail to see what good ground of quarrel the plaintiffs have with the judgment appealed from.

The appeal and the cross-appeal will be dismissed, but without costs.

Judgment accordingly.

Solicitors for appellant: *Belleau, Stafford, Belleau & Gelly.*

Solicitors for respondent: *Caron, Pentland & Stuart.*

TORONTO ADMIRALTY DISTRICT.

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Dec. 20.

"THE GRACE."

International law—Boundary line—Three-mile limit in relation to inland waters—Fishing by foreign vessel—R.S.C. c. 94—Forfeiture.

On the 21st April, 1894, the American steamer *Grace* was seized on Lake Erie by a Canadian government cruiser for an alleged infraction of chapter 94 of *The Revised Statutes of Canada*, entitled, *An Act respecting Fishing by Foreign Vessels.* Upon an action for condemnation it was found by the court that the vessel, when seized, was more than three marine miles from the shore, but clearly north of the international boundary line between Canada and the United States of America.

Held, that the three-mile limit to the maritime territory of a State, as fixed by the rules of International law, does not apply to the waters of the Great Lakes between Canada and the United States, and the territorial limits of both countries are determined by the International boundary line.

2. An American vessel fishing without a license upon the Canadian side of the boundary line on one of the Great Lakes is subject to seizure and condemnation under the provisions of chapter 94 of *The Revised Statutes of Canada.*

THIS was an action for the condemnation of the steamer *Grace*, an American vessel, seized for infraction of chapter 94, *The Revised Statutes of Canada.*

The facts of the case and arguments of counsel are fully set out in the reasons for judgment.

The case was tried before His Honour Judge McDougall, Local Judge of the Toronto Admiralty District, at St. Catharines, on the 28th September, A.D. 1894.

J. C. Eccles for the Crown.

W. M. German for the owners and claimants of the ship.

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McDOUGALL, L. J. now (December 20th, 1894) delivered judgment:—

This is an action by the Crown for the condemnation of the ship *Grace*, a foreign fishing vessel, her tackle, rigging, apparel, furniture, nets, stores, and cargo, as forfeited to Her Majesty for violation of the provisions of the Act, R. S. C., c. 94.

According to the statement of claim, the *Grace* is a steam fishing tug of seven tons burden, registered at the Port of Dunkirk, in the State of New York, one of the United States of America. It is owned by Frederick Helwig, Willoughby Meisner and David Waltus, of the City of Dunkirk, in the State of New York.

It appears that on the 21st April, 1894, the *Grace* was seized by the Government cruiser the *Dolphin*, John B. Peterson, commander, for an alleged infraction of the said Act. The *Dolphin* at the time was cruising on Lake Erie, and was owned by the Government of Canada, and employed in the service of protecting the fisheries of Canada on the said lake. The acts which constituted the alleged infraction of the law were as follows:—

The *Grace*, being an American vessel, was found fishing in British waters within the Province of Ontario, on Lake Erie, one of the inland waters of Canada, between eight and nine miles in a south-westerly direction from Port Colborne on the Canadian shore, without a license of the Governor-General of Canada to fish in the said waters. It is alleged that the *Grace* entered the waters in question, which were to the north of the international boundary line, for the purpose of fishing, and with intent to violate the provisions of the said Act.

The waters of Lake Erie are not included within the limits specified and described in the first convention between His Majesty King George III., and the

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United States of America, and signed at London on the 20th October, 1818.

The boat was seized for this alleged breach of the law, by Captain Peterson, as a fishery officer, on the said 21st day of April, 1894, and detained with her nets, tackle, furniture, &c., as subject to forfeiture, and duly brought by him into Port Colborne, and handed by him to Duncan McFarlane, the officer of Her Majesty's Customs at Port Colborne.

The defence set up by the owners of the *Grace*, who have intervened, is an absolute denial of the commission of any acts which should be construed as a breach of the provisions of the Fisheries Act, c. 94 of *The Revised Statutes of Canada*.

At the trial the evidence was very fully gone into and at the conclusion of the case for the Crown, Mr. German, counsel for the owners, took the objection that even upon the testimony of the witnesses called by the Crown there was no liability to forfeiture, because it clearly appeared that the *Grace* was fishing more than three marine miles from the Canadian coast, and that being established, even if the point where she was fishing should be found to be on the Canadian side of the international boundary line, the offence, if it was an offence at all, was not one punishable under the provisions of the said Act. He contended that it was only when the alleged fishing took place within three marine miles (even in inland waters) that any breach of the Act was committed. I overruled his contention at the trial, for the purpose of hearing all the evidence for the defence upon the facts, stating that I would reserve my judgment on the whole case, and consider more carefully what, if any, weight should be given to his objection after all the evidence was in.

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By the Treaty of Paris (1783) the boundaries between the United States and the English provinces were expressly defined; and article 2, which purports to define these boundaries, after describing the boundaries relating to the eastern provinces, then proceeds as follows:—

> From thence [a point in the 45th degree of north latitude, where a line drawn through the middle of the Connecticut river would intersect the 45th parallel of latitude] by a line due west on said latitude until it strikes the River Iroquois, or Cataraqui (St. Lawrence); thence along the middle of the said river into Lake Ontario; through the middle of the said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie; through the middle of said lake until it arrives at the water communication between that lake and Lake Huron, etc., etc.

The boundaries of Canada, then with reference to that part of the province of Ontario which borders on Lake Erie extend to the centre of said Lake Erie.

In Bar on International Law, 1067, the author says:—

> In land-locked lakes surrounded by several States, the same principles as regulate the application of territorial law on dry land must rule, in so far as there are distinct boundary lines recognized. The well-known rule for fixing these is that the centre of the lake determines, just as in the case of rivers.

Hall on International Law, 100, says:—

> The territorial property of a State consists in the territory occupied by the State community, and subjected to its sovereignty; and it comprises the whole area, whether of land or water, included within definite boundaries, as ascertained by occupation, prescription, or treaty.

National territory, therefore, consists of water as well as land, and it can be assumed without doubt that British territory extends from the shore line of Lake Erie south to the international boundary line fixed by treaty between Great Britain and the United States, as being a conventional line drawn through the middle of the lake.

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In the case of *The People* v. *Tyler* (1), Martin C.J., in his oral judgment, thus expresses the character of the territorial rights existing on the great lakes and rivers lying between Canada and the United States :—

By the Treaty of 1783, the boundary line between Great Britain and the United States ran through the centre [of the lakes]. They can, therefore, in no sense, be denominated "high seas" within the meaning of the constitution. Nor are their waters which are within the boundaries of the United States without the jurisdiction of any particular State. Each State lying upon their borders is bounded by the national boundary line ; beyond such line, the waters are within an acknowledged foreign jurisdiction, and, so far as I can ascertain, ****** within the body of foreign counties.

See *The Revised Statutes of Ontario*, 1887, cap. 5, sec. 7, whereby the limits of all townships lying on Lake Ontario, Lake Erie, etc., are extended to the boundary of the province in such lake.

Judge Christiancy in the case last cited, speaking of the Great Lakes, and after quoting from the Treaty of 1783, settling the boundaries of the two countries, says, p. 230 :—

Thus Great Britain and the United States appropriated to themselves, as part of their territorial domains, the lakes and water communication on their respective sides of the boundary line, as fully and unreservedly as the lands on either side. No distinction was made.

Speaking of the effect of subsequent treaties as altering or changing any of these alleged territorial rights, he says, p. 233 :—

It is too clear to admit of any serious doubt, that there is nothing in any of these treaties depriving the British Government of that complete and exclusive jurisdiction over that part of the lakes and rivers on her side of the line which any nation may exercise upon land within her acknowledged territorial limits. Under all these treaties it must, I think, be very clear, that while the citizens or subjects of either nation should be within the territorial limits of the other, they would be bound to conform to, and would be protected by, the laws of the nation or State to which the territory belonged, according to the settled principles of the law of nations. *Vattel* Bk. 2, c. 8, par. 101, 102.

(1) 7 Mich. at p. 164.

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Now, it is also an axiom of International law that every state is entitled to declare that fishing on its coasts is an exclusive right of its own subjects (1), and therefore the Act respecting fishing by foreign vessels (2) is strictly within the powers of the Parliament of Canada, and we must look to that statute for the express authority to protect the subjects in their fishing rights, and for the penalties incurred by any foreign vessel for infringing those rights.

Section 1 of the Act authorizes the Governor in Council to grant to any foreign ship, for a term not exceeding a year, a license to fish in British waters within three marine miles of any of the coasts, creeks or harbours of Canada, not included within the limits specified and described in Article 1 of the Treaty of 1818.

Section 3 authorizes various officials, including a fishery officer, to

> bring any ship, vessel, &c., being within any harbour in Canada, or hovering within British waters within three marine miles of any of the coasts, &c., &c.,

and if such vessel is foreign and has been found fishing, or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, &c , &c., without a license,

> such vessel, her tackle, rigging, cargo, &c., shall be forfeited.

The remaining sections of the Act describe the procedure for establishing the forfeiture and the limit of time within which action is to be taken.

Section 20 reads:—

> This Act shall apply to every foreign ship, vessel or boat in or upon the inland waters of Canada, &c., &c.

Now, it is contended that as to inland waters the three marine miles limit prevails equally as upon the

(1) *Bar's International Law*, p. 21. (2) R. S. C., c. 94.

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ocean, at any rate in so far as any offence against the provisions of the Act is concerned. In other words, that the penalties of this particular Act do not apply to a foreign vessel fishing in inland waters if the fishing is done outside of the three-mile limit; but it is not said in the statute that the Act should apply to the inland waters of Canada. Had this been the form of expression there would have been much force in the contention that the three-mile limit was equally applicable to the coasts of inland waters as to the sea coasts. But what the section does say is that the Act shall apply to every foreign vessel in or upon the inland waters of Canada. In other words, wherever in Canada a foreign vessel is found fishing or preparing to fish, or to have been fishing on Canadian inland waters, without a license, that foreign vessel at once incurs the penalty of the Act, and is liable to seizure and forfeiture.

Upon the ocean the law of nations recognizes the limit of three marine miles from the shore as the only portion of the ocean in respect of which a state can claim to exercise territorial rights; but the same law of nations recognizes the authority of a state to claim the same territorial rights in respect to so much of all inland lakes as lie within the limits of its conventional boundaries. If a foreign vessel, therefore, is twenty miles from shore, and is fishing without a license a quarter of a mile north of the boundary line upon an inland lake, she is subject to seizure and condemnation under the provisions of the Act under consideration.

This being my view of the law, it next becomes important to determine the questions of fact raised in this case, namely: Where was the *Grace* fishing on the morning of the 21st day of April, and just before her seizure by the commander of the *Dolphin?* To deter-

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mine this it will be necessary to make a brief review of the testimony given at the trial.

First, the evidence of Captain Peterson, commander of the *Dolphin*, establishes by the chart the following distances, having relation to that part of Lake Erie opposite Port Colborne. If a line is drawn from Port Colborne, on the Canadian shore, to Dunkirk, on the American shore, the point at which it would cross the boundary line would be about thirteen miles distant from the Port Colborne light. If the line is drawn from Port Colborne shore to Silver Creek on the American shore it would intersect the boundary line at a distance of eleven miles from the Port Colborne light. Silver Creek is a little to the east of Port Colborne on the American shore, and Lake Erie is narrower between these points. Dunkirk lies to the west of Port Colborne on the American shore. Again drawing a line due south from Port Colborne to the American shore, the distance to the boundary line, Captain Peterson says, is eleven and three-quarter miles from the Port Colborne light. At a distance of 7·4 miles from the Port Colborne light, which is close to the shore, there was at the time of the seizure the wreck of a vessel called the *Benson*; two spars of this vessel were plainly visible standing out of the water. This distance to the wreck was carefully logged the day after the seizure of the *Grace* by Captain Dunn, the commander of the *Petrel*, another Canadian fishery cruiser; and he fixes accurately the distance from Port Colborne light to the wreck at 7·4 statutory miles. It was sworn by the engineer, Edwin T. Dunn, of the *Dolphin*, that the speed of that boat is eight miles an hour or a trifle less; this is corroborated in a measure by Captain Dunn, of the *Petrel*. It is admitted by the defendants that the *Grace* had been fishing, and had taken in her nets

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just before the seizure, but it is denied that the fishing was done in British waters.

The evidence of the Crown, as given by the engineer, Edwin T. Dunn, and Captain Peterson, regarding the movements of the *Dolphin* on the day of the seizure, is that on the morning of April 21st the *Dolphin* left Port Colborne at 8.40 a.m., and steered a course south one-half east from Port Colborne, the wind blowing fresh from the south-west; passed the Colborne light at 9 a.m.; at 9.20 sighted a tug (the *Grace*); at 10 o'clock arrived at a fish buoy floating in the lake. Did not alter the course steered till reaching buoy. Left with the tug *Grace* at 10.30; abreast of Port Colborne light at 11.25; arrived at dock at 11.40 a.m.

Captain Peterson had made these entries at the time in the ship's log, which his instructions require him to keep. The engineer also keeps a log and his entries were:—Left dock at 8.50; passed Port Colborne light at 9; went about six miles out into the lake; lifted some American fishermen's nets; seized an American fish tug; arrived back at Port Colborne at 11.40 a.m.

Peterson, the commander; Neff, the deckhand; Hiscott, the cook; McLaren, the stoker; and Edwin T. Dunn, the engineer, all members of the crew of the *Dolphin*, agree in their evidence that the *Dolphin* came up to the fish buoy not more than half a mile to the south and west of the *Benson* spars, and the crew immediately commenced hauling in the nets attached to this buoy. These nets extended nearly due south towards the American shore. They say at the time they arrived at the fish buoy the *Grace* was lying to the south and west of them further up the lake, at a distance from the *Dolphin* variously estimated from 700 to 800 yards by Captain Peterson; about a mile by Neff, which in re-examination he reduces to half a mile at the outside; McLaren, one-quarter to three-quarters

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of a mile; and Dunn, the engineer, half a mile. They all speak of the distance between the boats. Nearly all the witnesses state that the *Grace* was to the south and west of the *Dolphin* when she arrived at the fish buoy. This buoy is spoken of in the evidence as the *Puritan* fish buoy, because the floats of the nets attached had the name of *Puritan* stamped on them. The *Grace* at that time was engaged in hauling up her own nets, working up northwards to her northern fish buoy; and nearly all the Crown witnesses say that when she had taken up her nets as far as her buoy, she was only about a quarter of a mile from the *Dolphin*, which had also been engaged in hauling in the *Puritan* nets, working south. As soon as the *Grace* took up her nets she started over to the *Dolphin* to see what that vessel was doing, and almost immediately on her coming alongside the vessel was put under arrest, and ordered into Port Colborne. Captain Peterson, of the *Dolphin*, went aboard of her, as the *Grace* was the faster boat; and with Captain Peterson on board the *Grace* got into Port Colborne ahead of the *Dolphin*.

Captain Peterson says he took up about 1,500 to 1,700 yards of the *Puritan* nets altogether; he says that when the *Grace* came up he continued taking in the nets for a few minutes, and then cut them, buoying up the severed end, and started for Port Colborne with the captured tug.

The distance from Port Colborne light to the wreck of the *Benson*, we have seen, was 7·4 miles; from the *Benson* to the *Puritan* buoy, half a mile, 1,300 or 1,400 yards of the *Puritan* nets were hauled in at the time when the *Grace* came alongside; this makes the distance of the point of meeting of the two vessels from the Port Colborne light 7·4+·5+·88·70 miles from Port Colborne light. Add to this as the result

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of the evidence of the Crown witnesses that when the *Grace* finished hauling in her nets she was about a quarter of a mile off, would make the northern end of her nets to have been located in the lake at a distance not exceeding nine miles from Port Colborne light.

Mr. German, at the close of the case for the defence, stated the distance between Port Colborne light to Silver Creek to be twenty-four miles; and from Port Colborne light to Dunkirk light, in a straight line, twenty-seven miles. So that we have this fact unmistakably proved, if the Crown witnesses are to be believed, that the northern end of the *Grace's* nets was at least from three to four and a half miles north of the international boundary; about three miles, if the *Grace* was lying to the east of the *Dolphin* and on a line between Silver Creek and Port Colborne; and about four and a half miles if she was lying more to the west of the *Dolphin*, and on or near a point that would be intersected by a line drawn from Dunkirk light to Port Colborne light. The length of the nets of the *Grace*, as stated by her crew, was two miles.

Turning to the evidence tendered by the owners of the *Grace* we find a totally different account. In the first place, no log was kept on the *Grace*. The engineer states that he takes the time when he passes Dunkirk light; that he regulates the speed of the *Grace* to nine miles an hour; runs one hour and five minutes, which brought him to the southernmost buoy of his nets on a course northeast by north. That would bring the *Grace* nine and three-quarter miles from Dunkirk light (assuming the speed absolutely correct at nine miles) to her southernmost buoy; thence north two miles, for the length of her nets would make her northern buoy eleven and three-quarter miles from Dunkirk light, or from one and a quarter to one and a half miles south of the interna-

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tional boundary line. The engineer and captain say that when they had finished taking up their nets they observed the *Dolphin* to the north of them, and they ran over to her, taking twenty-two minutes to make the run, and increasing the speed of the *Grace* to twelve miles an hour; this would make the distance between the boats, according to this evidence as to speed and time, about four and a half miles. The engineer says that the *Dolphin* when they came up to her was twelve or thirteen miles from Port Colborne. Now, let us see what the effect of adding these distances together will be:—

Distance to northernmost buoy, $11\frac{3}{4}$ miles; from buoy to *Dolphin*, $4\frac{1}{2}$ miles; from *Dolphin* to Port Colborne, 13 miles; total, $29\frac{1}{4}$ miles. Distance from Dunkirk light to Port Colborne light, or two and a quarter miles more than the chart shows the actual distance to be.

According to Captain Helwig's story, after the *Grace* was seized they ran towards Port Colborne for about five minutes, when as they were running away from the *Dolphin*, which was a much slower boat, Captain Peterson hailed them, and they stopped, and he (Peterson) came on board the *Grace*. They then ran for an hour and five minutes to Port Colborne; they say they ran the *Grace* at her utmost speed, which was about twelve miles an hour; in other words, that the *Grace* had traversed about thirteen and a half miles from the point of seizure to Port Colborne. He also says they reached Port Colborne light at twelve o'clock, and the *Dolphin* came in thirty-five minutes afterwards. Now, the *Dolphin's* log shows that she reached the dock at 11.40, fifty-five minutes before the time given by Captain Helwig. Weaver, a witness called by the Crown, who was fishing on the dock, says that the *Dolphin* got into Port Colborne a few minutes before

twelve o'clock, just before he went to dinner. Captain Helwig says the *Dolphin* must have been twelve, or thirteen, or fourteen miles from Port Colborne when the *Grace* came up to her; he says he saw the *Benson* wreck, and that this wreck was at least ten miles from Port Colborne; he says it was seven or eight miles from his southernmost fish buoy to the American shore, and about ten miles from his northernmost buoy. Mr. Meisener, the engineer of the *Grace*, who was also part owner, says that when running the *Grace* to inspect the nets he closes off the throttle, so as to make about nine miles an hour, though his boat will run twelve miles an hour when at full speed. He says that when the boat was arrested they went in past the *Benson* wreck, and he judged it would be ten miles from this wreck to the Port Colborne light. The engineer is unable to tell what time the *Grace* got into Port Colborne, but he thinks about twelve o'clock, or a few minutes after; the engineer is unable to say how long they were running into Port Colborne from the point where the *Dolphin* seized the vessel. Fred. Helwig, a fisherman on the *Grace*, and an owner of one share, gives a different version of the distance between the *Dolphin* and the *Grace*, when the latter finished taking in her nets; he says the *Dolphin* was over three miles away, the captain and engineer say four and a-half. John Waltus, a fisherman on board the *Grace*, makes the distance between the *Grace* and the *Dolphin* at the time the *Grace* started over to see what the *Dolphin* was doing, as between three and four miles.

I have to determine on this evidence whether the *Grace* had set her nets in Canadian waters on the morning of the 21st April. We have one fixed point established, namely, the position of the *Benson* wreck; that was accurately measured; it was distant from Port Colborne light 7·4 miles; the distance from the wreck

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to the boundary line would be from four and a-half to five miles at the very least. All the witnesses for the Crown agree that the *Dolphin* commenced taking in the *Puritan* nets at a point not exceeding half a mile south of the wreck; they substantially agree that at that time the *Grace* was not over three-quarters of a mile to a mile, at the outside, distant from them.

But even assuming that the *Grace* was, say, three or three and a-half miles away, as claimed by two of her own witnesses, she would then be at most not more than from eleven to eleven and a-half miles from Port Colborne, or from half a mile to a mile and a-half north of the international boundary line. Now, at this time she was in the act of taking in her nets, working northward, so that at that particular moment of time she was some little distance south of her northernmost fish buoy. If her nets were two miles long, at least a mile and a-half of her nets were in Canadian waters. If the evidence of the Crown witnesses, on the other hand, is taken, it establishes that her whole gang of nets was clearly north of the international line, and her southernmost fish buoy at least, a mile or a mile and a-half north of that line.

It is in evidence that the fish had been moving steadily northward all the spring; they had been freely taken at the first of the season a few miles from the American shore; but each week had worked their way towards the Canadian shore; and the fishing tugs followed the run of the fish. The only reasonable conclusion from the whole evidence is that the fish passed to the north of the boundary line, and that the fishing tugs and their nets followed them. It must be borne in mind, too, that the nets of the *Puritan*, another American fishing tug, were found set in Canadian waters, their northern buoy being located only eight

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miles from the Canadian shore, or half a mile south of the wreck of the *Benson*.

Upon this review of the evidence I find that the *Grace* had set her nets, and was engaged in taking them up within, at most, two or two and a-half miles south of where the *Puritan* nets were set, and that such locality where she was thus engaged in fishing was wholly within Canadian waters.

There will be judgment for the Crown, with full costs of suit; and the said tug *Grace*, her tackle, rigging, apparel, furniture, nets, stores, and cargo be declared to be forfeited to Her Majesty.

Judgment accordingly.

Solicitor for ship: *W. M. German.*

Solicitor for Crown: *J. C. Eccles.*

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Dec. 20.

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

AND

THE MISSISSIPPI AND DOMINION STEAMSHIP COMPANY (LIMITED) DEFENDANTS.

Navigation—Obstruction of—37 Vict. c. 29—43 Vict. c. 30—Pleading—Allegation of negligence—Demurrer.

Where a ship had become a wreck and, owing to her position, constituted an obstruction to navigation, the court held that it was not necessary in an information against the owners for the recovery of moneys paid out by the Crown, under the provisions of 37 Vict. c. 29 and 43 Vict. c. 30, for removing the obstruction, to allege negligence or wrong-doing against the owners in relation to the existence of such obstruction.

2. Under the Acts above mentioned it is only the owner of the ship or thing at the time of its removal by the Crown who is responsible for the payment of the expenses of such removal.

3. The right of the Crown to charge the owner with the expenses of lighting a wrecked ship during the time it constitutes an obstruction was first given by 49 Vict. c. 36, and such expenses could not be recovered under 37 Vict. c. 29 or 43 Vict. c. 30.

DEMURRER to an information for the recovery of moneys paid out by the Crown for the removal of an obstruction to navigation.

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

The demurrer was argued at Montreal before the Honourable Charles P. Davidson, judge *pro hâc vice*, on the 23rd June, 1893.

W. Cook, Q.C., in support of demurrer:

The information does not charge negligence in navigating the *Ottawa* which lead to the stranding, therefore it must be assumed that the loss was occasioned purely by inevitable accident or the act of God. This being

so, all the authorities are agreed that at common law no obligation lay upon the defendants to remove the obstruction, or to light the wreck, at least so far as the Crown is concerned, and no action would lie against them, on the part of the Crown, for expenses incurred for such objects. If the Crown has any claim at all, it must be a purely statutory one, and will have to be determined by the statutes in force in 1880 and 1881 when the wreck and sale took place, viz., 37 Vict. c. 29 as amended by 43 Vict. c. 30, no subsequent amendment of these Acts has, or was intended to have, any retroactive effect.

The sole question, then, to be determined here is: Who are intended by the word "owners" in the amending Act (43 Vict. c.30)? Are they to be held to be the owners when the vessel went ashore; or the owners when she was declared an obstruction by the Minister of Marine and the order in council was passed; or the owners when the Crown incurred the expenses claimed? It is clear from the law and the authorities that the "owners" who are responsible in such a case are not these defendants. Cites *Eglinton* v. *Norman* (1); *R.* v. *Watts* (2); *Hammond* v. *Pearson* (3); *Brown* v. *Mallet* (4); *White, et al* v. *Crisp* (5); *Arrow Shipping Co.* v. *The Tyne Improvement Commissioners* (6).

W. D. Hogg, Q.C., *contra*:

This action is properly brought against the defendants, as registered owners of the stranded ship, under 37 Vict. c. 29 and 43 Vict. c. 30. The latter Act was the first to give a right of action such as is relied on in this case. Under the last mentioned Act the action must be brought against the owner or owners of the vessel which caused the obstruction to navigation.

(1) 46 L. J. Exc. 557.
(2) 2 Esp. 675.
(3) 1 Camp. 515.
(4) 5 C. B. 617, 620.
(5) 10 Ex. 312.
(6) (1894) A.C. 508.

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Argument of Counsel.

The statute has reference to a vessel which causes an obstruction, and the right of action, while it is for the recovery of moneys expended in removing the obstruction, has reference back to the obstruction; and it is fair to say that the person who was the owner at the time the obstruction occurred is the person intended by the Act as being liable. The purchasers of the wreck could not be considered the owners of the vessel, because there is only one way to purchase a vessel, *i.e.*, by bill of sale under *The Merchant Shipping Act*, 1854, and amendments.

The statute has reference to an action which grows out of an obstruction, and to recover the outlay of the Government from the person who was the owner at the time of such obstruction. (He cites subsec. 52 of sec. 7 R.S.C., c. 1.)

The action is not brought to compel the owners to remove a wreck. The law applicable to the rights of the Crown is not invoked in this case The statutes governing this case do not necessarily contemplate a case arising out of the negligence or default of the owner. The clause referring to negligence or default has reference to persons other than the owner or managing owner. (He cites sec. 5 of 49 Vict. c. 36.) At common law, where a vessel is sunk in a navigable river by accident or misfortune, an indictment will not lie against the owner for not raising it. (He cites *R.* v. *Watts* (1), *Coulson and Forbes on Waters* (2), *River Wear Commissioners* v. *Adamson* (3), *The Piers and Harbours Act*, 1847 (4), *White* v. *Crisp* (5).)

A demurrer will only be sustained where, if the matter alleged be taken as true, the plaintiff has no title to relief. (*Piggott* v. *Williams* (6), *Utterson* v. *Mair* (7).)

(1) 2 Esp. 675.
(2) (Ed. 1880) p. 438.
(3) 2 App. Cas. 743.
(4) 10 Vic. (U.K.) cap. 27.
(5) 10 Ex. 312.
(6) 6 Madd. 95.
(7) 2 Ves. Jr. 95.

Mr. *Cook*, replied.

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DAVIDSON, J. now (December 20th, 1894) delivered judgment.

On the 21st of November, 1880, defendants' steamship *Ottawa* was wrecked and sunk at Cap à La Roche in the River St. Lawrence. The vessel, having been condemned, was, on the 6th of July, 1881, sold by the defendants. An order in council, dated the 13th of January, 1886, authorized the removal of the wreck, which is by the information charged to have been an obstruction to navigation and a source of danger to vessels plying on the river. By this and a second order in council, a sum of $13,000 was granted and afterwards paid to P. Fradette and Co. for the taking away of the wreck. It is alleged that until this removal, Her Majesty's Minister of Marine and Fisheries caused a light to be placed near the wreck as a warning to passing vessels, and thereby incurred expense to the amount of $5,158.29. Disbursements of $48.83 for advertizing for tenders and of $15.60 for an examination of the wreck are also charged.

Nothing was realized from the wreck. By virtue of the Canadian Statute, 37 Victoria, chapter 29, as amended by 43 Victoria, chapter 30, judgment is sought against the defendants for the several sums so expended, amounting to $18,223.72 with interest from the 28th November, 1889.

Issues of law and fact have been joined. It is upon the former that I have now to adjudge.

The demurrer prays that the information be held insufficient in law for these reasons :—

That, as well at common law as under the statutes cited, owners are only liable when they, or those in whose position they stand, occasioned the obstruction by their negligence or default, and neither is charged.

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That the wreck appears to have been declared an obstruction long after the defendants had ceased to have any property therein or control thereof, and it is not disclosed that the Crown had any rights, prior to the sale of the 6th of July, 1881.

That the statutes cited have been repealed; that the defendants were not liable by any law existing during their ownership, to maintain or be charged with the maintenance of a light on the vessel.

It is obvious that all the facts that may be invoked by the Crown, are stated in the information.

Were they to be fully admitted, would they suffice to justify the condemnation sought for?

An examination of the statutes is our first duty.

It is enacted by 37 Victoria (1874) cap. 29 sec. 1, as follows:

> Whenever in the opinion of the Minister of Marine and Fisheries, the navigation of any river, lake, bay, creek, harbour or other navigable water over which the jurisdiction of the Parliament of Canada extends, is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck, sinking or lying ashore or grounding, of any vessel or craft whatever, or of any part thereof, or other thing, and whether the cause of such obstruction occurred before or after the passing of this Act, then if such obstruction continues for more than twenty-four hours, the said minister may, under the authority of an order of the Governor in Council, cause the same to be removed or destroyed in such manner and by such means as he may think fit, including the use of gunpowder or other explosive substance if he deems it advisable, and may cause such vessel, craft, or its cargo or the material or thing causing or forming part of such obstruction to be conveyed to such place as he may think proper, and to be there sold by auction or otherwise, as he may deem most advisable, and may apply the proceeds of such sale to make good the expenses incurred for the purposes aforesaid—paying over any surplus of such proceeds to the owner or owners of the things sold, or other parties entitled to such proceeds or any part thereof, respectively.

This section neither created a statutory liability on the part of the owner, nor affected his responsibility at common law. It simply enabled the Minister of Marine

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and Fisheries, under the authority of an order in council, to keep the channels of navigable water clear of obstructions. To make these expenses specifically chargeable against not only the wreck but its owner, an amendment in the following terms was enacted by 43 Vict. (May, 1880) cap. 30, sec. 1:—

Whenever, under the provisions of the Act cited in the preamble, [37 Vict. Cap. 29], the Minister of Marine and Fisheries has, under the authority of an order of the Governor in Council, caused any obstruction or impediment to the navigation of any navigable water by the wreck, sinking or lying ashore or grounding of any vessel, craft or part thereof, or other thing to be removed or destroyed, and the cost of removing or destroying the same has been defrayed out of the public moneys of the Dominion—then if the net proceeds of the sale under the said Act of such vessel, craft or its cargo, or the material or thing which caused or formed part of such obstruction are not sufficient to make good the expenses incurred for the purposes aforesaid and the costs of sale, the amount by which such proceeds fall short of the expenses so defrayed, as aforesaid, and costs of sale or the whole amount of such expenses, if there is nothing which can be sold as aforesaid shall be recoverable with costs by the Crown from the owner or owners of the vessel, craft or other thing which caused such obstruction, or impediment; and the sum so recovered shall form part of the consolidated revenue fund of Canada.

Does this amendment make the defendants statutorily liable upon the statement of facts set forth in the declaration? What, too, is their position in regard to a common law liability?

The Imperial *Harbours, Docks and Piers Clauses Act* 1847, being 10 & 11 Vict. cap. 27, by its 74th section enacts that the owner of any vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith.

It was held in *Dennis* v. *Tovell* (1) that the owner of a vessel driven against a pier by stress of weather,

(1) L.R. 8 Q.B. 10.

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was liable whether the loss was caused by negligence or by inevitable accident. This case was overruled by *The River Wear Commissioners* v. *Adamson* (1). In this case the defendant's vessel was driven ashore in a storm. A rising tide dashed her against plaintiffs' pier, causing the damage complained of. The Court of Appeal held the owners not liable, and the House of Lords affirmed the decision.

Lord Cairns, L.C., considered section 74 to relate to procedure only, and to be solely intended to give an action against the owner of a ship whenever damage was caused by it, owing to the fault of the persons in charge, whether these were his servants or not, saving his resource against the persons really to blame.

Lords Hatherly and Blackburn were of opinion that the section covered even damages caused by the act of God, or inevitable accident, but considered the case one of such extraordinary hardship as to justify a secondary interpretation.

Lord O'Hagan agreed with the Court of Appeal that the wording of the section excluded damages for the act of God.

Lord Gordon dissented.

In the presence of such scattered opinions it is not easy to fix the precise value of this case, overruling though it did *Dennis* v. *Tovell* (*supra*).

Another section (56) of the *Harbours, Docks and Piers Clauses Act*, 1847, has greater pertinence. It reads as follows:—

The harbour master may remove any wreck or other obstruction to the harbour, dock or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction or floating timber shall be repaid by the owner of the same, and the harbour master may detain any such wreck or floating timber for securing the expenses, and on non-payment of such expenses, on demand, may sell such wreck or

(1) 1 Q.B.D. 546; 2 App. Cas. 743.

floating timber and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand.

By our Act 43 Vict. c. 30 the expense "shall be recoverable with costs by the Crown from the owner or owners of the vessel, craft or other thing which caused such obstruction or impediment."

Interpreting this section of the Imperial Act, the Court of Appeal held in *Lord Eglington* v. *Norman* (1) that the owner "referred to was the owner at the time the thing became an obstruction."

This ruling was followed in *The Edith* (2), but both cases were, on the 2nd of June, 1894, overruled by the House of Lords in the *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (3).

Respondents had obtained judgment both in the Admiralty Division and in the Court of Appeal. The vessel *Crystal*, belonging to the appellants, sank at the mouth of the River Tyne, as the result of a collision.

There was no evidence how this was caused or that any blame was attributed to the owners or their servants. The wreck was abandoned as a derelict on the high seas. The commissioners gave notice that they purposed to remove it and in the meanwhile would buoy and light it. Action was brought to recover the difference between the expenses incurred and the amount produced by the sale of the materials. The Lord Chancellor first distinguished the *River Wear Commissioners* v. *Adamson* (*supra*) as resting on another section and in the course of his judgment spoke, as well on the extent of the responsibility which the statute created, as of the persons on whom the responsibility fell. On the first point he said (p. 516) :—

Although I am of opinion that, in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at

(1) 46 L. J. Ex. 557 (1877). (2) 11 L. R. Ir. 270.
(3) [1894] A. C. 508.

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common law for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of section 56 which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law. I am fully alive to the force of the argument, and feel much impressed by it, that the obstruction is removed for the benefit of the public at large, and that where the owner of the vessel which has met with a disaster has not been to blame it is hard that the loss of his vessel should entail on him the furthur burden of bearing expenses incurred not for his benefit but for that of the public. But a sense of the possible injustice of legislation ought not to induce your Lordships to do violence to well settled rules of construction, though it may possibly lead to the selection of one rather than the other of two possible interpretations of the enactment. In the present case, however, I am unable to see that there are two alternative constructions.

Lord Ashbourne showed strong reluctance, indeed refused, to make the owner responsible under every conceivable cause of accident. He approved the *River Wear Commissioners* v. *Adamson* (*supra*) and considered it in point.

These cases founded on Imperial statutes of somewhat like tenor to our own, disclose serious diversities of judicial opinion, and an unusual expression of hesitancy and doubt as to the true construction of the sections referred to.

In the domain of common law, all difficulty disappears.

In *Rex* v. *Watts* (1) an indictment was preferred against the defendant for that he

> being the owner of a certain ship which had been sunk in the River Thames suffered and permitted the said ship to remain and continue there to the obstruction of the navigation, &c.

Lord Kenyon was of the opinion that the offence charged was not of a description to support an indictment as it was not asserted that there was any default or wilful misconduct on the part of the accused. In

(1) 2 Esp. 675 (1798).

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Brown v. *Mallet* (1) Mr. Justice Maule said "no such wrong being alleged, none is to be presumed." (2)

From these analyses of enactment and precedent, must it be held that an allegation of negligence or default in connection with the disaster ought to appear?

The common law does not reach them, indeed it is not seriously disputed on the part of the Crown that the defendants must be held liable under our statute, if at all.

The rule is that if a vessel is sunk by accident, and without any default of the owner or his servant no duty is ordinarily cast upon him to remove it or use any precaution by placing a buoy or light to prevent other vessels from striking against it, except for so long as he remains in possession and control of it. The liability ceases when the control ceases.

I regard the statute as superseding the common law to the extent expressed in its provisions or fairly implied in them, in order to give them full operation (3). It makes no exception as to the acts of God or *vis major*, and I cannot therefore see why either should be alleged. I am not called upon to decide if these would be lawful grounds of defence; but it may be said that the House of Lords in the *Arrow Shipping Company's case* (*supra*) adopted a rigid and far reaching interpretation to the effect that they would not. I have, therefore, to hold that under the statute it is not necessary to allege more than its provisions call for and that the information did not need to affirm wrong-doing on the part of the owner or his servants.

With reference to the question of ownership, the Lord Chancellor said (p. 519):—

(1) 5 C.B. 618.

(2) *See* also *White* v. *Crisp* 10 Ex. 312; The *Columbus*, 3 W. Rob. 158; The *Swan*, 3 Blatch. at p. 288; The *Franconia*, 16 Fed. Rep. 149; Coulson and Forbes's law of Waters, 438; Gould on Waters, sec. 98.

(3) *Endlich on stats.* sec. 127.

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My Lords, when I examine the language of the section, it appears to me to point not to ownership at the time the obstruction is created, but to ownership at the time the expense of removing it is incurred.

Lord Watson said (pp. 521, 522) :—

I agree with the Lord Chancellor in thinking that their abandonment of a sunken ship in the open sea, *sine animo recuperandi*, had divested the appellants of all proprietary interest in the wreck before the respondents commenced operations with a view to its removal.**** It is clear to my mind that, *primâ facie*, the owner of the wreck must be the person to whom the wreck belongs during the time when the harbour master chooses to exercise his statutory powers.

Lord Ashbourne said (p. 527) :—

I agree with my noble and learned friends who have preceded me, that the owner referred to in the section is the owner at the time the harbour master incurred the expense, and concurring as I do generally in the arguments they have expressed in support of this conclusion, I see no good purpose in repeating or attempting to add to them.

Contrasting the sections of the Imperial with those of the Canadian statute, we find that the former, by its section 74, provides that the

owner of any vessel.....shall be answerable,

and by its section 56, that the

expense of removing any such wreck.....shall be repaid..... by the owner of the same ;

while the Canadian Act provides for responsibility on the part of

the owners of the vessel, craft or other thing, which caused such obstruction or impediment.

It is argued on behalf of the Crown that the difference between the words "wreck" and "vessel" emphasizes the purpose of our statute. to make the original owner liable. I am unable to hold with this contention. There had to be a sale of the salvage. Its proceeds went in deduction of the amount for which the owner was liable. This cannot mean that the owner, at the time of the disaster, was to benefit by the net value of what he had sold to another, or could

the pretension prevail that he would be entitled to a surplus, if surplus there were. It must refer to the person whose wreck was disposed of and removed. Moreover, the dates set forth in the information are of striking importance. The *Ottawa* foundered in November, 1880, and was condemned and sold in July, 1881, while the order in council relied upon was only passed in January, 1886. Now, under the English statute, an immediate right accrues to the harbour master, and an equally immediate obligation is imposed upon the owner. In this respect our statute offers a marked contrast. The mere existence and continuance of an obstruction or impediment to navigation does not of itself vest the Crown with the right to remove it, or impose upon the owner a correlative obligation to pay the net expenses. The opinion of the Minister of Marine and Fisheries needs executive expression in an order in council, before either the one or the other exists. If, then, under the Imperial Harbours and Piers statutes it can be held that only the actual owner at the time of removal may be charged, by much more are the present defendants free from responsibility, for it is an undeniable rule of construction that a statute has prospective operation only, unless the intention to have it operate retroactively is expressed in precise terms.

As regards the legal sufficiency of the charge for lighting the wreck, the defendants occupy an even stronger position. It was only by 49 Victoria chapter 36 that authority was given to maintain a light, and charge its maintenance to the owner. This statute repealed 37 Vict. chap. 29 (except section 4) as amended by 43 Vict. chap. 30, and, re-enacting the sections in question, put the expense of maintaining lights on the same footing as that of removing the wreck.

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The repeal in itself, did not affect any right which may have accrued to plaintiff during the existence of the previous statute, R. S. C. cap. 1, sec. 2, subsecs. 49, 50, 51, 52, 53.

But the new law only covered such expense as might be incurred "under the provisions of this Act," and the reasons already given in connection with the question of ownership apply to this issue, with the added fact of law that at the time defendants admittedly sold their vessel, the Act 49 Vict., c. 36, was not yet in existence.

I think, therefore, that judgment on the demurrer ought to be entered for the defendants, and that costs ought to follow.

Demurrer allowed, with costs.

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

Solicitors for defendants: *W. & A. H. Cook.*

THE DOMINION BAG COMPANY (LIMITED) ..... } CLAIMANTS; 1894 Dec. 6.

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Revenue laws—R.S.C. c. 33, items 261 and 673—57-58 Vict. c. 38, item 621—Construction—Importation of jute cloth.

In construing a clause of a Tariff Act which governs the imposition of duty upon an article which has acquired a special and technical signification in a certain trade, reference must be had to the language, understanding and usage of such trade.

By item 673 of R.S.C. c. 33, jute cloth "as taken from the loom, neither pressed, mangled, calendered nor in any way finished, and not less than forty inches wide, when imported by manufacturers of jute bags for use in their own factories," was made free of duty. By item 261 of such Act, it was provided that manufactures of jute cloth, not elsewhere specified, should be subject to a duty of 20 per cent. *ad valorem.*

The claimants, who were manufacturers of jute bags, had for a number of years imported into Canada jute cloth cropped after it was taken from the loom. Item 673 was susceptible of several interpretations, one of which was that the jute cloth so cropped should be entered free of duty, and in this construction the importers and the officers of customs had concurred during such period of importation.

Held, that, inasmuch as the cloth in question had been, in good faith, entered as free of duty and manufactured into jute bags and sold, and it would happen that if another construction than that so adopted by the importers and customs officers was now put upon the statute, the whole burden of the duty would fall upon the importers, the doubt as to such construction should be resolved in their favour.

Quære, whether the words used in sec. 183 of *The Customs Act* (as amended by 51 Vict. c. 14 s. 34) "the court.....shall decide according to the right of the matter," were intended by the legislature in any way or case to free the court from following the strict letter of the law, and to give it a discretion to depart therefrom if the enforcement, in a particular case, of the letter of the law, would, in the opinion of the court, work injustice?

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Statement of Facts.

THIS was a claim for the return of goods alleged to have been improperly seized for the non-payment of customs-duties.

The facts of the case appear in the reference of the claim to the court by the Minister of Trade and Commerce, which is as follows :—

Department of Justice, Canada,
October 16th, 1894.

To the Registrar of the
Exchequer Court of Canada.

Sir,

In the matter of the detention by the Acting Collector of Customs at Montreal, Quebec, under the terms of section 161 of the Customs Act, of certain Jute Cloths, known as Cream Weft Hessians, imported by and in possession of The Dominion Bag Company, Limited, of the city of Montreal, as the result of an investigation made by Mr. Henry McLaughlin, Tide Surveyor of the Port of Montreal, upon sworn information supplied to him, to the effect that the Cream Weft Jute Hessians imported by the said company, during the three years antecedent to such detention, had been improperly entered at Customs free of duty, as coming within the provisions of the old and present tariffs, which except Jute Cloths from duty when the same are, "as "taken from the loom, neither pressed, mangled, calendered, nor in "any way finished, and not less than forty inches wide, when import-"ed by manufacturers of jute bags for use in their own factories," or item 621 of the present tariff, "as taken from the loom, not coloured, "cropped, mangled, pressed, calendered nor finished in any way." when in reality, as alleged in the information, the said Hessians or Jute Cloths were not as taken from the loom, but had been cropped and lapped, the former of which operations constituted a finishing of the goods after the same had been taken from the loom.

The Acting Commissioner of Customs having, in pursuance of ection 178 of the Customs Act, duly notified The Dominion Bag Company, Limited, the owner and claimant of the said goods, and having considered and weighed the evidence submitted by that company, and the circumstances of the case, and reported his opinion and recommendation thereon to me, I do thereupon refer the matter, together with the said report of the Acting Commissioner, and the evidence and papers, to the Exchequer Court of Canada, for decision.

I have the honour to be, Sir,
Your obedient servant,
(Sgd.) N. CLARKE WALLACE,
Controller of Customs.

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I concur in the reference of this matter, respecting the seizure, detention, penalty or forfeiture and the terms if any upon which the goods seized or detained may be released or the penalty or forfeiture remitted, to the Exchequer Court for decision.

(Sgd.) M. BOWELL,
Minister of Trade and Commerce.

Statement of Facts.

The case was heard at Montreal on the 6th of December, 1894.

D. Macmaster, Q.C., for the claimants, cited R. S. C. c. 33, items 261 and 673; 57-58 Vict. c. 38, item 621; *Grinnell* v. *The Queen* (1).

W. D. Hogg, Q.C., for the defendant, cited *The Customs Act* (R.S.C. c. 32) secs. 167 and 233, 263; R. S. C. c. 33, item 173; 57-58 Vict. c. 38, item 673.

D. Macmaster, Q.C., replied.

THE JUDGE OF THE EXCHEQUER COURT.—

The main question to be determined is: Was jute cloth that had been cropped, but not calendered or mangled, free of duty under item 673 of the Act respecting duties of Customs in force prior to the 27th of March, 1894, or dutiable under item 261 of that Act? (2).

By item 261 it was provided that manufactures of jute, not elsewhere specified, should be subject to a duty of twenty per cent. *ad valorem*, and then, as being elsewhere specified, and so excepted from that clause, it was enacted (item 673) that:

> Jute cloth as taken from the loom, neither pressed, mangled, calendered nor in any way finished, and not less than 40 inches wide, when imported by manufacturers of jute bags for use in their own factories,

should be free of duty.

Now it is clear, and as to that I agree with Mr. Hogg, that the process of cropping, as now performed, is done after the cloth is taken from the loom; that in

(1) 16 Can. S. C. R. 119. (2) R.S.C. c. 33, items 261 and 673.

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the ordinary course of manufacture and business cropped jute cloth is not as it comes from the loom. The provision in question, if I may rely upon the compilation of statutes relating to the Customs and duties of Customs that I have in my hand, first occurs in an order in Council of the 22nd of December, 1881, and what I have said of the present manufacture of such cloth is, I think, equally applicable to the trade or business as it was carried on in 1881. It appears that formerly the cropping was done with shears while the cloth was passing through the loom. But before 1881 that process had been generally abandoned in favour of a cropping done by machinery after the cloth left the loom.

Construing the clause then by the state of the art or trade as it existed in 1881, and has since been carried on, it is obvious that if the words "as taken from the loom" are to be taken literally as the controlling words in determining the intention of the legislature, then cropped jute cloth was dutiable and not free under the Act to which I have referred. That view is supported somewhat, it seems to me, by the consideration that this clause is found in a Tariff Act, a leading feature of which was, and is, as we all know, to give protection to Canadian manufactures and labour. And for myself I should have been inclined to think that the intention of the legislature, in the particular matter under discussion, was to give the manufacturers of bags in Canada jute cloth free, but at the same time to compel them to perform in Canada all the labour that could possibly be performed here. There is no doubt that the cropping, which we have seen is a separate process, could be done here, and if that view were to prevail the cropped cloth would be dutiable.

But if that was the intention of Parliament there was no occasion for the addition of the words "neither

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pressed, mangled or calendered, nor in any way finished," and either the latter expression is to be treated as surplusage, or as qualifying the preceding words, "as taken from the loom." As Mr. Mcmaster pointed out, jute cloth cannot be imported in the actual condition in which it comes from the loom, for whether it is cropped or not, it must be folded or lapped and packed in bales before it can be shipped. These necessary things must of course be done, and it would not, I think, occur to any one to say that because of these the cloth, when so put upon the market, was not as it was taken from the loom. But "cropping" is not, it seems to me, one of these necessary things. It may or may not be usual, but it is not necessary, and so perhaps that consideration is not very helpful in ascertaining the intention of the legislature.

Now, I gather from the papers that the acting Commissioner of Customs has taken the view that the words "as taken from the loom" have to be construed by reference to the expression following, to which I have referred "neither pressed, mangled, calendered nor in any way finished"; the distinction being, in his view, between cloth that was in the rough and cloth that was finished, and that, I may add, is not an unreasonable construction of the clause.

But this qualifying expression is itself open to two different constructions. First, it appears that there is no distinct process of pressing as known in the manufacture of jute cloth. It is clear also that the word "pressed" cannot be taken literally, as that would include packing or baling, one of the necessary things be done before the cloth is put upon the market, and we must limit the word "pressed" to such "pressing" as occurs in the process of mangling or calendering. If the general word "finished," following the particular terms "mangled or calendered," is subject

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as in accordance with a settled rule of construction, it might well be, to a like qualification or limitation, then of course it is obvious that "cropping" is not a process of "finishing," within the meaning of the clause. The doubt as to that being the true construction of the provision, arises from the fact that there are other processes of finishing, such as dyeing, which one would have expected to find in the same category as mangling and calendering. This difficulty could, I think, be solved, and the intention of Parliament ascertained, if it were permissible, to examine the corresponding clause in the Act now in force, which reads as follows:—

> 621. Jute cloth as taken from the loom, not coloured, cropped, mangled, pressed, calendered nor finished in any way. 57-58 Vict. c. 33, item 621.

That, but for the amendment to *The Interpretation Act*, which provided that the repeal or amendment of an Act should not be deemed to be, or involve any declaration whatsoever as to the previous state of the law (1), would, it seems to me, show that the legislature itself understood the word "finished" in item 673 of *The Revised Statutes*, chapter 33, to be limited to a finishing such as mangling or calendering. That would, perhaps, have been conclusive. But at all events the construction I have mentioned is one to which the provision is open.

Then there is the other construction which, as I have said, the acting Commissioner of Customs has placed upon the clause, that the expression "as taken from the loom" is to be qualified by the words "neither pressed, mangled, calendered nor in any way finished," but that the term "finished" is not itself to be qualified by the words immediately preceding it.

(1) 53 Vict. c. 7.

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That construction raises in this case a question of fact, as to whether or not the "cropping" of jute cloth is a process of finishing. The acting Commissioner of Customs, on the facts before him has found, and I think rightly found, that it is not; and I do not think the position of affairs has in that respect been materially changed by the additional evidence adduced before me. The question is one that must be determined by the language, understanding and usage of the trade, and it appears tolerably clear that cropping is not in the trade considered to be a process of finishing, and that the jute cloth in question in this case is understood commercially to be in the rough and not finished. There is, of course, some evidence the other way, but on the whole case I agree with the acting Commissioner, and find the fact as he found it.

Then it is important to bear in mind the rule of construction to which Mr. Macmaster has called attention, and in support of which he has cited the opinion of the late Chief Justice of the Supreme Court of Canada, sitting in this court, that a tax must be imposed in clear terms, and that if it is doubtful whether it has been imposed by the statute or not, the doubt ought to be resolved in favour of the importer. Notwithstanding anything contained in *The Customs Act*, I am, I think, bound by that decision and a decision of the Supreme Court to the same effect, [*Grinnell* v. *The Queen* (1)], to hold that duties of Customs must be imposed in clear terms or by necessary intendment, and that the importers should have the benefit of any fair and reasonable doubt.

With regard to the cloth under seizure, I should, as I have said during the course of the argument in this case, hesitate on the evidence before me to find that any of it has in fact been cropped. I should have great

(1) 16 Can. S. C. R. 119.

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difficulty in finding either one way or the other. Experienced witnesses examined here have either differed as to that, or have expressed their opinion with a good deal of hesitation and reserve. It is a question, however, which without doubt could be definitely determined. If the importers do not know, and apparently they do not know, whether this cloth is cropped or not, the manufacturers or shippers would know, and if it were necessary to the disposition of the case, I should not hesitate to direct a reference to ascertain that fact.

Now there is another observation which I think I ought to make, and that is that it is perfectly clear that the jute cloth which the claimants imported under the tariff in force prior to the 27th of March, 1894, and which they passed at the Custom house as free of duty, was so entered and passed by them in good faith, in the belief that it was free, and that the Customs officers at Montreal, whose duty it was to examine the cloth, must at the time have been of the same opinion. I should agree with the view presented by Mr. Hogg that so far as the collection of the duty is concerned that consideration would not be material, if it were perfectly clear that the goods were dutiable. It is important only in view of the incident that the case on the whole is a doubtful one, and in that connection is, I think, entitled to very considerable weight.

By the 183rd section of *The Customs Act*, as amended by 51 Vict. c. 14, s. 34, under which this case is proceeding, it is provided that:

> On any reference of any matter by the Minister to the court, the court shall hear and consider such matter upon the papers and evidence referred, and upon any further evidence which the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, or the Crown produces, under the direction of the court, and shall decide according to the right of the matter; and

judgment may be entered upon any such decision, and the same shall be enforceable and enforced in like manner as other judgments of the court.

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Now the words "decide according to the right of the matter" might, I suppose, be taken to raise a somewhat important question as to whether or not the legislature, by the use of the term, intended in any way or case to free the court from following the strict letter of the law, and to give it a discretion to depart therefrom if the enforcement, in the particular case, of the letter of the law would, in the opinion of the court, work injustice or unrighteousness. If the exercise of such a discretion were open to me, I should have no hesitation in the present case, in which in good faith and without the slightest intention of defrauding the revenue, the importer and manufacturer have entered the goods as free under an interpretation of the Tariff Act, in which during a series of years the Customs officers have acquiesced, in which the goods so entered have for the most part been manufactured and sold, the consumer or purchaser getting wholly, or largely, the benefit of the free entry, in which, if another construction is now to be put upon the statute and the duty collected, the whole of such duty must fall upon the manufacturer, who will not in any way be able to reimburse himself by increasing the price of the goods he sells, and in which, in short, it is impossible to restore parties to their original positions; in such a case I should, I say, have no hesitation in coming to the conclusion that "the right of the matter" would be to let the free entries stand and to release the seizure.

But it is doubtful if such a construction of the statute under which the case is referred is open to me, and I do not rest my judgment on that, but in this particular case on the following view of the matter.

While I think, as I have already intimated, that there is a good deal to be said for the construction of

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THE DOMINION BAG CO. v. THE QUEEN.

Reasons for Judgment.

the provision in question for which Mr. Hogg has so forcibly contended, it is now too late to adopt that construction. There are, as we have seen, three different constructions that may be put upon the clause. The importers and the officers of Customs have, during a series of years, concurred in an interpretation under which the cloth in question has in good faith been entered as free of duty. The cloth has, for the most part, been manufactured into bags and sold, and if duty is now exacted the whole burden must fall as a loss upon the importers. That makes a case in which, it seems to me, there is especial reason for resolving the doubt as to the construction of the statute in favour of the importer. The seizure will be released in respect of the cloth imported prior to the 27th of March last.

Now that disposes of the whole case, with the exception of importations that may have occurred since that date. As to that there is, I understand, nothing to show definitely whether any cropped jute cloth has since March been entered as free of duty. It is conceded, as it ought to be, for there can be no possible doubt as to that, that such cloth is dutiable under the Act that took effect on that day.

There will be, in accordance with the agreement between the parties, a reference to the Registrar of the court to inquire and report whether any of the cropped jute cloth in question in this case has been entered since the date mentioned, and if any, the value thereof and the duty leviable thereon.

The question of costs is reserved.

Judgment accordingly.

Solicitors for claimants: *Macmaster & Maclellan.*

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

HENRY F. COOMBS.....SUPPLIANT; 1895

AND Mar. 4.

HER MAJESTY THE QUEEN.....RESPONDENT.

Contract—Common carrier—Railway passenger's ticket—Condition printed on face—No stop over—Continuous journey.

The suppliant, who was a manufacturers' agent and traveller, purchased an excursion ticket for passage over the Intercolonial Railway between certain points and return within a specified time. On the going half, printed in capitals, were the words, "good on date of issue only," and immediately thereunder, in full-faced type, "no stop over allowed." He knew there was printing on the ticket but put it into his pocket without reading it. He began the journey on the same day he purchased the ticket, but stopped off for the night at a station about half-way from his destination on the going journey. The next morning he attempted to continue his journey to such destination by a regular passenger train. Being asked for his ticket he presented the one on which he had travelled the evening before, and was told by the conductor that it was good for a continuous passage only. On his refusal to pay the prescribed fare for the rest of the going journey, the conductor put him off the train at a proper place, using no unnecessary force.

Held, that issuing to the suppliant a ticket with the conditions upon which it was issued plainly and distinctly printed upon the face of it was in itself reasonably sufficient notice of such conditions; and if, under the circumstances, he saw fit to put the ticket into his pocket without reading it he had nothing to complain of except his own carelessness or indifference.

PETITION OF RIGHT for damages against the Crown as a common carrier.

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

The case was tried at St. John, N.B., on 1st August, 1894.

C. N. Skinner, Q.C. (with whom was *H. A. McKeown*), for the suppliant.

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Statement of Facts.

E. L. Newcombe, Q.C., Deputy Minister of Justice, (with whom was *J. A. Belyea*) for the respondent, cited the following authorities:—*Armstrong* v. *Grand Trunk Railway* (1); *Thompson's Carriage of Passengers* (2); *Stone* v. *C. N. W. Railway Company* (3); *Craig* v. *G. W. Railway Co.* (4); *Briggs* v. *Grand Trunk Railway* (5); *Beaver* v. *Grand Trunk Railway* (6); *The Government Railways Act* (7); *McNamara on Carriers* (8); *Beven on Negligence* (9); *Zunz* v. *The South Eastern Railway Company* (10); *Henderson* v. *Stevenson* (11); *Parker* v. *South Eastern Railway Company* (12); *Burke* v. *The South Eastern Railway Company* (13); *Richardson* v. *Rowntree* (14); *G. T. R. Co.* v. *Cunningham* (15); *Livingston* v. *Grand Trunk Railway Company* (16); *Drew* v. *Central Pacific Railway Company* (17); *Hutchinson on Carriers* (18).

THE JUDGE OF THE EXCHEQUER COURT now (March 4th, 1895) delivered judgment:

The suppliant is a manufacturers' agent and traveller. On Good Friday, March 31st, 1893, he was at Moncton, and having business to transact at Chatham Junction on the Intercolonial Railway, thought to take advantage of an issue of excursion return tickets which the Minister of Railways and Canals had authorized for the Easter holidays. He had seen the advertisement of the General Manager of Government Railways, the material part of which, so far as concerns this case, was as follows:

(1) 2 P. & B. 458.
(2) P. 69.
(3) 29 Am. Rep. 458.
(4) 24 U.C.Q.B. 504.
(5) 24 U.C.Q.B. 510.
(6) 22 Can. S.C.R. 498.
(7) Sec. 80 [ed. 1881].
(8) Pages 18, 447 and 448.
(9) Page 650 et seq.
(10) L.R. 4 Q.B. 539.
(11) L.R. 2 H.L. (Sc.) 470.
(12) L.R. 2 C.P.D. 416.
(13) L.R. 5 C.P.D. 1.
(14) [1894] A.C. 217.
(15) 9 L.C. Jurist 57.
(16) 21 L.C. Jurist 13.
(17) 51 Cal. 425. Cited in *Lacey's Digest* Volume 2, p. 1206.
(18) [ed. 1882] p. 462.

For the Public.
(Local Issue.)

Excursion return tickets will be issued on March 30th and 31st, and April 1st, inclusive, at first class single fare. Tickets are not good going after April 1st. Good for return up to and including April 4th, 1893.

Reasons for Judgment.

About eight o'clock in the evening of the day mentioned, the suppliant went to the ticket office and asked for an excursion ticket to Chatham Junction, and having paid the single fare, $2.16, or three cents per mile for 72 miles, was given a ticket, on the face of which on the "going half," printed in capitals, were the words "good on date of issue only," and immediately thereunder, in full-faced type, "No stop over allowed." The suppliant knew there was printing on the ticket but did not read it. The train by which he proposed to make the journey left Moncton on that evening between 8 and 9 o'clock, and by it he travelled as far as Harcourt Station, which is about half way between Moncton and Chatham Junction. At Harcourt he stopped for the night. He was not feeling well, he says, and he had business to do there. The next day, April 1st, having finished his business he proceeded on his journey by a regular passenger train. Being asked for his ticket, he presented the one on which he had travelled the evening before, and was told that it was not good; that it was good for a continuous passage on the day of issue only. There is, as is usual in such cases, some difference between the suppliant's account and the conductor's of what took place. But assuming that the tendered ticket was not good for the journey, I see no reason to think that the conductor in any way exceeded his duty or his instructions. He demanded payment of the prescribed fare, and the suppliant persisting in his refusal to pay it, he removed the latter from the train at a proper place, using no unnecessary force (1).

(1) R. S. C. c. 38, s. 37.

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It will have been observed that by the General Manager's advertisement the tickets were to be "issued on March 30th and 31st, and on April 1st, inclusive" and that they were not to be "good going after April 1st." This notice was apparently construed by the suppliant to mean that a ticket issued on any one of the days mentioned would be good going on any day up to and including April 1st. But that is not the question with which I have at present to deal. Whether such a ticket as that in evidence issued pursuant to this advertisement on the 30th or 31st of March, would have been good for a continuous journey commenced, say on April 1st, is one question. That presented by the case, namely, whether the passenger having commenced his journey on either of the three days, could break it, and stopping over continue it on another day by another train, is a different question.

Now it cannot, I think, be said that there is anything in the advertisement to prevent the issue of a ticket with the "no stop over" condition attached, or that such an issue in this case was unusual or improper. The only questions are: (1). Did the suppliant know there was printing on the ticket? (2). Did he know or believe that this printing contained conditions relating to the terms of the contract of carriage? (3). If not, was what was done reasonably sufficient to give him notice thereof? (1)

He knew there was printing on the ticket, but had no reason, he says, to think there was anything special on it. He had not noticed anything unusual on it. He

(1) See *Parker* v. *South Eastern Railway Co.*, L.R.C.P.D. 416; and *Richardson* v. *Rowntree*, [1894] A.C. 217; see also *Zunz* v. *The South Eastern Ry. Co.*, L.R. 4 Q.B. 539; *Henderson* v. *Stevenson* L.R. 2 H.L. (Sc.) 470; *Harris* v. *The Great Western Ry. Co.*, L.R. 1 Q.B.D. 515; *Burke v. The South Eastern Ry. Co.*, L.R. 5 C.P.D. 1; and *Watkins* v. *Rymill*, 10 Q.B.D. 178, in which the earlier cases are discussed and the principles to be deduced from them stated.

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had not in fact noticed anything, as he had not looked at the ticket. As a matter of fact it cannot, I suppose, be said that for the class of ticket he was purchasing the condition was unusual or special. It is one that every traveller of experience is familiar with, and he was an intelligent man constantly travelling. At all events, he does not pretend to say that he did not know the printing concerned him or related to the conditions on which he was to be carried; and even if he did not know this, the issue to him of a ticket with the condition plainly and distinctly printed upon the face of it, was in itself reasonably sufficient to give him notice. If, under the circumstances, he saw fit to put the ticket in his pocket without reading it, he has now nothing to complain of except his own carelessness or indifference. The petition must be dismissed.

Apart altogether from a "no stop over" condition printed on the face of the ticket, it has been held that the contract in such a case is to carry in one continuous journey (1).

There will be judgment for the respondent, with costs.

Solicitor for suppliant: *H. A. McKeown.*

Solicitor for respondent: *J. A. Belyea.*

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(1) *Craig* v. *The Great Western Ry. Co.*, 24 U.C.Q.B. 504; *Betts* v. *The Grand Trunk Ry. Co.*, 24 U.C. Q.B. 510; see also *Cunningham* v. *The Grand Ry. Co.*, 11 L.C.J. 107, and *The Grand Trunk Ry. Co.* v. *Cunningham*, 21 L.C.J. 13.

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Mar. 18.

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

AND

THE ST. JOHN GAS LIGHT COMPANY ..... DEFENDANTS.

Public Harbour—Ownership of by City under Royal Charter—B. N. A. Act secs. 91, 108 *and sched.* 3—*Interference with navigation and fisheries—Right to restrain—Federal rights.*

The harbour of the City of St. John is not one of the public harbours which by virtue of the 108th section and 3rd schedule of *The British North America Act*, 1867, became at the Union the property of Canada. It is vested in the Corporation of the City of St. John who are the conservators thereof, and who have certain rights of fishing therein for the benefit of the inhabitants of the city.

2. Notwithstanding such ownership of the harbour by the Corporation of the City of St. John and their rights therein, the Attorney-General of Canada may file an information in this court to restrain any interference with or injury to the public right of navigation or fishing in such harbour.

3. By the Act of Assembly of the Province of New Brunswick, 8 Vict. chap. 89, section 16, incorporating the defendants, they were prohibited from throwing or draining into the harbour of St. John any refuse of coal-tar or other noxious substance that might arise from their gas-works under a penalty of £20.

Held, that the remedy so provided was cumulative, and that while the repeal of the provision might relieve the defendants from the penalty prescribed by the Act, such repeal would not legalize any nuisance they might commit by throwing or permitting to drain into the harbour the refuse of coal-tar, or other noxious substance, that might result from the manufacture of gas at their works.

4. *Semble:* That while an exemption granted by the Minister of Marine and Fisheries under subsection 2 of 31 Vict. c. 60, s. 14, may be a good defence to a prosecution for the penalty therein prescribed, it would not afford a good answer to an information to restrain any one from throwing any poisonous or deleterious substance into waters frequented by fish if the act complained of constituted an

injury to, or interference with, some right of fishing existing in such waters.

5. By the Act of Assembly of the Province of New Brunswick 40 Vict. c. 38, authority was given to the defendants to construct a sewer, with the sanction of the Governor-General of Canada, (which was obtained) from their gas-works to the harbour for the purpose of carrying off the refuse water from such works; it was further provided by the Act that the drain should be laid under the supervision of the common council of the city, and that no discharge therefrom should take place or be made except upon the ebbing of the tide, and at such times during the ebbing of the tide, as the common council should direct. After the drain was constructed it appeared that at times tar had been suffered to escape with the refuse water through the drain into the harbour, but that the discharge of refuse water when separated from the tar had not been injurious to the fisheries carried on in the harbour.

Under these circumstances, the court granted an order restraining the discharge of tar and other noxious substances through the drain by the defendants, and further restraining them from allowing any discharge therefrom except at the ebbing of the tide and at such times during the ebbing of the tide as the common council of the City of St. John might direct.

6. *Held*, that whilst the Legislature of New Brunswick could not, at the time of the passing of the Act of Assembly 40 Vict. c. 38, legalize such an interference with or injury to the right of navigation or fishery as would amount to a nuisance, they could authorize the construction of a drain to carry the refuse water from the defendants' works to the harbour, and so long as the discharge of such refuse water through the drain did not amount to a nuisance there was no ground upon which to enjoin the defendant company to remove their sewer or to abandon the use of it.

INFORMATION for an injunction to restrain an alleged interference with navigation and fisheries in the harbour of St. John, New Brunswick.

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

The case was tried at St. John, N.B., on the 23rd, 25th and 26th days of May, 1893, and argued upon the evidence at Ottawa on the 30th day of April, 1894.

J. G. Forbes, Q.C. for the plaintiff: The statute of the New Brunswick legislature, which the defendants put

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THE ST. JOHN GAS LIGHT COMPANY v. THE QUEEN.

Argument of Counsel.

forward as sanctioning the acts complained of, does not authorize them to discharge substances deleterious to fish life through their drain into the harbour. It merely mentions "refuse water." Then, again, they allow the discharge to take place at all hours of the day; while the statute only allows them to do it at ebb-tide.

The evidence shows that they have been guilty of an interference with the public rights of navigation and fishery, and they ought to be enjoined.

(He cites 40 Vict. (N.B.) c. 38; *The British North America Act*, 1867, sec. 91, subsec. 10.)

L. A. Currey followed:—Statutory authority to do what the defendants have done, obtained from the legislature of New Brunswick, is no defence to this action; such authority could only come from the Parliament of Canada. The ownership of the soil and bed of the harbour, and the right to deal with all matters connected with navigation and fisheries are vested in the Crown in right of the Dominion by *The British North America Act*, 1867. (He cites *The Queen* v. *Fisher* (1); *Holman* v. *Green* (2).

As to the exemption from the operation of subsection 2 of sec. 15 of *The Fisheries Act* (3) by the Minister of Marine and Fisheries, relied upon in the defence, I submit that while such exemption may be made in the case of "streams," it cannot be made to apply to "harbours." The exemption is only intended to apply to running waters containing fish, such as rivers and brooks, but not to public harbours. To determine this fact one has only to turn to the clauses of section 15. The first clause deals with "rivers" and "harbours," and the second clause refers simply to "streams."

(1) 2 Ex. C. R. 365. (2) 6 Can. S. C. R. 718.
(3) R. S. C. c. 94.

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Argument of Counsel.

The company did not do what was required of them under the local Act, 40 Vict. c. 38, s. 8. They contravened its provisions and discharged substances from their pipe not only at ebb-tide but at all times of the tide.

The amount of damage done by the defendants need not necessarily be considerable when the action is at the suit of the Attorney-General. (He cites *Attorney-General* v. *Earl Lonsdale* (1), *The Queen* v. *Fisher* (2), *Wood on Nuisance* (3).)

Anything that interferes with the free exercise of the right of navigation is an interference with the right itself.

J. D. Hazen for the defendants:—By virtue of the royal charter and the local Act of 1785 the City claims to own the soil, waters and bed of the harbour and all the rights incidental thereto. It was never the property of the Government of New Brunswick, but of the City of St. John; and at the time of the Union of the provinces in 1867 the City of St. John had the same rights therein as a riparian proprietor would have in a river. (He cites *Ex parte Wilson*) (4). Under the 3rd schedule of *The British North America Act*, 1867, all "public harbours," of course, passed to the Federal Government; but the term "public harbour" meant public harbours that were the property of the several provinces. The harbour of St. John never passed to the Federal Government, it was absolutely the property of the mayor and corporation of the City of St. John. Under the 108th section of *The British North America Act*, 1867, and the 3rd schedule thereof the provincial public works and property to be the property of Canada are defined, but this does not include St. John harbour. That is the view held by the late Chief Justice

(1) L. R. 7 Eq. 377.
(2) 2 Ex. C.R. 365.
(3) Pp. 510, 574.
(4) 26 N.B. 209.

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Ritchie in the case of *Robertson* v. *The Queen* (1). In *Holman* v. *Green* it was decided that the harbour in question there was a public harbour in the sense that the soil was vested in the Crown (2). In *Brown* v. *Reed* (3) Ritchie, C.J. says, in clear terms, that the Crown's rights as conservator of the harbour of St. John had been conceded to the corporation. Therefore it is the City of St. John, and not the Dominion Government, that has the right to come into the proper court and get an injunction if the navigation of the harbour is being interfered with. This case was decided in 1874. I also call your lordship's attention to the Act of Parliament 45 Vict. c. 51. In the preamble it is recited that the harbour of St. John "within the limits of the said city" is vested in the city corporation of St. John. I do not think there can be the slightest question at all that as far as the harbour of St. John is concerned it has not been dealt with as an ordinary harbour which passed to the Federal Government at the time of the Union of the provinces. Then I submit that the property in the soil of the harbour, and the rights of conservation of navigation being granted to and vested in the city corporation, the Attorney-General of Canada has no *locus standi* in this court in respect of the remedy he seeks. How could the Attorney-General of Canada file an information for relief where the Queen, whom he represents, has no property in the soil or any kind of property in the harbour. I do not dispute the fact that if the City of St. John went to work and filled the harbour up with stone that the Crown could compel them to remove the obstruction, but I do contend that where the Dominion Government has no property rights at all in the harbour, they, as against the defendants here, have no right to obtain an injunction from this court.

(1) 6 Can. S. C. R. p. 121. (2) 6 Can. S. C. R. 711.
(3) 2 Pugs. 206.

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I submit with great confidence to the court this proposition that the Attorney-General of Canada cannot interfere by injunction where neither the soil nor any proprietary rights in the harbour are vested in Her Majesty the Queen.

[Cites *The Attorney-General* v. *Niagara Falls International Bridge Co.* (1); *Attorney-General* v. *Axford* (2); *Attorney-General* v. *O'Rielly* (3); *Attorney-General* v. *International Bridge Co.* (4).]

The Parliament of Canada has the right to legislate upon and make regulations with reference to the protection of fish life, and they have legislated on that subject. By R.S.C. c. 95 s. 15 subsec. 2, any one is prohibited from putting any deleterious matter into a harbour, and a penalty therefor is provided; and my contention is that where a statute prohibits a certain thing and provides a penalty for its infraction, that the penalty is the proper punishment for the wrong committed against the public. The general principle is that the penalty is the punishment for the public wrong, and as in *The Fisheries Act* the penalty for depositing deleterious matter in the harbour is clearly defined. I submit that no other remedy is open to the Crown. If there were no penalty provided it would be a misdemeanour and indictable, but as there is a penalty, to be enforced on summary conviction, provided for, the matter is not indictable.

We have an absolute right to the fish in this harbour. My contention is that the Attorney-General has no right to have an injunction in this case for any injury done to the fisheries because *The Fisheries Act* provides a penalty; and, further, because the Queen has no such right to the fish in this harbour as would entitle her to an injunction. (He cites *Couch* v. *Steele* (5), *Stevens* v. *Jeacooke*) (6).

(1) 20 Grant 34.
(2) 13 Can. S. C. R. 294.
(3) 6 Ont. App. 576.
(4) 6 Ont. App. 537.
(5) 3 El. & Bl 411, 412.
(6) 11 Q.B. 741.

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I submit, further, that under the permission given to the defendants by the Minister of Marine and Fisheries, and it has not yet been cancelled, no one in behalf of the Crown can come here and ask for an injunction to restrain what they have the Crown's permission to do.

Counsel for the Crown say this local Act was *ultra vires*. All the legislature pretended to do was to give authority to build a sewer. Surely they had a perfect right to do that. I do not see how the question of *ultra vires* affects this matter at all. We have the proper authority of the provincial legislature to build the sewer. We have the approval and sanction of the Governor-General in Council, and we have the approval of the common council of the city, as well as the permission of the Minister of Marine and Fisheries (which has never been cancelled), and how can the Queen come in here now and restrain us from doing what she gave us permission to do. What I speak of as a "permission" by the Minister of Marine and Fisheries, is the exemption provided in subsec. 2 of sec. 15 of *The Fisheries Act.*

Now it is contended that the exemption can only be applied to "streams" not harbours; but we all know that a stream means water of any sort that flows. The harbour of St. John is a stream in this sense in that for twelve hours out of the twenty-four it flows up and for twelve hours it flows down. Stream is a word in common use, in common parlance, amongst shipping men as indicating a harbour or part of a harbour.

I do not think your lordship would be justified in granting an injunction because once or twice the water flowed from this pipe when the tide was not ebbing. Before a court will grant an injunction there must be some damage of a substantial character, and there must be a constant and continuous nuisance. (He cites

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Attorney-General v. *Sheffield Gas Co.* (1), *Attorney-General* v. *Cambridge Gas Co.* (2), *Attorney-General* v. *Gee* (3).

Mr. *Currey*, in reply: Counsel for the defendants has cited a case (*Brown* v. *Reed*) (4), in support of the right of the city to interfere in such a case as this. But that case only goes so far as to say that the City as conservators of the harbour under their charter impliedly had the right to interfere with private rights so far as to remove an obstruction to navigation.

Then it is contended that because the Dominion Government have only a right to regulate the fisheries they have on that account no *locus standi* here. We maintain they have. Counsel for the defendants cited against us the case of the *Attorney-General* v. *Axford* (5) but that case is one arising out of a charitable trust merely and in no possible way in point. Then *ex parte Wilson* (6), establishes a proposition the other way from my learned friend's contention. The *Attorney-General* v. *O'Reilly* and *Attorney-General* v. *Niagara Falls Bridge Co.* are not in point. I submit that if we have made out our case at all we have a right to have an injunction.

Then with reference to the meaning of the word "stream" as used in *The Fisheries Act* subsec. 2 of sec. 15, counsel for defendants says it is broad enough to include the harbour; but in order to establish the meaning of a word used in a particular part of a statute we ought to look at the whole statute.

There might be something in that if the word was used by the Act generally to include "harbours," but notwithstanding what is said about that and the local use of the word "stream," I contend that in *The Fisheries Act* the word "stream" has reference to a

(1) 3 DeG. M. & G. 304.
(2) L.R. 4 Ch. 86.
(3) L.R. 10 Eq. 131.
(4) 2 Pugs. 206.
(5) 13 Can. S. C. R. 294.
(6) 25 N. B. 209.

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stream of fresh water flowing down into the sea or into a river. Now we find in the first subsection of section 15 of *The Fisheries Act* the words "river, harbour, or roadstead, or any water where fishing is carried on" and there is a penalty prescribed in respect of polluting such waters in that subsection.

Now in the second subsection is contained a proviso for the exemption of "any stream or streams" from the operation of the Act. I submit that the exemption can only apply to the second subsection where it is found, and that refers to "streams." And there is reason for this, because there are some streams that run into a mud lake or a bog, and in the case of such streams fisheries would not be interfered with and the Minister might very properly exercise his discretion and allow it. These would be streams where no harm would be done to the fisheries by putting deleterious or noxious matters into them because there are no fish in them to be hurt.

It is contended there is no interference with navigation because the vessels go right through the stuff discharged from the defendants' works, but any one knows that the rate of speed of a steamer or sailing vessel is diminished by dirt adhering to her by 40 or 50 per cent. It is not necessary to show that a ship was absolutely stopped by a rock or sand-bar to constitute an obstruction to or interference with navigation.

Then it is said that because some fish are seen going up the harbour every year, therefore the fisheries are not interfered with by such discharge. But, the evidence shows that some kinds of fish that used to go there do not go there at all now.

I submit that we have made out two general propositions, first, that the defendants are committing an illegal act in discharging the substances complained of into the harbour. We say for this they had no warrant

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of law; we say the exemption from the operation of *The Fisheries Act* which they got was illegal; we say the Provincial Act is *ultra vires*, and we further say that they have not complied with its requirements.

Secondly, we have shown an injury to the harbour by filling it up. We have shown the defendants to be guilty of an injurious act in interfering with the navigation of the harbour and the trade carried on there—an interference with trade and commerce. We have shown an interference with the fisheries. We say that an interference with navigation, no matter how slight, is a proper matter for an injunction at the suit of the Attorney-General of Canada. We claim this discharge interferes with fish life. It also interferes with the fish by keeping them from using the harbour, and further, we say it gets on the nets. It causes the net to attach to itself drift-wood and other floating substances in the harbour.

I submit we are entitled to an injunction—at all events to one directing the defendants to comply with the provisions of the Act of the local legislature.

THE JUDGE OF THE EXCHEQUER COURT now (March 18, 1895) delivered judgment.

The information in this case is exhibited to obtain an order to restrain the defendants from depositing in the harbour of St. John, tar, pitch, ammoniacal water and other noxious refuse from their works at the City of St. John, or from allowing the same to drain into any public sewer of the city, and to compel them to remove a sewer which they have constructed from their works to the said harbour.

As it is argued that the rights which the corporation of the City of St. John have in the harbour of St. John and the fisheries carried on there distinguish this case from like cases occurring in other public harbours of

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Canada, it is necessary to state at some length what these rights are and how they arise.

By the charter of the City of St. John, granted on the 18th day of May, 1785 (1), and ratified and confirmed by an Act of the Legislature of the Province of New Brunswick, 26th George III., chapter 46 (2), all the "land covered with water, bays, inlets and harbours" and the "fishing" within the limit and boundaries of the City were among other things vested in the mayor, aldermen and commonalty of the city (3). It was also thereby provided:

> That the fisheries between high and low water-mark along the east side of the bay, river and harbour of the city should be and for ever remain to and for the sole use, profit and advantage of the freemen and inhabitants of the said city on the east side of the said harbour, who should by virtue thereof have and enjoy the sole fishing, hauling the seine, erecting weirs and taking the fish between high and low water on the east side of the harbour to the total exclusion of all and every the freemen and inhabitants of the west side of the harbour and all others under any pretence whatsoever.

In like manner the freemen and inhabitants of the City on the west side of the harbour were given the sole right of fishing between high and low water-mark on that side to the exclusion of their fellow-citizens on the east side and all others, with the exception of the fisheries "on and surrounding Navy Island" which were to remain to all the inhabitants of the City in common.

Prior to the year 1862 the right of fishing between high and low water-mark in the harbour of St. John was disposed of by lottery to the freemen and inhabitants of the City entitled by the terms of the charter in part recited. In that year the fishing draft was abolished and provision made, which has continued to this time, for the annual sale by public auction of the

(1) L. & P.S.N.B. pp. 981 to 1030. (2) Id. p. 3.
(3) Id. 1010.

fishing lots in the harbour. The moneys arising from such sales were to be appropriated respectively to the construction of a public building on the west side of the harbour and a city hall on the east side (1).

At the date of the union of the provinces of Canada, Nova Scotia, New Brunswick, the coast and river fisheries of the latter province were protected and regulated by an Act of the legislature of that province directed against foreign vessels fishing within three marine miles off the coast or off any harbour (2); and by the Act 26th Victoria, chapter 6, relating to the coast and river fisheries, which however did not "in any wise apply to or interfere with the fisheries of the harbour of the City of St. John, or with the rights, powers, duties, authorities or privileges of the mayor, aldermen and commonalty of the City of St. John" (S. 30).

By the 91st section of *The British North America Act*, 1867, by which the union was consummated, the Parliament of Canada was given exclusive authority "to make laws for the peace, order and good government of Canada in relation to 'the sea coast and inland fisheries'" (3). In the exercise of this legislative authority the Parliament of Canada in 1868 enacted, among other regulations, the following provision, to which it will be necessary to refer later on:

> Lime, chemical substances or drugs, poisonous matter (liquid or solid) dead or decaying fish or any other deleterious substance shall not be *drawn* [a misprint, as will be seen by reference to the French version, for "thrown"] into or allowed to pass into, be left, or remain in any water frequented by any of the kinds of fish mentioned in the Act; and saw-dust or mill rubbish shall not be drifted or thrown into any stream frequented by fish under a penalty not exceeding one hundred dollars: Provided always that the Minister shall have power to exempt from the operation of this subsection wholly or

(1) 25 Vict. c. 50, amended by 28 Vict. c. 30 and 39 Vict. c. 27; and 25 Vict. c. 51, amended by 27 Vict. c. 19 and 30 Vic. c. 72.

(2) 16 Vict. c. 69, 2 P. S. p. 157.

(3) 30 and 31 Vict. (U.K. c. 31, s. 91 (12).

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from any portion of the same, any stream or streams in which he considers that its enforcement is not requisite for the public interest (1).

The same provision occurs in the *Revised Statutes of Canada* (2), and was in force when this information was filed. It was amended at the last session of Parliament in respect of the amount of the penalties to be recovered in the case of a first, second or subsequent offence, and by omitting the proviso that empowered the Minister of Marine and fisheries to except certain waters from the operation of the enactment (3).

We have seen that by the charter of the City of St. John, all the

> land covered with water, bays, inlets and harbours within the limits and boundaries of the city were among other things vested in the mayor, aldermen and commonalty of the city (4).

It was also by this charter provided that the latter and their successors should

> be the conservators of the water of the river, harbour and bay of the said city, and should have the sole power of amending and improving the said river, bay and harbour for the more convenient, safe and easy navigating, anchoring, riding and fastening the shipping resorting to the said city, and for the better regulating and ordering the same, and that they, the said mayor, aldermen and commonalty and their successors should and might, as they should see proper, erect and build such and so many piers and wharves into the said river, as well for the better securing the said harbour and for the lading and unlading of goods, as for the making docks and steps for the purpose aforesaid; and that they should and might have, receive and take reasonable anchorage, wharfage and dockage for the same without any account thereof to be rendered to His Majesty, His heirs or successors (5).

This charter was, in 1874, in *Brown* v. *Reed* (6), upheld by the Supreme Court of New Brunswick as a royal grant confirmed by Parliament; and in 1882, by the Act 45 Vict., chap. 51, the Parliament of Canada, to which was assigned by *The British North America*

(1) 31 Vict. c. 60, s. 14, ss. 2.
(2) R. S. C. c. 95 s. 15 ss. 2.
(3) 57-58 Vict. c. 51 s. 6.
(4) L. & P. S. N. B., p. 1010.
(5) L. & P. S. N. B. 998, 999.
(6) 2 Pugs. 212.

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Act, 1867, the exclusive legislative authority over "navigation and shipping" (1), in terms recognized the ownership of the harbour by the city corporation, and their rights therein. And perhaps with reference to a question that was the subject of some debate in this case, it will be convenient here to add that in my opinion the harbour of St. John was not one of the "public harbours" which by virtue of the 108th section and 3rd schedule of the Act last mentioned became at the union the property of Canada. The provisions of that section and schedule vested in Canada "the public works and property of each province enumerated" in the schedule. But St. John harbour was not at the date of the Act the property of the province of New Brunswick, but of the City of St. John.

The defendant company were incorporated in 1845, by an Act of the Assembly of the province of New Brunswick, 8th Vict., chap. 89, by the 16th section of which it was provided that neither the company nor any person who might in any way be employed by them should throw or drain into any part of the harbour of the City of St. John, or into any bay, cove, creek or stream falling into the harbour, any refuse of coal-tar or other noxious substance that might arise from their gas-works, under a penalty of twenty pounds for each and every offence. This section was in 1877 repealed by the 6th section of an Act of the Assembly of the province, 40 Vict., c. 38, but subject to the "fulfilment of the conditions imposed" by the 3rd section of the Act, which were that the power thereby given to lay a drain from the company's works into the harbour of the City of St. John for the purpose of carrying off the refuse water arising from their gas-works

should not be exercised unless with the consent and approval of the common council of the city of St. John first had and obtained, and

(1) 30-31 Vict. [U.K.] c. 3 s. 91 (10).

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signified by a vote of at least ten members of the common council exclusive of the mayor, and unless upon the sanction of the Governor-General of Canada first had and obtained that the drain should be laid under the supervision of the common council, and that no discharge therefrom should take place or be made except upon the ebbing of the tide, and at such times during the ebb of the tide as the common council should direct.

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The sanction of His Excellency the Governor-General to the exercise by the company of the powers conferred by the statute subject to the conditions thereof, was given by an order in council dated the 31st of March, 1877. On the 29th day of the same month the Minister of Marine and Fisheries, on the application of the company, exempted it in respect of the discharge of ammoniacal water from their gas-works into the harbour of St. John, from the operation of the provision of *The Fisheries Act* that has been cited (31 Vict., c. 60, s. 14, ss. 2), the Minister being of opinion that the enforcement of that clause of the Act in the case in question was not "requisite for the public interest." In March, 1882, the common council of the City of St. John by resolution, passed by the necessary majority, approved of the grade and course of sewer, which the company proposed to construct, and which was shown on plans submitted to the council for the purpose of obtaining its consent and approval under the Act. This sewer was afterwards constructed under the supervision of Mr. William Murdoch, an engineer employed by the City as assistant to the engineer for the City water-works. In respect to this sewer he was however acting for the defendant company and not for the City. But what was done was done openly, and later we find an extension of the sewer made by the company under the direction of the director of public works for the City, and so I think we may take it that the common council has exercised such supervision in the laying of the drain as it thought necessary, and that in that re-

spect there has been a substantial compliance with the Act of the Assembly.

In support of the information it is alleged (1st), that the refuse water from the defendants' works for the manufacture of gas, and the substance that such water holds in solution or suspension are inimical to the life of the fish that resort to St. John harbour and river, and destructive of the valuable fisheries carried on there; and (2ndly), that the deposit of tar or pitch which such refuse water occasions tends to and does interfere with the navigation of the harbour and with the convenience of ships using the harbour The defendants do not claim the right to carry into the harbour any tar or pitch but only the refuse water from their works. The tar, they say, is a valuable product which it is their interest to save and sell, and that they have appliances and take care to separate it from such refuse water before the latter is allowed to pass into the drain they have constructed, and that if there has at any time been any discharge of tar through their drains into the harbour, it has been accidental and exceptional. They express also their willingness to comply with the provision of the Act of Assembly and not to allow any discharge from the drain to take place except upon the ebbing of the tide, and at such time during the ebb of the tide as the common council may direct. With reference to the refuse water from their works, they justify, under the Act of Assembly to which I have referred; and they say that such water being discharged on the ebb of the tide into a harbour where the rise and ebb and flow of the tide is so great, there is in fact no injury to or interference with any public right; and they also say that even if it were found that there was an interference with any right of navigation or fisheries, any proceeding to restrain such interference should be taken by the corporation of the

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City of St. John, and not by the Attorney-General of Canada.

To deal first with the objection last mentioned, I must say that I cannot accede to the proposition contended for. The jurisdiction of the court to grant relief in such a case as this, depends upon clause (*d*) of the 17th section of *The Exchequer Court Act*, 50-51 Vict. c. 16, which gives the court concurrent original jurisdiction in Canada in "all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner." Whatever question may arise in provincial courts in particular cases as to whether the Crown should be represented by the Attorney-General of Canada or the Attorney-General of the province, there can, I think, be no doubt that in the Exchequer Court of Canada, in any matter within the legislative authority of Canada, the Crown is properly represented by the Attorney-General of Canada. Then, so far as this contention is based upon the ownership by the corporation of the City of St. John of the harbour of St. John, and on their rights and interests therein, the objection is, I think, equally untenable. Admitting such ownership and rights to be as large as claimed for the City by the defendants, yet such ownership and rights must be held and exercised, subject to the public rights of navigation and of fishery; and there can, it seems to me, be no doubt that in respect of any interference with any such right which would amount to a nuisance, the Attorney-General of Canada may come into this court and file an information and obtain an order to restrain such nuisance. While the corporation of the City of St. John own the harbour and are the conservators thereof, yet the general public have the right of navigation therein, which is subject to regulation by the Parliament of Canada. If that right is so invaded as

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to entitle the public to a remedy, can there be any doubt that the Crown, represented by the Attorney-General of Canada, may take steps to protect the public interest?

So, too, in respect of the right of fishery, while it is true that the corporation of the City of St. John have, for the benefit of the inhabitants of the City, certain rights of fishery in the harbour of St. John, which may be exercised subject to such regulations as Parliament may prescribe, yet they are not the only persons interested in the protection and preservation of the fish that are found there. It is well known that the principal fisheries in St. John harbour are the shad, alewive and salmon fisheries, and these fish, at the season when the fishing is carried on, are on their way to their spawning-beds in the St. John River and its tributaries, so that not only are the inhabitants of the City interested in their protection but the people who live along the river and its tributaries, and also those who may seek to take such fish in the waters or on the shores of the Bay of Fundy and its arms to which such fish also resort.

It has not been contended in this case that the authority to enact regulations for the preservation of the fisheries in the harbour of St. John, and to prevent them from being exhausted, is not now vested in the Parliament of Canada. If there was ever any doubt about the matter it was settled in *ex parte Wilson* (1), where it was held that although the charter of the City of St. John grants the right of fishery in the harbour to the corporation, for the benefit of the inhabitants, the Dominion Parliament has the right under *The British North America Act*, 1867, sec. 91, to make laws for the regulation of such fisheries, and that power was impliedly given thereby to Parliament to interfere with civil rights in the provinces so far as may be necessary

(1) 25 N.B.R. 209.

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to give effect to such regulations. It follows equally, I think, that if any nuisance has been committed in respect of such fisheries, the Attorney-General of Canada may come into this court and seek to restrain the same by injunction.

It is also to be observed, I think, that the right of the Attorney-General to an injunction does not depend on any of the statutes to which I have referred. The remedies therein given are, I think, cumulative. For instance, apart altogether from the 16th section of 8 Vict., c. 89, it would not have been lawful for the defendants to have thrown into the harbour of St. John any refuse of coal-tar or other noxious substance, if by doing so they would have committed a nuisance. The effect of the statute was, of course, to prohibit the throwing of such refuse of coal-tar into the harbour under the penalty therein prescribed and to make the company liable, without any proof of any injury to or interference with any public right. And so I take it that admitting that the conditions of the 3rd section of the Acts of Assembly 40 Vict., c. 38, have been complied with and that the 16th section of the Act 8th Vict., c. 89, has been repealed, yet the effect is only to relieve the defendants from the penalty prescribed in that Act, and not to legalize any nuisance they may commit by throwing, or permitting to drain into the harbour the refuse of coal-tar or other noxious substances that may result from the manufacture of gas at their works.

With respect to the clause in *The Fisheries Act*, under which the Minister of Marine and Fisheries in 1877 exempted the harbour of St. John from the operation of such clause so far as regards ammoniacal water discharged from the defendants' gas-works, two views may possibly be taken—first, that such exemption had the effect of a legislative sanction of the act of discharging the ammoniacal water into the harbour

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and of, therefore, legalizing that act although it may have occasioned such an interference with the fisheries there carried on as would be a nuisance; secondly, that the exemption had no greater effect than to prevent the successful prosecution of the defendants for the penalty prescribed by the Act for allowing such ammoniacal water to drain from their works into water frequented by such fish as are mentioned in *The Fisheries Act.*

As, on the facts of the case, I have come to the conclusion that it has not been established that the discharge of "refuse water" from the defendants' gas-works, and I think that term must in this connection include "ammoniacal water," has caused any such interference with the fisheries in St. John Harbour as to justify the granting of an injunction, it is unnecessary for me to come to any conclusion as to which is the true construction of the clause in question though I may perhaps add that I am inclined to think that the provision must be taken as providing a cumulative remedy for the offence therein described, and that while the exemption mentioned might be a good defence to a prosecution for the penalty prescribed, it would not be a good answer to an information to restrain the act complained of in case it clearly appeared that the throwing of such poisonous or deleterious substances into waters frequented by fish was an injury to or interference with some right of fishery existing therein.

Then with reference to the sanction of the Governor-General given to the construction of the sewer under the 3rd section of the Act of 1877, I agree with Mr. Currey that it could not have the effect of legalizing any such interference by the defendant company with any public right of navigation or fishery as would amount to a nuisance unless the Governor-General had otherwise, by authority of Parliament, the right so to legalize

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such nuisance, and I may add that no such authority was cited and that I am not aware of any.

It is, of course, to be admitted that the Legislature of New Brunswick had power to authorize the construction of the drain, and if it saw fit to make the obtaining of the sanction of the Governor-General of Canada a condition precedent to exercising that power; but it had at that time no authority to legalize any such interference with any right of navigation or of fishery as would amount to a nuisance.

Coming then to consider more in detail the relief prayed for in the information filed in this case, it is clear, I think, that there is no good ground upon which the defendants could be enjoined to remove the drain connecting their works with the harbour of St. John. Neither is there any reason to restrain them from allowing any of the refuse water from the drain to pass into the public sewers of the city, because there is no evidence that they have at any time done any such thing. With reference to the tar, it is, I think, clear that at times there must have been a considerable discharge thereof from the drain in question. For that the company have not and do not claim to have any authority. They are, I think, now doing what they can to prevent it, and I see no reason why they should not with their present appliances succeed. Then as to the refuse water from the defendants' works, there is not, it seems to me, any good reason to suppose that this of itself has occasioned any interference with navigation, or so far been the cause of any injury to any right of fishing in the harbour. Of course it will always be open to the Crown to renew its application on a new state of facts and to come again to the court for an order to restrain the discharge of such water into the harbour if it can be made to appear that it has occasioned such an interference with any right of fishery as would amount to

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a nuisance. But at present I do not think a case for an injunction has, on this ground, been made out.

The order of the court will be that the defendant company be restrained from allowing any tar or pitch, or other noxious substances, other than refuse water, arising from their gas-works, to be discharged through the drain from their works at the City of St. John into the harbour of St. John, and that they be restrained from allowing any discharge therefrom except at the ebbing of the tide, and at such time during the ebb of the tide as the common council of the City of St. John may direct.

There will be no costs to either party. The defendants have not, I understand, from the first objected to an order in the terms in which it has been given. At the same time, by their evident failure at times to exercise proper care to separate the tar from the refuse water before allowing the latter to flow into the drain, they have to that extent given occasion for this proceeding, and under all the circumstances I am disposed to leave each party to pay its own costs.

Judgment accordingly.

Solicitor for plaintiff: *J. G. Forbes.*

Solicitors for defendants: *Barker & Belyea.*

1895
April 1.

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

AND

THE MONTREAL WOOLLEN MILLS COMPANY .... } DEFENDANTS.

Incidental demand—Counter-claim—Right to plead same to information by the Crown—Substantive action—Fiat—Reference to court—50-51 *Vict. c.* 16, *sec.* 16, *sub-sec. (e) and sec.* 23.

A substantive cause of action cannot be pleaded as an incidental demand or counter-claim to an information by the Crown.

THIS was a motion to set aside an incidental demand. The motion was made at Ottawa on the 7th and 28th days of March, 1895.

W. D. Hogg, Q.C., in support of motion :—

This action arose out of a break in the bank of the Lachine Canal at Montreal. It was discovered that the accident was owing to the defendants having their works so improperly constructed that the water found its way from the flumes through the foundations, and so undermined the wall of the canal. The Government expended $15,878.97 in repairing the canal. The Crown brought an action against the Woollen Mills Company for such amount, and the company in their defence plead that the cause of the leak was the negligence of Her Majesty, and Her Majesty's officers. Besides denying their liability the defendants constitute themselves plaintiffs by virtue of an incidental demand which they file and in which they bring an action against the Crown founded upon a cause of action arising out of the same leak or injury of which the Crown complains in the information. They say it was in consequence of the negligence of the Crown's

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Argument of Counsel.

servants that they had to expend a large sum of money in repairing their works damaged by the break, and they seek to recover it. This motion is for the purpose of setting aside the incidental demand upon several grounds.

Now the Code of Procedure allows and provides for incidental demands in proper cases. (He cites Articles 149 and 151 C. C. P. L. C.) Article 152 of the Code provides that an incidental demand must be made on petition. The first objection I take is that this is an incidental demand made by filing a statement of claim. While under the practice in the province of Quebec an incidental demand must be made on petition.

Then rule 37 of the Superior Court Practice of the province of Quebec provides that an incidental demand or cross-demand shall be deemed to be a distinct action. There are several grounds upon which the incidental demand here set up cannot be allowed. In the first place the incidental demand here is equivalent to a counter-claim, and as such it is in the nature of a new action.

By our statute 50-51 Vict., chapter 16, section 16, subsection (*e*), the whole jurisdiction of this court is set out in respect of matters of counter-claim. While the Crown is given the right to set up a counter-claim against the subject the statute is silent as to a cross-demand or counter-claim being allowed to the subject against the Crown, and it is not to be found in any place in this statute that a person against whom the Crown has a right to set up a set-off or counter-claim has in turn the right to set up one against the Crown.

This is a question not of procedure, but it is a question of jurisdiction simply. I submit that it is entirely out of the jurisdiction of this court to hear anything in the way of a counter-claim set up by a subject in an action at the suit of the Crown.

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Secondly, I submit that no subject has the right to bring an action against the Crown by filing a statement of claim. There is a mode provided as to the way in which an action is to be brought against the Crown, that is by petition of right or by reference under the 23rd section of the Act. I submit that as this is a new action the only way to bring it before the court is by reference or by fiat. This is simply a new action, the defendants constitute themselves plaintiffs and ask for judgment. And apart from this they are pleading as a set-off what would not be allowed to prevail as such. Besides this there is the general rule that a set-off cannot be asserted against the Crown.

I submit that this is merely a question of jurisdiction, and at all events that there is no rule of procedure which allows it.

F. S. Maclellan, contra:—I submit that the defendants have a right to make an incidental demand in respect of the same cause of action as the information is based upon. The procedure of the province of Quebec must be applied to this case, and I submit that the Code of Procedure permits the filing of an incidental demand in such a case as this.

One of the contentions of my learned friend was that this incidental demand could not be made unless upon petition, and he cites article 152 of the Code of Procedure in support of this contention. I refer your lordship to the rules of practice in the Superior Court (he reads rule 36). The incidental demand in this case was filed with the plea, now the practice in the province of Quebec is that an incidental demand may be filed with the plea as was done here. A practice has grown up in cases such as this to put in an incidental demand with the plea and not by petition. (He cites *Lionnais* v. *Lamontagne*) (1).

(1) 20 L.C.J. 303.

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Argument of Counsel.

In the province of Quebec the defendant has a right to make an incidental demand in exactly the same form as we have done here. I have never known an objection to be taken in the province of Quebec because the defendant has not put in his incidental demand by petition. In the case of libel he might require a petition, but in cases such as the present one Art. 152 of the Code of Procedure seems to have been departed from.

The second point of counsel for the Crown was, that this was not a question of procedure, but of jurisdiction. I think it is entirely a question of procedure.

[*By the Court.*—I think Mr. Hogg's objection was that I had no jurisdiction because there was no petition having a fiat thereon nor any reference of the claim.]

But the Crown has consented to this proceeding.

[*By the Court.*—But the rule of English law is that jurisdiction cannot be given by consent.]

I think your lordship could go on without a fiat if they have taken further steps in the cause. I think that as we were brought into court that we are entitled to all the privileges that a subject would have in an ordinary action in the way of defence. If the subject is entitled to exercise certain rights in regard to the same subject-matter as the one before the court, and there is no limitation either in the rules of court or in *The Exchequer Court Act.* I do not see why the subject should be deprived of this right against the Crown. I was going to say that this objection is analogous to an exception to the form. Art. 107 of the Code of Procedure requires the exception to be made not more than four days after the filing of the incidental demand in court, and also in the case of persons sueing in the province of Quebec if they do not take advantage of the right of objection before taking new steps in the cause, any objection they might raise will be taken to be waived.

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[*By the Court.*—What is the other step taken in the cause here ?]

The demand for particulars of the incidental demand. The incidental demand was filed on the 7th of February, 1895, and on the 12th of February we were served with a demand of particulars of the incidental demand, and having given particulars two days afterwards we were served with a summons for this motion.

I say that the demand for particulars was a waiver of the right to object to the sufficiency of the incidental demand. [He cites *Munro* v *Laliberté* (1) ; *Brisson* v. *McQueen* (2)]. Rule 166 of the Exchequer Court seems to contemplate that an incidental demand or some such procedure on behalf of the subject may be made against the Crown. (He reads the rule). It seems that the subject may get judgment for something more than costs, because he could only get judgment for more than costs upon something in the nature of an incidental demand. If the defendants' incidental demand were struck out under this rule he would get judgment for costs only, but if sustained he might have judgment for damages as well as costs. I submit that the incidental demand under the procedure of the Exchequer Court rules is well founded. Rule 166 is one of the rules that applies to cases in the province of Quebec. I think the effect of rules 256 and 257 is to give the court considerable scope in applying rules of procedure in cases between the Crown and the subject where they both have causes of action in respect of the same subject-matter.

Mr. *Hogg*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (April 1st, 1895) delivered judgment.

(1) 3 Rev. de Leg. 72. (2) 7 L. C. J. p. 7.

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Reasons for Judgment.

This is an application for an order to strike out the incidental demand or counter-claim pleaded by the defendants in this case. To the application, which is made upon the ground, among others, that the incidental demand is a set-off or counter-claim, and cannot be pleaded according to the rules of this court, the defendants answer that according to the practice and procedure in force in the Superior Court of Quebec, which apply to this case, an incidental demand such as this now filed may be pleaded; and that by demanding particulars of the incidental demand the plaintiff has waived any objection that otherwise might have been taken thereto.

The real difficulty, however, that the defendants have to meet is that the question is one of jurisdiction. In their incidental demand they set up a claim against the Crown which, while it may have its origin in some of the facts, or even in the same state of facts, as those on which the Crown's claim rests, is wholly independent of such claim.

By the 23rd section of *The Exchequer Court Act* it is provided that any claim against the Crown may be prosecuted by petition of right, or may be referred to the court by the Head of the Department in connection with the administration of which the claim arises, and there is no other way in which the court can acquire jurisdiction in respect of such a claim. The incidental demand or counter-claim filed in this case must be struck out with costs to the Crown.

Judgment accordingly.

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

Solicitors for defendants: *Macmaster & Maclellan.*

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Feb. 16.

TORONTO ADMIRALTY DISTRICT.

GEORGE SYLVESTER.....PLAINTIFF;

AGAINST

THE SHIP "*GORDON GAUTHIER.*"

Maritime lien—Seaman's wages—The Maritime Court Act, s. 14 *ss.* 5—*Mortgagee in possession—Subsequent purchaser—Rights of lien-holder.*

The mortgagee of a ship who takes possession under his mortgage before the institution of an action *in rem* for the recovery of a claim which constitutes a maritime lien, does not thereby become a 'subsequent purchaser,' within the meaning of subsection 5 of section 14 of *The Maritime Court Act*, as against the lien-holder although the lien may have arisen since the date of the mortgage.

2. In such an action the lien-holder is preferred to the mortgagee.

ACTION *in rem* for the recovery of seaman's wages.

The facts of the case and the arguments of counsel are set out in the reasons for judgment.

The case was tried at Toronto before the Honourable Joseph E. McDougall, Local Judge of the Toronto Admiralty District, on the 22nd day of January, A.D. 1895.

Messrs. *Caniff & Caniff* for the plaintiff;

Mr. *Fleming* (Windsor) and Mr. *Howell* (Toronto) for the Third National Bank, interveners.

McDOUGALL, L. J. now (February 16, 1895) delivered judgment:

This is an action for seaman's wages. The services were rendered by the plaintiff in the seasons of 1893 and 1894. The action was commenced on the 5th December, 1884, and the ship arrested. There is no doubt that the plaintiff had a maritime lien for these wages.

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On the 23rd November, 1886, Charles W. Gauthier, the then owner of the vessel, mortgaged the ship to Milton H. Butler and others to secure the re-payment of the sum of ten thousand dollars. This mortgage was registered on the 2nd of December, 1886, at Windsor, the port of the registry of the ship. On the 16th May, 1890, by an assignment endorsed on the mortgage, Butler *et al*, mortgagees, assigned the above described mortgage to S. T. Reeves. This assignment was recorded at Windsor on the 31st March, 1891. On the 4th October, 1892, S. T. Reeves assigned his interest in the said mortgage for a recited consideration (no amount named) to the Third National Bank of Detroit. This latter assignment was not recorded, however, at the Custom House at Windsor until the 25th January, 1895. On the 19th of June, 1894, Charles W. Gauthier the registered owner of the ship, transferred his title to Stephen J. Reeves by bill of sale of that date recorded 22nd June (no year named in the Registrar's certificate) and there does not appear to have been any declaration of ownership filed pursuant to *The Merchant Shipping Act*, sections 56 and 57.

In May, 1894, S. T. Reeves got an extension of time by deed from his creditors conditioned on his agreeing to transfer all his estate to Oscar E. Fleming as trustee for his creditors. The estate enumerated in the extension deed included the ship *Gordon Gauthier*, which was not at that date registered in Reeve's name as owner although it is probable that at the said date he was entitled to a conveyance from Gauthier of the said ship.

On the 4th August, 1894, Stephen J. Reeves, by bill of sale pursuant to the arrangement made with his creditors in the extension deed, transferred the "Gordon Gauthier" to Oscar E. Fleming. This bill of sale was recorded on the 4th September, 1894.

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There appears to be no declaration of ownership pursuant to sections 56 and 57 in the Act either registered or filed in this case.

On the 27th December, the Third National Bank intervened as defendants in this action, appearing by Oscar E. Fleming, their solicitor. And on the same day, Oscar E. Fleming the trustee of Reeves' estate intervened as a defendant, his appearance being signed by E. S. Wigle, his solicitor.

The defendant Oscar E. Fleming sets up as his defence that he knows nothing of the plaintiff's claim and says that he relies on his bill of sale, 4th August, 1894, and also claims the benefit and protection of subsections 5 and 6 of section 14 of *The Maritime Court Act* as preserved by section 23, subsection 4, of *The Admiralty Act*, 1891.

The defendants, the Third National Bank, set up the defence that they know nothing of the plaintiff's claim, but claim to be entitled to the said ship in priority to the plaintiff by virtue of being assignees of the mortgage dated the 23rd November, 1886, the assignment to them before this action was commenced, and they also claim the benefit of subsections 5 and 6 of section 14 of *The Maritime Court Act*, as preserved by section 23 of *The Admiralty Act*, 1891.

The plaintiff's claim as set out in his statement of claim is that Reeves was either the owner or mortgagee in possession or agent for the owner or mortgagee in 1893, and that he was employed by the said Reeves to act as engineer for the season of 1893, and in his statement of claim he sets out the terms of his hiring. He avers that there was a balance due to him for the year's wages of $175 and interest. He further claims a balance of $60 for the season of 1894, when, as he states, he was also engaged by Reeves as engineer for that year upon the said ship.

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The defendants admit that the plaintiff has a claim against the owner for two hundred and thirty-five dollars for balance of wages in respect of the seasons of 1893 and 1894, and admit that if he has a maritime lien against the vessel superior to the claims of the intervening defendants, the judgment should be for two hundred and thirty-five dollars; and the plaintiff is willing to take a judgment for this amount if he is entitled to recover.

The defendant Fleming admits that he is only a trustee for the creditors of Reeves, and that he has no title otherwise than as such trustee to claim to be the owner of the ship. An assignee or a trustee for the benefit of creditors is in the same position as the debtor himself and can only claim such rights as the debtor was legally entitled to at the date of the execution of his deed of trust (1). Reeves, it appears, was the real owner of the vessel in 1893-94, though he only procured his bill of sale from Charles Gauthier in June, 1894. The plaintiff was clearly entitled to his lien against the vessel for his wages as against Reeves or the true owner of the ship at the date of the assignment to Fleming for the benefit of his (Reeve's) creditors. Fleming can only make claim to the ownership of the ship subject to this lien, because he has no higher or better title than Reeves, the debtor, had (2).

The plaintiff further avers that the bill of sale to Fleming was never properly registered pursuant to *The Merchant Shipping Act*, nor was any actual possession of the vessel taken by Fleming. I think beyond all question the defendant Fleming cannot claim the position of a *bonâ fide* purchaser within the meaning of section 14 of *The Maritime Court Act*, subsection 5.

(1) *McMaster* v. *Clure* 7 Gr. 550. (2) See *Collver* v. *Shaw*, 19 Grant 599; *Robinson* v. *Cook*, 6 O. R. 590.

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As to the contention of the Third National Bank that they are mortgagees in possession, this, from the evidence, does not appear to be the fact. The mortgagees according to Mr. Petzold, who was examined on their behalf, were not in possession of the "Gordon Gauthier" and had not taken possession of the vessel as such mortgagees before this action was commenced. Something was said on the argument of this case that this was a mistake on the part of Mr. Petzold, and that it could be shown that the mortgagees had taken possession of the vessel some time about the 20th of November, 1894. If that be so, it is necessary to consider whether a mortgagee who has taken possession under his mortgage can be considered as a subsequent purchaser within the meaning of section 14, subsection 5 of *The Maritime Court Act*. When a ship is mortgaged and the mortgage registered according to the requirements of *The Merchant Shipping Act*, by virtue of the mortgage the property in the ship passes *primâ facie* to the mortgagee, and he is thereby the owner of the ship unless his rights as to ownership are restrained by any other part of *The Merchant Shipping Act*. Section 70 of *The Merchant Shipping Act* enacts as follows:—

> A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share except in so far as may be necessary for making such ship or share available as a security for the mortgage debt.

It is said in *Dickinson* v. *Kitchen* (1), that the true meaning and intention of the earlier part of this section is to protect a mortgagee in doing acts necessary to make the ship available as a security for his debt. To so make the ship available he may take possession of her and collect the freight, and yet by the earlier part of the section he is protected from liabilities such as

(1) 8 El. & Bl. 789.

the debts of the ship which might otherwise be urged against him as the legal owner in possession, receiving a beneficial interest. Coleridge, J. in the same case, says (1) that even a defective registration of a mortgage does not prevent the ordinary incident of a mortgage, that thereby the mortgagee is become the owner of a ship. Crompton, J.(2) in the same case says, speaking the position of the mortgagee of a ship :

> By the ordinary incident of the conveyance to him by way of mortgage, he would be owner. The question, therefore, is whether the conveyance by way of mortgage under section 66 of the statute, [*The Merchant Shipping Act*] is an ordinary mortgage. If it is, the mortgagee is thereby, by reason of such mortgage, become the owner of the ship as against a subsequent execution at the suit of a creditor. I am of the opinion that the mortgage under the statute is an ordinary mortgage with ordinary incidents. It seems to me that none of these ordinary incidents are taken away by section 70. That section was intended to protect the mortgagee taking possession of a mortgaged ship in order to make it available as a security from certain liabilities which frequently attach upon an owner of a ship in possession.

The question in this case, (*Dickinson* v. *Kitchen*) was as to the rights of the mortgagee of a ship against an ordinary execution creditor of the owner of a ship, and the case determined that the mortgagee's rights as owner and right to possession of the ship prevailed against an execution creditor of the registered owner, though such an owner and not the mortgagee was in possession of the ship at the time of the seizure under the writ of execution.

I refer also to the case of *Dean* v. *M'Ghie* (3), an earlier case under the statute of 6 Geo. IV, c. 110 where it was held that a mortgagee who had taken possession of the ship under his mortgage was liable to pay seamen's wages, and very similar words in the statute of 6 Geo. IV, c. 110, sec. 45, namely, that the mortgagee by virtue of his mortgage should not be

(1) Ibid. p. 799. (2) Ibid. p. 800.

(3) 4 Bing. 45.

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deemed to be the owner of the ship were held to not prevent such mortgagee from being considered the legal owner of the ship. The effect of these cases would appear to be that the execution and registration of the mortgage constitutes the mortgagee the legal owner of the ship from the date of his mortgage, and that transferees of such mortgage will occupy the same position from the date of their respective transfers. Sec. 70 of *The Merchant Shipping Act* does not limit his common law rights or vary its incidents, but simply protects him from certain claims only which he might otherwise be liable for if treated as an owner in possession. His taking possession of the ship under his mortgage does not vary or alter his title as legal owner; it only puts him in the position to make a sale for the purpose of realizing upon his security. He can in no sense be treated or considered, in my opinion, as becoming, by the act of taking possession, a subsequent purchaser within the meaning of subsection 5 sec. 14 of *The Maritime Court Act.*

I would refer to the cases of the *Mary Ann* (1), and *The Feronia* (2), as showing that a seaman's lien for wages will rank in priority to the claim of the mortgagee; and, therefore, I find that the plaintiff's claim in this case is not superseded by the claim of the Third National Bank under their mortgage, even if before the commencement of the action they had taken possession of the ship under their mortgage, and they cannot be treated as having by the act of taking possession, become subsequent purchasers. The ninety-day limit, therefore, imposed by section 14 subsection 5 of *The Maritime Court Act*, does not prevent the plaintiff bringing his action to recover against the ship the amount of his wages in this case.

(1) L. R. 1 A. & E. 8. (2) L. R. 2 A. & E. 65.

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I direct that judgment be entered for the plaintiff against the said ship for the sum of two hundred and thirty-five dollars ($235), and costs of suit and that an order for the sale of the said vessel will be made unless the said amount and costs are paid within twenty days from this date, and that the decree do not issue till the expiration of the said twenty days.

Judgment accordingly.

Solicitors for the plaintiff: *Caniff & Caniff.*

Solicitors for interveners: *O. E. Fleming and E. S. Wigle.*

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Mar. 15.

TORONTO ADMIRALTY DISTRICT.

GEORGE ALLAN SYMES.....PLAINTIFF;

AND

THE SHIP *CITY OF WINDSOR*, THE THIRD NATIONAL BANK OF DETROIT, AND THE PENINSULAR SAVINGS BANK OF DETROIT, MORTGAGEES INTERVENING .... } DEFENDANTS.

Maritime law—Master's wages and disbursements—Lien—Statute 56 *Vict., Chap.* 24 *(Can.)—Inland waters—Seamen's Act—Mortgagees—Form of judgment.*

The master of a ship registered at Windsor, Ontario, instituted an action for wages or damages in the nature of wages for alleged wrongful dismissal, for disbursements, and liabilities incurred by him for necessaries supplied, and repairs done to the ship by persons in Ontario.

The owner did not appear but the claim was opposed by mortgagees of the ship who intervened.

During the time these liabilities were incurred by the master his means of communication with the owner were limited.

Held, that the master was entitled to a maritime lien on the ship for his wages, and as the power of communication by the master with the owner was not correspondent with the existing necessity, he was entitled to recover for disbursements properly made by him and for liabilities properly incurred by him on account of the ship.

2. *Held* that the master's claim for his wages and for disbursements were to be preferred to the mortgage.

3. *Held*, that as to liabilities properly incurred but not paid, the master's claim as to these were also to be preferred to the mortgage, but vouchers of their due payment must be filed by the master with the Registrar before the master could receive out of court sums awarded in respect of such claims.

THIS was an action by a ship-master to recover wages, damages, disbursements and liabilities incurred by him for necessaries supplied and repairs done to the

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ship by persons resident in Ontario while he was acting as master of the ship.

The owner made no defence but the mortgagees of the vessel intervened and disputed the claim of the master. The facts of the case and the arguments of counsel are fully set out in the reasons for judgment.

The trial of the case was commenced at St. Catharines on the 23rd day of November, 1894, and concluded at the city of Toronto on the 22nd and 23rd days of January, A.D. 1895.

Messrs. *Caniff & Caniff* for the plaintiffs.

Mr. *Fleming* (Windsor) and Mr. *Howell* (Toronto) for the Third National Bank, interveners.

McDOUGALL, L. J. now (March 15, 1895) delivered judgment:

This is an action *in rem* against the ship *City of Windsor* brought by the master to recover wages due him upon an alleged hiring for the season of 1894; for damages for wrongful dismissal; and for disbursements properly made by him and liabilities properly incurred by him on account of the ship during the months of April, May, June, July and August, 1894.

The ship was taken possession of by the Third National Bank as mortgagees, on the 27th August, 1894, and they now intervene as defendants. The Peninsular Savings Bank also intervene as defendants, claiming some right or interest in the same mortgage.

The *City of Windsor* is a passenger steamer registered at the port of Windsor. For some years she has been plying at or near that port. In the spring of 1894, her then registered owner, S. T. Reeves, who resided at Windsor, decided after conference with the mortgagees, the Third National Bank, to place her on the passenger route between the cities of St. Catharines and Toronto.

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The plaintiff, George A. Symes, was engaged by Mr. Reeves as master and was placed in charge of the vessel on the 13th day of April, 1894. The first duty assigned to him was to superintend the fitting out of the vessel for the proposed season's work. While the fitting out was in progress, Reeves the owner, and the master visited St. Catharines to arrange for a dock and other business details necessary for placing his passenger boat on a new route. The evidence shows that Capt. Symes was well known in St. Catharines, while Reeves the owner was an entire stranger. Capt. Symes had commanded several other vessels in former seasons, and his credit and reputation at St. Catharines was excellent. When it was known that he was to command the new passenger excursion steamer, no difficulty was experienced in making satisfactory preliminary arrangements at that port and later at Toronto, the other terminus of the route.

On the 11th day of May the *City of Windsor* started for St. Catherines, arriving there on the 13th, and the boat was at once placed on the dry-dock by the owner's orders to have her bottom scraped and several other minor repairs made. The trial trip was made on the 17th May, and the first regular trip on the 22nd May. Several rival steam-boats were running on the same route as competitors for the business. The owner during the whole season supplied little or no money for the running expenses of the boat. He was himself pecuniarily embarrassed and his own time was much occupied in managing a large fishing business carried on in Lake Huron. He stated that he expected and hoped that the *City of Windsor* would earn enough money to pay her own way. One or two small drafts drawn upon him by the master were paid, while others were protested for non-acceptance or non-payment. The owner had no agent either at St. Catharines or

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Toronto. In his letters to the master he was urging him not to draw on him for necessary outlays, but to try and meet his accounts and bills from the boat's earnings.

In the month of May the boat met with several accidents. She unshipped her rudder by striking a sunken log in the canal, necessitating her going into dry-dock. A second accident occurred through the engineer disobeying a signal, resulting in the breaking down of the gates of one of the locks of the canal. In consequence of this injury caused to the canal, the boat was tied up for some weeks by the Government. Great delay ensued in procuring bonds for the security of the Government's claim, and the boat was not released for about three weeks. The business done throughout the season was unsatisfactory. Money enough was not earned to pay running expenses and the charges for the repairs necessitated by the several casualties above alluded to. The master had to purchase coal, provisions and other necessaries for the boat on credit. Money was borrowed to pay wages and various liabilities incurred amounting in the aggregate to about $2,500, outside of the master's present claim for wages.

The master swears that he endeavoured to raise money on the credit of the owner but was unable to do so. Reeves gave the master $100 on leaving Windsor in May; $20 at another time, and paid one draft drawn on him by the master amounting to $50. Beyond this he paid nothing towards the expenditure incurred during the season.

On the 27th August, 1894, the defendants the Third National Bank, mortgagees, sent their agent, Mr. Petzold, to Toronto, and he took possession of the boat in their name. The seamen and master were paid up to that date, and the boat was laid up for the balance of the season.

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On the 31st day of August, the master commenced the present action for his own claim and for the amount of the various debts which he had incurred on account of the ship. Nearly all the creditors were examined and detailed the circumstances under which they supplied the goods to the steamer. A large number swear that they supplied the goods they charge for solely on the credit of the master with whom they were personally acquainted, and state the fact that as they were totally unacquainted with the owner they did not credit him. Others declare that they supplied the goods on the joint credit of the ship and the master, and a few admitted that they did not look to the master but had supplied the goods in the usual course of their business to the ship, charging the account to the *City of Windsor* on their books. The master gave notes of acceptance for some of the accounts and in a few other cases acknowledgements or agreements to be personally responsible for the charges. The *City of Windsor* made two or three excursions trips during the time she was plying on Lake Ontario, to American ports, but with these exceptions made all her trips between Canadian ports.

The Third National Bank and the Peninsular Savings Bank who also intervene as defendants, occupy this position with reference to their mortgages: Reeves the owner of the vessel, on the 1st December, 1891, executed a mortgage to the Third National Bank, for $9,000; in January, 1893, Reeves executed another mortgage to the Third National Bank for $17,500, as security for certain advances made to him, as appears from the evidence, and to cover any outstanding balance of account due by Reeves to the Bank. The Third National Bank is at present in liquidation, but it is alleged, assigned the indebtedness covered by the mortgages to the Peninsular Savings Bank as security for certain advances

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made by them to the Third National Bank. The mortgages themselves were not assigned. It is admitted that there is due and unpaid in respect of all these mortgages as against the *City of Windsor* about $9,700. Beyond this amount Mr. Hudson, the Receiver of the Third National Bank, made an advance of about $600 to Reeves, the owner, to enable him to fit out the *City of Windsor* in the spring of 1894, and was a consenting party as representing the bank, to the placing of the boat on the Toronto and St. Catharines route. The Receiver also advanced further, about $1,700 on the 27th August, 1894, to pay off the crew and certain claims then settled; they contend that these advances should be treated as covered by these mortgages. Mr. Petzold, his agent, took possession of the boat under their mortgage on the latter date.

One question arises in this action which it is necessary to decide before entering upon any consideration of the various liabilities alleged to have been incurred by the master on account of the ship, and before I deal with his own personal claim for wages:—Is the plaintiff entitled to a maritime lien on the said ship for the liabilities alleged to have been incurred by him as master?

By 56 Vict. (Dom.) cap. 24, entitled *An Act to amend the Inland Water Seamen's Act*, assented to on April 1st, 1893, it is provided by sec. 35 (*a*) as follows:—

> The master of any ship, subject to the provisions of this Act shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, and for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as by this Act or by any law, or custom, any seaman not being a master, has for the recovery of his wages; and if in any proceeding in any court possessing Admiralty jurisdiction in any of the said provinces touching the claim of a master to wages, any right of set off or counter-claim is set up, such court may enter into and adjudicate all questions and settle all accounts then arising or outstanding and un-

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settled between the parties to the proceeding, and may direct payment of any balance which is found to be due.

The section above quoted is practically a transcript of the Imperial statute 52–53 Vict., cap. 46, sec. 1, and the courts in Canada are aided in construing its provisions by several very recent English decisions upon the section defining its legal effect and meaning. The first is *Morgan* v. *The Castlegate Steamship Co.* (1) and the *Orienta* (2), as qualified by the judgment of the Court of Appeal (3). The Imperial Statute of 1889 was passed immediately after the decision of the House of Lords in the case of the *Sara* (4), and in consequence of such decision. The effect of the decision in the *Sara* was to hold that the provisions of the Admiralty Court Act 1861, did not give a master a maritime lien on the ship for disbursements or liabilities incurred by him. The contrary of this had been held in a long series of cases, commencing with the *Mary Ann* (5), decided in 1865, and ending with the *Sara* in the court below, until the latter case was reviewed in the House of Lords when all the prior decisions were declared unsound and the judgment of the court below in the case of the *Sara* reversed. In the previous cases of the *Chieftain* (6), and the *Edwin* (7), it was held that the maritime lien then thought to exist in favour of a master for disbursements extended only to moneys actually paid, but not to liabilities incurred and not actually paid. But in the case of the *Feronia* (8), this doctrine was infringed upon, for Sir Robert Phillimore confirmed the ruling of the Registrar as to certain items for liabilities for proper necessaries purchased by the master but not actually paid for by him; and the items were allowed to the master conditionally

(1) [1893] A. C. 38.
(2) [1894] Prob. 271.
(3) [1895] Prob. p. 49.
(4) L. R. 14 A. C. 209.
(5) L. R. 1 A. & E. p. 8.
(6) Brown & Lush 104.
(7) Brown & Lush, 281.
(8) L. R. 2 A. & E. p. 65.

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upon his producing vouchers showing actual payment of them by him and depositing them in the Registry. See also the *Red Rose* (1). The added words in the Imperial statute of 1889: "And liabilities incurred on account of the ship" now clearly establish a maritime lien for such liabilities even if such liabilities had not been actually paid by the master at the date of his action.

The *Sara* (2), as I have said, reversed all these cases, and Parliament recognizing the confusion that would arise from disturbing a line of decisions which had been followed and acted upon for twenty or twenty-five years, immediately enacted 52–53 Victoria, cap. 46. The effect of this statute is stated by Lord Halsbury in the *Castlegate* (3), "to be to create the lien which it had been supposed existed by virtue of the section which gave jurisdiction to the Court of Admiralty," sec. 10, Admiralty Court Act, 1861. Again he says at page 47:

> When the legislature altered the law laid down in this House in the case of the *Sara* and restored the law which was supposed to exist before, it cannot for a moment be imagined that the legislature was ignorant of the construction which had been consistently put upon the words in the former Admiralty Court Act which was supposed to create a lien. I cannot conceive that if it had been intended to create a wider lien than had been held to exist under the previous words which were supposed to create it, the Legislature would not have used different words to those upon which the construction had been put, so as to make that intention clear and unambiguous.

This being the result of the statutory amendment, and our Act of 1893 being to all intents and purposes identical in language, we are compelled to examine some of the earlier cases which by force of the Act of 1889 in England are re-established, as authorities, to ascertain what are and what are not proper disburse-

(1) L. R. 2 A. & E. 80. (2) 14 App. Cas. 209.
(3) [1893] L. R. App. Cas. 46.

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ments and liabilities incurred on account of the ship by the master in respect of which the maritime lien will arise. It is also necessary to consider under what circumstances such disbursements, even if creating a maritime lien upon the ship, if expended or incurred in a foreign port, would create a similar lien if the expenditure was made and the liability incurred in a home port.

First, what are necessaries for which disbursements may be made or liabilities incurred? *Coals*, [the *West Frieland* (1), the *N. R. Gosfabrick* (2)]; *cables, anchors, rigging, and matters of that description*, [the *Sophie* (3)]; *money advanced for procuring necessaries*, [the *Omni* (4)]; *primary indispensable repairs—anchors, cables, sails and provisions*, [the *Comtesse De Pregeville* (5)]; *insurance for freight, money advanced to pay pilotage, light, tonnage and harbour dues, noting protest travelling expenses of master*, [the *Riga* (6)]; *tobacco and slop supplied seamen; bill of exchange drawn by master of the dishonour of which he had received no notice*, [the *Feronia* (7), the *Fairport* (8)]; *account for painting ship on master's order*, [the *Great Eastern* (9)]; *money advanced to pay a shipwright's bill for repairs where he refused to allow the ship to leave his dock until paid*, [the *Albert Crosby* (10)].

The obligation of the owners upon the contract of the master for repairs and necessaries to the ship depends upon the principles of agency. The owners act through the master, as their agent, and in the absence of any express directions, impliedly hold him out to the world as possessing authority to bind them

(1) Swab. 344; 456.
(2) Swab. 344.
(3) 1 Wm. Robinson, 368.
(4) Lush. 154.
(5) Lush. 329.
(6) L. R. 3 A. & E. 516.
(7) L. R. 2 A. & E. 65.
(8) 8 P. D. 48.
(9) L. R. 2 A. & E. 88.
(10) L. R. 3 A. & E. 38.

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by his contract for the employment or repair of the ship and the supply of necessaries. He is appointed by the owners for the purpose of conducting the navigation of the ship to a favourable termination, and there is vested in him, as incident to that employment, an implied authority to bind the owners for all that is necessary to that end. The master is always personally bound by a contract of this kind made by himself, unless he takes care by express terms to confine the credit to the owners only. But when the contract is made by the owners themselves or under circumstances that show the credit to have been given to them, there is no right of action against the master. Usually, however, the surrounding circumstances attending the making of the contract are such that there is an election for the creditor to proceed against the owners or against the master, but he may not sue both (1). Where the owner or his agent is at the port where the liability is incurred or so near it as to be reasonably expected to interfere personally, the master cannot without special authority for the purpose, pledge the owner's credit or the ship's necessities. Under the foregoing limitation of the implied authority of a master, it has been stated that the rule cannot be described by any geographical radius because it is said that cases arise daily, where, as the necessity is pressing, the delay of communicating with the owner, though comparatively near, would be prejudicial to his (the owner's) interests. Mr. McLachlan formulates the rule as a result of a number of decisions, in the following language (1):

> There is authority to borrow money on the ship or pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity.

In the *Orienta* (2), Lord Esher thus expresses himself as to the circumstances under which the master

(1) *McLachlan on Shipping* [3rd edition] 139, 142.

(2) [1895] Prob. 49.

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incurs a liability which entitles him to a maritime lien:

> He (the master) is only authorized to pledge his owner's credit for what you may call the things necessary for the ship, that is to say, he can pledge his owner's credit if he is in a position where it is necessary for the purposes of his duty that these things should be supplied and he cannot have recourse to his owners before ordering them. * * * The real meaning of the word 'disbursements' in Admiralty practice is disbursements by the master which he makes himself liable for in respect of necessary things for the ship for the purposes of navigation which he as master of the ship, is there to carry out, necessary in the sense that they must be had immediately—and when the owner is not there able to give the order and he is not so near to the master that the master can ask for his authority, and the master is, therefore, obliged necessarily to render himself liable in order to carry out his duty as master.

In the *Riga* (1), Sir Robert Phillimore, in the Admiralty Court, adopted the common law rule laid down by Abbott, C. J. (not Lord Tenterden as stated in the report) in *Webster* v. *Seekamp* (2), and he thus expresses the rule to be applied by a jury in determining what were the circumstances that would justify the master in pledging his owner's credit for necessaries, and in determining what were necessaries:

> If the jury are to enquire only what is necessary, there is no better rule to ascertain that than by ascertaining what a prudent man if present would do under the circumstances in which the agent in his absence is called upon to act. I am of opinion that whatever is fit and proper for the service on which the vessel is engaged, whatever the owner of that vessel as a prudent man would have ordered if present at the time, comes within his meaning of the term 'necessaries,' as applied to those repairs general or things provided for the ship by order of the master for which the owners are liable.

See also *Arthur* v. *Barton* (3), *Webster* v. *Seekamp*, above cited. The *Riga* (4), abolished the distinction between necessaries for the ship and necessaries for the voyage and placed them on the same footing.

(1) L. R. 3 A & E. 516.
(2) 4 B. & Ald. 352.
(3) 6 M. & W. 138.
(4) L. R. 3 A. & E. 516.

In the *Castlegate* (1), Lord Watson lays down the principle that:

> There can be no lien upon a ship in respect to disbursements for which the master had not authority to bind the owner, or, in other words, that no maritime lien can attach to the *res* for any sum which is not a personal debt of the owner.

And this definition must be taken as the latest judicial decision of the highest court in the empire as determining the test which must be applied in each case where the master sets up a lien for disbursements made by him for liabilities incurred on account of the ship.

Before examining the evidence in the present case, then, it becomes necessary to consider a few of the authorities wherein it has been held that the master had authority to pledge the owner's credit in a home port, and thereby render the owner liable in an action brought by the creditor to recover for an indebtedness contracted by the master. McLachlan, (3rd edition) p. 133, states that even when the ship is at home, if she is to be employed as a general ship, it rarely happens in practice that the owners interfere with the receipt of the cargo. Without doubt, however, they are by law bound by every contract made by the master relative to the usual employment of such ship. At page 138, the same author says:

> The obligation of the owners upon the contracts of the master for repairs and necessaries to the ship is of the same nature and depends upon the same principles as their obligation on his contracts with regard to its employment.

And at page 139, speaking of the implied authority of the master, he says:

> Consequently this authority, subject to certain limits hereafter to be considered, covers all such repairs and the supply of such provisions and other things as are necessary to the due prosecution of the voyage and extends to the borrowing of money when ready money is required

(1) [1893] App. Cas. 51.

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for the purposes of the same employment to which this authority is incident.

In *Webster* v. *Seekamp* (1) Abbott, C. J., and the court, held it was a proper question to submit to the jury to determine whether the coppering of a vessel for an intended voyage to the Mediterranean ordered by the master living at Liverpool, the owner living at Ipswich was necessary, and what a prudent owner if present would have ordered; and the jury having found both questions for the plaintiff, he refused to disturb the verdict and held the owner bound by the master's contract. In *Arthur* v. *Barton* (2), Lord Abinger held that the question as to the owner's liability for money borrowed for necessaries by the master of a coasting vessel from the plaintiff who resided at Swansea, the owner residing at Port Madoc in Merionethshire, was a question for the jury and he laid down the principles as follows:

> Under the general authority which the master of a ship has, he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged, but this does not usually extend to cases where the owner can himself personally interfere in the home port or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required. Therefore if the owner or his general agent be at the port or so near to it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him or to his agent to do what is necessary. But if the vessel be in a foreign port where the owner has no agent, or if in an English port, but at a distance from the owner's residence, and provisions or things require to be provided promptly, then the occasion authorizes the master to pledge the credit of the owner.

In *Stonehouse* v. *Gent* (3), the owner escaped liability, but largely on the ground that the plaintiff in that case set up in evidence what amounted to a special authority

(1) 4 B. & Ald. 352 (1821). (2) 6 M. & W. 143 (1840).
(3) 2 Q. B. 451 (1841).

from the owner to the master, but the court found that the conditions of the special authorization had not been followed and that there was full opportunity for communicating with the owner. In *Wallace* v. *Fielden* (1), the owner was held not liable because he was in actual communication with the master by telegraph though the ship was in a foreign port and the master signed a bottomry bond for repairs and for discharging and re-loading cargo without his express authority, which could have been asked for. In *Gunn* v. *Roberts* (2), the court cites *Arthur* v. *Barton* and affirms and approves of the judgment in that case as a correct and proper exposition of the law.

In the light of the principles laid down in the foregoing cases, I will endeavour now to consider the evidence given at the trial herein to ascertain the relative position of the parties and the authority, expressed or implied, conferred upon the master by the owner of the *City of Windsor* to make contracts for necessaries and repairs, and to borrow money for the payment of the seamen's wages and other disbursements and liabilities for which the plaintiff now sets up a maritime lien.

The *City of Windsor* was a passenger boat and also carried freight and anything else that might offer; she was therefore a general ship. The route upon which she was plying between St. Catharines and Toronto on Lake Ontario was two hundred and twenty miles from Windsor and the port of registry and the place of residence of her owner Mr. Reeves. Her owner though engaged at a fishing village on Lake Huron, three hundred miles from Toronto, it appears did not leave Windsor for his fishing station until 6th July. He remained at Lake Huron until August 1st, and then came to Toronto, remaining until the 7th August; went away again to Lake Huron until August 18th, returned

(1) 7 Moore's P. C. Cases, 398. (2) L. R. 9 C. P. 331 (1874).

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to Toronto for a day or two, then went to Detroit and Windsor and returned to Toronto again on the 25th August where he remained until 27th August, on which last date the steamer was taken possession of by the mortgagee.

The greater number of the accounts and claims set up by the master as liabilities incurred by him were by him contracted prior to the 6th July. Those incurred by him after that date would amount to four or five hundred dollars out of the aggregate of the claims. The route upon which the boat was placed, as I have before remarked, was a new one. Two and sometimes three other steamers, the *Lakeside*, the *Garden City*, and the *Empress of India* were active competitors for the traffic and freight between St. Catharines and Toronto. The steamer *City of Windsor* was a slow boat and as stated earlier in my judgment, she had the misfortune to carry away the gates of a lock of the canal in the latter part of May, and was tied up by the Government for about three weeks, because the owner between those dates had been unable or neglected to furnish a bond to secure the claim of the canal authorities for the damage caused by the casualty. Mr. Reeves, the owner, acquits the captain of any responsibility for this canal accident. It was due either to a defect in the engine or to negligence on the part of the engineer in not promptly obeying the signals given by the master from the deck. The weather during May had been cold and rainy so that there was little travel. When the boat resumed her trips in June after her release by the Government, it was difficult to secure a share of the passengers. The season altogether was a most unprofitable one for the vessel. The owner himself accepted a few drafts, but allowed most of them to go to protest for non-payment. The master was being urged by the owner to keep the vessel on the route,

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and yet the *City of Windsor* was not earning enough money to nearly pay her running expenses. As to some of the drafts, the owner was writing the master to try and meet them from the earnings of the boat. Such articles as provisions, fuel, and certain of the repairs, were required to be got immediately; and if the owner's orders were to be obeyed to keep the vessel running strictly according to her published time table, there would be no opportunity to communicate with the owner to get express authority except by laying up the boat.

I have, therefore, come to the conclusion that the disbursements by the master for provisions, fuel, and certain of the repairs he only acted as an ordinarily prudent man would have done, and as an ordinarily prudent owner would have acted had he been there dealing with the same difficulty. He procured his daily necessary supplies under various heads on credit, and under all the circumstances of the case, and looking to the nature of the employment of the boat, I am of the opinion that the master must be held to have had implied authority from the owner to incur the liabilities in question.

The master further swears that the owner visited him at various times during May, June and July, and that he advised him from time to time of his difficulties and of the fact of his having to procure many necessaries on credit, and in no instance does it appear that the propriety of his doing so was called in question by the owner Reeves, nor was any objection raised to this method of procuring what was needed for the crew and vessel to enable the *City of Windsor* to continue her daily advertised trips.

[His Lordship here gave a detailed statement of the particulars of the various disbursements and liabilities

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in reference to which the master set up his claim to a maritime lien.]

Many of the foregoing accounts were open accounts with grocers, butchers and bakers, the supplies only being obtained from day to day. In some instances payments were made on account to the creditors by the master, out of the moneys received by him from the vessel's earnings, and as to such claims it is for unpaid balances that the master now sues. In other cases the articles were procured on credit and nothing has been paid on account.

I find the following items and accounts contracted by the master should be allowed:—Items 2, 3, 6, 12, 13, 14, 17, 18, 19, 20, 21, 24, 30, 31, 39, 44 and 45.

As to item 1, this is a claim for $61.77 for groceries purchased from John M. Butler. The master settled part of the claim by directing the purser of the boat Mr. Love, to give Butler a note signed by himself (Love) the purser, at one month, for $53.35, the amount of the account. The circumstances of giving the note as shown by the evidence of the master appear as follows:—Butler said he must have some money; the master said he was unable to give it; he suggested to Butler that if he (Butler) would take a note at a month, he (the master) would be able to meet it out of the earnings of the boat. Butler said he could use a note if it would be paid at maturity. The master said he would instruct the purser, Love, to draw up and sign the note, which was accordingly done on the master's instructions. Love signed the note in this form "John Love, Purser *City of Windsor*." It is clear from the evidence of both Butler and the master that the note was not to be taken in satisfaction, but only to give time to the master to procure the money to meet it. The master was to meet the note, not Love. It is quite manifest that it was not intended by the parties to the

transaction to make Love responsible personally; I think therefore this claim should also be allowed.

Claim No. 4 included besides an account for groceries, one hundred dollars money borrowed by the master from the claimant to pay seamen's wages and a draft, at thirty days was drawn by the master on the steamer *City of Windsor* for $165.50 being the amount of the grocery claim and the borrowed money. The draft was not used or discounted and was not paid. I think that part of this claim, for $72.97, for groceries, should be allowed. I will deal with the question of borrowed money later.

Claim 5, for $53.89, the creditor accepted a draft on the owner drawn by the purser for the amount of his debt. The owner accepted the draft but did not pay it. Here the creditor elected to look to the owner, and the master is discharged. The master was not a party to the draft.

Claim No. 7 is a claim for repairs by Polson & Miller. The work was building and setting up new davits and repairing the rudder. The amount of the claim is $263.65; protest fees on a draft subsequently given by Capt. Symes, $1.58. In this case the evidence shows that the Inspector of Hulls ordered the steamer to procure an extra boat and have davits fitted up to carry the same; in default she would not be allowed to carry passengers. The claim is made up of $187.56 fitting up and building the davits and $87.09 repairing the rudder which had been broken and had to be welded. I think these are repairs which had to be made promptly, and, as to the rudder, were imperatively necessary. The boat's passenger license would have been withdrawn unless the davits had been put in and the extra boat carried. The owner was notified of the expenditure, and in fact approved and ratified the incurring of the liability. On the 20th June, 1894,

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Polson & Miller forwarded the account in question to the master requesting him to "o. k." the same and send it on to the owner. This to my mind shows an election on the part of the creditor to look to the owner for payment. The account so forwarded is made out to the *City of Windsor*. On the 6th August, Polson & Miller made a draft on the master, owner, and steamer *City of Windsor* for $263.65 at fifteen days which draft was accepted by the master in these words: "Accepted, G. A. Symes, manager of the *City of Windsor*." I do not think this alters the former election by the creditor of the owner as the party liable, nor does it render the plaintiff liable as master, or even if it has this effect, I do not think he had any authority to bind the owner by his later acceptance after he had received the letter of June 20th from the creditor. I therefore cannot allow this claim as a liability properly incurred by the master on account of the ship.

No. 8 is a claim for $60.32 meat and vegetables and $75 borrowed money to pay seamen's wages. I allow the claim for $60.32 for the provisions and defer considering that part of the claim relating to borrowed money.

Claim 9, $10.75, for horse and hack hire, I also allow. Part of it was occasioned by the accident in the canal and the necessity to transport the passengers then on the steamer from Port Dalhousie, the place of the accident, to St. Catharines, their destination. The other items were necessary expenses by the master in St. Catharines for the necessary business of the boat.

Claim 10, Wm. Hutchison, fuel. $353. As to part of this claim, the creditor drew directly upon the owner for $137.25. This draft went to protest and Hutchison accepted a renewal draft for $139.15 on the owner to satisfy the first draft. Prior to the first draft going to

protest and on the 28th July, Hutchison insisted upon a letter of guarantee from the master. This letter purported to cover the past and future credits. Prior to the 28th July, the creditor evidently had given credit to the owner. On the 28th July, after he insisted on the personal liability of the master, the master assumed the same. I think from the evidence, therefore, that for all fuel supplied prior to the 28th July, the master was not responsible. And upon the authority of the *Orienta*, I must hold that the master cannot come in after the debt has been incurred on the owner's credit and create a maritime lien in his own favour for the liability by voluntarily assuming personal responsibility after the debt has been contracted. I will allow to the master as a liability, the value of the fuel supplied on and after the 28th July. This amounts to $84. As to the cash payments made by the master on account, as they were not appropriated at the time by him, they will apply to the earlier items of the account, and cannot, therefore, be credited to the portion which I have allowed to the master.

Claim 15, $123, is for hardware, coal oil, paint, rope, etc., etc., and I consider that these were all general and proper supplies for the boat, and I therefore allow this claim.

Claims 22, 27, 32, 41, 42, 43, and 46, are all claims for advertising the boat and her trips in Toronto and St. Catharines papers, and for necessary printing, tickets, books, &c., for use on the steamer. Looking to the employment of the ship and the propriety of these expenditures and liabilities contracted, I think that they are clearly within the term necessaries. The only question that could arise would be was the expenditure too large or too lavish. They are as follows: *Toronto News*, contract for season advertising only to date of boat ceasing to run, $54.62; *Toronto Telegram*,

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ditto, $29.50; *Toronto World*, ditto, $23.75; *Toronto Mail* for dodgers and tickets, $10.75; *St. Catharines Journal*, $30.75; *St. Catharines Star*, printing tickets, excursion books, etc., $52.80; advertisements, $23.35; *St. Catharines Standard*, printing, $7.85; advertising $13. I think these amounts are not unreasonable, and and I shall allow Nos. 32, 42, 43 and 46, and disallow claims 22, 27 and 41. In the case of these three last claims, the creditors expressly swore when they were examined that they do not hold the master personally responsible, and they must therefore look for their claims to the owner.

Claim 23, $13.50, rental of cots for an excursion, I allow.

Claim 25 for telegrams, $7.35 I allow. I consider that they were all proper messages to be sent in connection with the business of the boat.

Claim 26, for dry dock and repairs, for $87.19. These were immediate repairs required by reason of the canal accident. As to part of this claim, the master gave the creditor a draft on the owner for $76 for thirty days which was accepted and dishonoured. The acceptance by the owner is an acknowledgment of the claim by him, and of the master's authority to draw on him. I think this claim should be allowed, as both master and owner are on the draft. It is true the draft was not protested, but it was not accepted in payment but only sent forward for collection and as the master well knew the financial position of the owner and had no funds in the hands of the acceptor at the time, and does not himself set up any defence of want of notice of dishonor, upon the authority of the *Feronia* (*supra*), I think the master should be allowed this claim.

Claim 28, lumber for life preservers, I also allow. In this claim as in claim No. 1, the purser's note at a month was given to gain extension of time for the master to

earn the money, but it was not taken in satisfaction of the debt. And the same reasons which guided me in allowing claim No. 1, apply in this claim also.

Claims 29, 36 and 37, for soda water, cigars and whisky for sale on the steamer, I disallow as not being necessaries.

Claims 33, $4.40 for some awnings supplied the ship, I allow.

Claim 36, two dollars, for an advertising card, I disallow as being unnecessary.

Claim 34 by P. Dixon, $52.90, for use of his dry-dock, I disallow because the arrangement was made by the owner in person and the master is not responsible for the indebtedness.

Claim 38, I disallow, it having been included, as I find on the evidence, in the settlement by the mortgagees with the master in August.

Claim 40, dockage at Toronto. This is a claim by Mr. R. A. Dickson, proprietor of the Toronto dock where the steamer landed her passengers during the season. The owner is liable upon the contract of the master for engaging the dock at which to land his passengers. The master was sent by the owner to Toronto to make the arrangements for the dock, and entered into them with Mr. Dickson for the season on behalf of the owner. There is no evidence that the master made any personal promise or assumed any personal responsibility; but stated that he was acting for the owner. He himself declares that he made no promise or engagement nor did he pledge his own credit nor does he consider himself liable for the claim. In view of all the circumstances of this case and in the light of the letter written by Mr. Dickson setting up his claim, I cannot allow it as as a liability incurred by the master on account of the ship.

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Now, turning to claim No. 4, so far as it relates to borrowed money, the facts are as follows:—Capt. Symes swears that on the 14th June, some of his men desired their wages and he had no money to pay them. The boat at the time was tied up by the Government and the owner had been unable to procure a bond which was acceptable to the canal authorities to secure her release. The master swears he could get no communition with the owner who was at Windsor and who did not reply to his requests for money; that he went to Merriman whom he knew, and borrowed the money, telling him he required it for seamen's wages. A draft was then drawn by himself for $165.50 on the steamer *City of Windsor*, a peculiar document, amounting probably to a mere acknowledgment in writing by the master for indebtedness for $165.50. The draft covered the $100 borrowed and the open account for necessaries of $65.50. He did not pay the draft and was therefore liable to Merriman for the money. The money was chiefly disbursed in paying wages. Can this claim be recognized as a liability properly incurred? I do not think the master had any express authority to borrow this money; the boat was not running at the time and there was ample opportunity of communicating with the owner and awaiting his reply. I do not think there was any implied authority to authorize the master to borrow this money, nor was there any pressing necessity. If the boat had been running and her trips likely to be interrupted, there might have been colour for the claim that it was an emergency which had immediately to be provided for; but the facts are all the other way. The bond for the canal authorities was not forwarded until the 18th June and the boat did not resume her trips until after the 23rd or 24th day of June. In view of the foregoing facts I cannot allow this claim.

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Claim No. 8. As to the borrowed money under this claim, Mr. Hare, who claims, says that the master borrowed $75 from him to pay seamen's wages. The owner accepted this draft and admits that by accepting the master's draft, made it his own indebtedness. He also admits that more than $75 was originally borrowed from Hare ($150), and that it was actually disbursed in wages. The draft was duly protested and both the owner and master are liable on it, and I think therefore that the subsequent ratification of the transaction by the owner and his acceptance of the draft is equivalent to a previous express authority, and that I should allow the claim.

Claim 11 is one by Mr. Norris for an advance of $75 to the master for the purpose of retiring an accepted draft by the master for $75 in favour of the claimant (Mr. Hare) under No. 8, being the other half of Hare's original advance of $150. This retired draft had been discounted by Mr. Hare and was maturing at the bank. The master in order to protect the owner's credit, borrowed the $75 from Mr. Norris and took up the draft at maturity. The master having secured the owner's acceptance of the original indebtedness to Hare, was not in my opinion authorized expressly or impliedly to create a new debt and to borrow money to discharge an existing claim already recognized by the owner. I must disallow this claim.

The foregoing findings dispose of all the items except claim 16, which is a claim for board of the master at Windsor while he was overseeing the fitting out of the boat. I think he was hired (taking the owner's own statement of the nature of the engagement) at $100 a month and all found. His services commenced on the 13th April, when he started to superintend the fitting out of the boat, and he was entitled to his board from that date until he went on board the ship, and I therefore allow the claim ($32.17).

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I now have to deal with the question of the master's wages and his claim for damages for wrongful dismissal. The evidence upon the facts is most contradictory. The master swears that he was engaged for the season at the rate of $100 per month, and board and lodging, and that he was given to understand that he would be employed for nine months. Mr. Reeves the owner swears that the engagement was only by the month at $100 per month and board and lodging. He states that the question was fully discussed and that the plaintiff endeavoured to procure a contract for the season, but that he declined positively to make any such arrangement. He says that the plaintiff asked him what had been his arrangement with the master who had sailed the steamer the previous season, and that he told him that he (Reeves) had paid $100 per month and agreed to keep Capt. Moore, the former master, employed for about eight months, but he also told the plaintiff that he would not make any such arrangement for the season of 1894, because he said he was desirous of selling the *City of Windsor*, especially in view of the fact that he had lost $1,400 or $1,500 by her in the season of 1893. He avers that the plaintiff said that he (the plaintiff), would take his chances. That the boat was going to be placed on a good route (speaking of the St. Catharines and Toronto route), and that he (the plaintiff), was satisfied to take the risk, feeling confident that he would make more than eight months' time for the season. In view of this conflict of testimony, I am compelled to adopt the rule that the burden is upon the plaintiff to establish his case by satisfactory evidence. The case of the plaintiff depends simply on his own statement of the facts, without corroboration, and this statement by him is absolutely contradicted by the oath of the owner of the vessel, and there are no attendant circumstances which will

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guide the court to a safe conclusion between these two conflicting statements. The affirmative of the issue is upon the plaintiff. I do not find sufficient evidence in the face of the denial of the owner, to enable me to accept the plaintiff's version of the facts as establishing the contract he sets up. Mr. Reeves' most positive denial is strengthened, as his evidence is, by so many circumstances. His financial difficulties, his losses in the season of 1893, the experimental character of the proposed employment of the *City of Windsor* for the season of 1894—are all good and probable reasons why he should decline to employ a master for the full season if it could be avoided.

I cannot, therefore, pronounce judgment in the plaintiff's favour upon his alleged contract of hiring. It is admitted, however, that the plaintiff was hired by the month; it is also admitted that he was discharged by the mortgagees on the 28th August, and his wages as master paid up to that date. I think upon the monthly hiring, he cannot be discharged so summarily without some notice. He is entitled to reasonable notice, *Creen* v. *Wright* (1). He cannot be discharged without cause in the middle of the month. Reasonable notice would be a month's notice, and therefore I think he is entitled to $100 for a month's wages and an allowance for his board for one month, which I fix at one dollar a day or $30.

Having disposed of the various claims for disbursements, liabilities, and the master's claim for wages and damages, there remains but one question further to be considered. Is the plaintiff to have the amount of such wages, damages and disbursements or liabilities, or any of them, paid out of the proceeds of the vessel in priority to the claim of the mortgagees? The cases of

(1) L. R. 1 C. P. Div. 591.

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the *Chieftain* (1); the *Mary Ann* (2); the *Feronia* (3); and the *Hope* (4), seem to be conclusive upon this point. In the *Mary Ann*, at page 12, Dr. Lushington, says (speaking of the Admiralty Act of 1861):

> I think under this Act a seaman would have a maritime lien for his wages although fixed by special contract. Because before the Act he had such a lien for wages earned not under any special contract. And for a similar reason there would be a maritime lien for damages done by any ship. If this be so, then under the Act the master, claiming for disbursements is to be preferred to the mortgagee because before the Act his claim for his disbursements was entitled to similar preference in the only case where the court could take cognizance of such disbursements, namely in the case of a set-off.

I refer also to the case of the *Marco Polo* (5), where the mortgagee's claim was postponed to the master's claim for disbursements and liabilities incurred by him on account of the ship.

From these decisions, it is clear that a master's lien for his wages and disbursements (including under our statute of 1893, liabilities properly incurred by him on account of the ship), takes priority to the claim of the mortgagees under their mortgage. Of course this means as to disbursements and liabilities incurred by the master before the mortgagees took possession of the ship under their mortgage.

There will, therefore, be judgment for the plaintiff in this action for $1,196.17 in respect of proper disbursements and liabilities properly incurred on account of the ship—and for $130 for wages and his claim for wrongful dismissal, in all $1,326.17 subject to this direction: That as to the liabilities allowed to the master herein he must deposit with the Registrar the vouchers showing payment by him of the several claims outstanding to the various creditors which are

(1) Br. & Lush 212.
(2) L. R. 1 A. & E. 8.
(3) L. R. 2 A. & E. 65.
(4) 28 L. T. N.S. 287.
(5) 24 L. T. R. 804.

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unpaid and the amounts of which have been allowed to him by me as proper liabilities incurred by him on account of the ship. I also allow the master his costs of this action, and in default of the payment into court of the amount above awarded and costs within thirty days from the date of this judgment by the intervening defendants, the mortgagees, who claim to have been in possession of the *City of Windsor* when arrested by the warrant in this action, I order that the said ship be sold pursuant to the usual practice of this court, and the proceeds brought into court. And that after payment out to the plaintiff of the various sums herein awarded to him according to the terms of this judgment—together with his costs of the action and the costs (if any), of the sale, that the balance be paid over to the defendants, the mortgagees.

Judgment accordingly.

Solicitors for plaintiff: *Caniff & Caniff.*

Solicitor for interveners: *O. E Fleming.*

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May. 22.

JOHN THEODORE ROSS, FRANCES ELLA ROSS, JOHN VESEY FOSTER VESEY-FITZGERALD AND ANNIE ROSS..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Intercolonial Railway contract—31 Vict. c. 13—37 Vict. c. 15—42 Vict. c. 7—Chief Engineer's final certificate—Condition precedent.

By section 18 of 31 Vict. c. 13 (The Intercolonial Railway Act, 1867) it was enacted that no money should be paid to any contractor until the Chief Engineer should have certified that the work for or on account of which the same should be claimed had been duly executed, nor until such a certificate should have been approved by the Commissioners appointed under such Act. By 37 Vict. c. 15 the duties and powers of the Commissioners were transferred to the Minister of Public Works, and their office abolished. By 42 Vict. c. 7 the Department of Railways and Canals was created, and the Minister thereof became in respect of railways and canals the successor in office of the Minister of Public Works, with all the powers and duties incident thereto.

The suppliants claimed certain extras under two contracts made in pursuance of the statute first mentioned, for the construction of portions of the railway, but had never obtained any certificate as required by such statute from the Chief Engineer of the railway at the time of the execution of the work. After the resignation of F. the original Chief Engineer, S. was appointed to such office for the purpose of investigating "the unsettled claims which had arisen in connection with the undertaking, upon which no judicial decision had been given, and to report on each case to the Department of Railways and Canals." S. investigated the suppliants' claims amongst others, and made a report thereon recommending the payment of a certain sum to the suppliants. This report was not approved by the Minister of Railways and Canals, as representing the Commissioners, nor was it ever acted upon by the Government.

Held, following the case of *McGreevy* v. *The Queen* (18 Can. S. C. R. 371) that the report of S. was not such a certificate as was contemplated by the statute and the contracts made thereunder.

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SPECIAL CASE upon a claim for extras arising upon certain contracts for the construction of portions of the Intercolonial Railway.

The facts of the case and the contentions of counsel appear in the reasons for judgment.

The case was argued on the 26th January, 1895.

A. Ferguson, Q.C. and *G.G. Stuart*, Q.C. for suppliants;

The *Solicitor-General* and *W. D. Hogg*, Q.C. for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (May 22nd, 1895) delivered judgment.

The present suppliants are the legal representatives of the late John Ross, of the City of Quebec, who in 1876 became entitled by assignment to all the rights of Messrs. J. B. Bertrand & Co. in, or incident to, two contracts into which that firm had entered with the Crown for the construction of sections nine and fifteen of the Intercolonial Railway; and the only question to be now determined is as to whether or not the suppliants are entitled to recover against the Crown on a certificate or report made by Mr. Frank Shanly, civil engineer, on certain claims made by Mr. Ross in respect of the construction of the two sections of the railway referred to.

By an Act of the Parliament of Canada, 31st Victoria, chapter 13, provision was made for the construction of the Intercolonial Railway. By the third section of the Act it was provided that the construction of the railway and its management until completed should be under the charge of four Commissioners to be appointed by the Governor-General. By the fourth section provision was made for the appointment of a Chief Engineer, who, under instructions he might receive from the Commissioners, should have the general

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superintendence of the works to be constructed under the Act. The railway was to be built by tender and contract, and it was provided that no contract involving an expenditure of ten thousand dollars or more should be concluded by the Commissioners until sanctioned by the Governor-General in Council (section 16). By the eighteenth section it was enacted that no money should be paid to any contractor until the Chief Engineer should have certified that the work for or on account of which the same should be claimed had been duly executed, nor until such certificate should have been approved by the Commissioners.

The contracts made between Bertrand & Co. and the Crown, as represented by the Commissioners appointed under the Act 31st Victoria, chapter 13, were entered into on the 26th day of October, 1869, and the 15th day of June, 1870, respectively, the former for the construction of section nine of the railway, and the latter for the construction of section fifteen. By the second clause of the contract for the construction of section nine, it was among other things agreed that all the works were to be executed and materials supplied to the entire satisfaction of the Commissioners and engineer, and that the Commissioners should be the sole judges of the work and materials, and their decision on all questions in dispute with regard to the works or materials, or as to the meaning or interpretation of the specifications or the plans, or upon points not provided for or not sufficiently explained in the plans or specifications should be final and binding upon all parties. By the fourth clause of the contract, the engineer was given authority at any time before the commencement, or during the construction of any portion of the work, to make any changes or alterations which he might deem expedient, in the grades, the line of location of the railway, the width of cuttings or fillings, the

dimensions or character of structures or in any other thing connected with the works whether or not such changes should increase or diminish the work to be done or the expense of doing the same, and it was agreed that the contractors should not be entitled to any allowance by reason of such changes unless such changes consisted in alterations in the grades or the line of location, in which case the contractors should be subject to such deductions for any diminution of work or entitled to such allowance for increased work (as the case might be) as the Commissioners might deem reasonable, their decision to be final in the matter. By the ninth clause of the contract it was further agreed that the sum of $354,897, for which the work was to be done, should be the price of, and be held to be full compensation for all the works embraced in or contemplated by the contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not upon any pretext whatever be entitled by reason of any change, alteration or addition made in or to such works, or in the said plans and specifications, or by reason of any of the powers vested in the Governor in Council by the said Act intituled "*An Act respecting the construction of the Intercolonial Railway*" or in the Commissioners or engineer, by this contract or by law, to claim or demand any further or additional sum for extra work or as damages or otherwise; the contractors thereby expressly waiving and abandoning all and any such claim or pretension to all intents and purposes whatsoever, except as provided in the fourth section of the contract.

By the eleventh clause of the contract it was further agreed that cash payments equal to eighty-five per cent of the work done, approximately made up from returns of progress measurements should be made monthly on

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the certificate of the engineer, that the work for or on account of which the sum should be certified had been duly executed and upon approval of such certificate by the Commissioners. On the completion of the whole work to the satisfaction of the engineer a certificate to that effect was to be given; but the final and closing certificate including the fifteen per cent retained was not to be granted for a period of two months thereafter. The progress certificates, it was agreed, should not in any respect be taken as an acceptance of the work or release of the contractors from their responsibility in respect thereof; but they should at the conclusion of the work deliver over the same in good order according to the true intent and meaning of the contract and of the said specifications.

And by the twelfth clause of the contract the parties stipulated that the contract and the specifications should be in all respects subject to the provisions of the Act 31st Victoria, chapter 13, and also to the provisions of *The Railway Act*, 1868, in so far as the latter might be applicable.

The contract for the construction of section fifteen of the railway was in like terms, except as to the twelfth paragraph which provided for the substitution, at the option of the Commissioners, of iron bridges for wooden bridges, the superstructure of such iron bridges to be procured at the cost of Her Majesty; but in every such case the value of the wooden superstructure and the reduction in quantity and value of masonry (if any) consequent upon such substitution was to be deducted, at the prices named for such descriptions of work in the schedule annexed to the contract, from the full amount mentioned in the contract as payable and to be paid for the performance of the work under said contract.

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Bertrand & Co. did not complete the work embraced in either of the two contracts. In both cases the work was taken out of their hands and completed by the Crown. That on section nine was finished in November, 1873, and that on section 15, in February, 1874.

In the latter year by the Act 37th Victoria, chapter 15, the 3rd section of 31st Victoria, chapter 13, respecting the appointment of Commissioners, was repealed from the 1st of June, 1874, and it was provided that thereafter the railway should be a public work under the control of the Minister of Public Works, to whom was transferred the powers and duties which had been previously vested in the Commissioners, or assigned to them. In 1879 the Department of Public Works was divided and the Department of Railways and Canals created. By the fifth section of the Act (42 Vict., chapter 7) by which this change was effected the Minister of Railways and Canals became in respect of railways and canals the successor in office of the Minister of Public Works, with all his powers and duties incident thereto.

During the progress of the work covered by the two contracts to which reference has been made Mr. Sandford Fleming was Chief Engineer of the Intercolonial Railway. He furnished the contractors with progress estimates of the work done under such contracts, the amount of which was paid, but he gave no final certificate in respect of either contract.

In December, 1876, as has been stated, Mr. Ross became entitled by assignment from Bertrand & Co. to their rights and interests in the two contracts and in any moneys that might be due to them thereunder. In December, 1879, he filed in this court a petition in which in respect of such contracts and the work done by Bertrand & Co. on sections nine and fifteen he claimed a sum of $576,904.02.

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There were at the time claims by other contractors for work done on the Intercolonial Railway, and in May, 1880, an order in council was passed, by which Mr. Fleming was "reappointed" Chief Engineer of the railway "to investigate the unsettled claims which had arisen in connection with the undertaking upon which no judicial decision had been given, and to report on each case to the Department of Railways and Canals." Mr. Fleming declined the position, and on the 23rd of June, 1880, Mr. Frank Shanly was appointed thereto.

On the 18th of July, 1881, Mr. Shanly, in a letter to the Secretary of the Department of Railways and Canals, made for the information of the Minister of that Department his report on the claims put forward by Mr. Ross.

With reference to section nine of the railway, he recommended the payment of four items amounting to $12,277, "as being extra to the contract" and three sums amounting to $92,310, as "an advance in price" in "rock excavation and borrowing," and on "first-class and second-class masonry." With respect to section fifteen he recommended the payment of one item of $1,875, which he considered formed "no part of the original contract"; and as before he recommended that the rate or price for rock excavation and masonry should be increased. In all he recommended that the claimant should be paid $231,806 in excess of the lump sum agreed upon. Mr. Shanly's report or recommendation was never acted upon; but in July, 1882, a commission was appointed to investigate these Intercolonial Railway claims and to report thereon to His Excellency in Council to the end that he might be well advised as to the liability of Her Majesty in regard to such claims. The order in council under which the commission was constituted and the proceedings thereon, so far as the present claim is affected, are before the court; but it is

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not, I think, necessary for the disposition of the only question now to be disposed of to make any further reference thereto. The only question to be now decided, as has been stated, is: Are the suppliants entitled to recover against the Crown on Mr. Shanly's certificate or report? It is admitted that in this court the question is answered by the decision of the Supreme Court of Canada in the case of *The Queen* v. *McGreevy* (1), in which a like question arose. The certificates or reports in question in that case and this are not, it will be seen, in the same terms. They were, however, made by the same officer, under the same statutes and like contracts and under similar circumstances, and gave rise to like questions. There is some difference of opinion between the parties to this petition as to what was decided in *McGreevy's case*; but there is no contention that the report or certificate on which the present suppliants rely can be distinguished to their advantage from the certificate upon which the decision turned in the case to which I have referred. If the latter was not sufficient to sustain the petition in that case, the suppliants in this case and before this court must also fail.

McGreevy's case came first before Mr. Justice Fournier sitting in this court, upon a statement of admissions by both parties similar to that now submitted and for the determination, as I have already mentioned, of a like question, namely: Whether the suppliant was entitled to recover on Mr. Shanly's certificate or report?

To answer that question in the affirmative, it was necessary to come to the conclusion:

1. That Mr. Shanly was the Chief Engineer of the Intercolonial Railway within the meaning of the statutes and contracts, under which the Intercolonial Railway was built.

(1) 18 Can. S. C. R. 371.

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2. That his report constituted a good and sufficient certificate under such statutes and contracts.

3. That the approval of the certificate by the Minister of Railways and Canals was not a condition precedent to the right of the suppliants to recover thereon, or that such approval had been given. In the Exchequer Court Mr. Justice Fournier held that Mr. Shanly was the Chief Engineer of the railway and competent to give a certificate; that his report constituted a good certificate, and that if the approval of the certificate by the Minister of Railways and Canals, as representing the Commissioners, were necessary, such approval had been given by acquiescence. On appeal to the Supreme Court, Mr. Justice Strong and Mr. Justice Taschereau were of opinion to answer the question submitted in the affirmative and to dismiss the appeal. They agreed that Mr. Shanly was the Chief Engineer of the railway; that he had authority to make the report in question; that it constituted a good final and closing certificate, and that the approval of the Minister was not necessary. Chief Justice Sir William J. Ritchie and Mr. Justice Gwynne took a different view. They thought that Mr. Shanly's report was not such a certificate as was contemplated by the statutes and contracts to which I have referred. Mr. Justice Patterson agreed with Mr. Justice Strong and Mr. Justice Taschereau that Mr. Shanly was Chief Engineer and competent to give a certificate and that the approval of the certificate by the Minister of Railways and Canals was not necessary. He agreed, however, with the Chief Justice and Mr. Justice Gwynne, but on a different ground, that the suppliant could not recover on the certificate. In his opinion the Chief Engineer had no power or authority to determine the amount or price to be paid for the work done. In the

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result the question submitted was answered in the negative, and the appeal was allowed.

Whatever my own view might be, it would, it seems to me, be incumbent on me, under these circumstances, to follow that decision and declare that the suppliants in this case are not entitled to the relief prayed for. But even if it were thought that the difference of opinion that existed in that case between the learned judges who constituted the majority of the court left it open for me to form and express my own view as to whether the Crown is liable on Mr. Shanly's report or not, I should still be of opinion that it is not liable.

In submitting a single question for the decision of the court the suppliants reserved the right, if the court decided against them on that question, "to proceed on other clauses of the petition for the general claim." In order, however, that a judgment might be entered on the answer to the question submitted from which an appeal could be taken, it was agreed by counsel that as the question was answered, so judgment on the petition should be entered, reserving to the suppliants the right to come before this court and ask to have that judgment set aside.

*Judgment for the respondent, with costs.**

Solicitors for suppliants: *Caron, Pentland & Stuart.*

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

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*Affirmed on appeal to the Supreme Court of Canada.

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THE THIRD NATIONAL BANK OF DETROIT AND THE PENINSULAR SAVINGS BANK OF DETROIT..... } APPELLANTS;

AND

GEORGE ALLAN SYMES..... RESPONDENT.

(*THE CITY OF WINDSOR.*)

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

Maritime law—Inland Waters—Master's lien for disbursements and liabilities on account of the ship—56 Vict. c. 24—Priority of lien over mortgage—Master's authority to pledge the ship.

The object of the Act of the Parliament of Canada 56 Vict. c. 24, entitled *An Act to amend "The Inland Waters Seamen's Act,"* is to give the master of a ship navigating the inland waters of Canada above the harbour of Quebec a lien for disbursements made and liabilities incurred by him on account of the ship in all matters in which, prior to the case of *The Sara* (14 App. Cas. 209), it had been held by the courts in England that a master of a ship had such a lien for his disbursements.

2. The master's lien for disbursements and liabilities of this character is preferred to the claim of a mortgagee taking possession after such disbursements had been made and such liabilities incurred.

3. The rule that the master has authority to borrow money on the ship and to pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity, applies as well to a case where a vessel, subject to *The Inland Waters Seamen's Act*, is in a home port as where she is in a foreign one.

APPEAL AND CROSS-APPEAL from a judgment of the Local Judge for the Toronto Admiralty District (1).

The facts of the case are stated in the judgment.

The case on appeal was argued on the 14th day of May, 1895.

O. E. Fleming for the appellants:

(1) Reported *ante*, p. 362.

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Argument of Counsel.

I submit that there is no maritime lien in Ontario for necessaries and disbursements of themselves; and the captain cannot go and make a debt and so create a maritime lien against the ship. That being the case the only way a maritime lien can be created is by statute, and this is the first case in Ontario where it has been sought to create a maritime lien by the master for necessaries and disbursements. Under the Imperial Act of 1861, section 10, it was supposed, until the decision in the *The Sara* (1), that he could create a maritime lien in his favour for his disbursements and liabilities. That doctrine was overruled in the case of *The Sara*. This caused the Imperial Act of 1889 to be passed. That and our own Act of 1893 are in substance the same. Other cases prior to the Imperial Act of 1889, which the learned judge has referred to in the court below, assumed that disbursements would create a lien. They are the cases of *Morgan* v. *Castlegate* (2). The earlier cases assumed that the lien existed under the Act of 1861, but it must be remembered that the Act of 1889 did not create a greater lien or higher lien than was thought to have been created by the Act of 1861.

There was a distinction drawn under the Act of 1861 between liabilities and disbursements,—it was held by Dr. Lushington that the master had a lien for disbursements and not for liabilities generally.

Where I find fault with the judgment in this case is that while the learned judge of the court below cites authorities to show the authority of the master to incur liabilities on behalf of the owner, as his agent, the cases are really only those where parties have brought ordinary actions against the owner for goods supplied to the master. It is not shown that they created a maritime lien against the vessel.

(1) 14 App. Cas. 209. (2) [1893] A. C. 38.

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Argument of Counsel.

I say the *Orienta* case goes to show that he had no right to do this when the owner resided in Canada. That case was decided in November, 1894, in the Divisional Court and on appeal in February, 1895. We are mortgagees here and in a better position than the owner would be in the *Orienta* case.

The test appears to be, under the decisions, could the master here have made a bottomry bond so as to create a maritime lien?

[By the Court: Would you have to go as far as that?]

I submit almost as far. The decisions are that a master could not make a bottomry bond so as to bar a mortgagee where he could have communicated with the owner. Now the Imperial Acts have almost done away with the necessity of bonds in any case, on account of the easy means of communication now existing between the various countries. [He cites *The Lizzie* (1)]. That was a contest as to the validity of a bond because the master did not communicate with the owner. Held, as a fact, that under the circumstances there he could not have communicated with the owners.

Supposing the owner could have been communicated with and the master did not, but acted in collusion with the creditors, could the creditors secure a lien against the ship? I submit not.

The owner was not supplying the goods himself. The facts are that the owner said to the master: "Do as well as you can with her." [He cites *The Karnak* (2).] This is a judgment of Sir Robert Phillimore. I call your lordship's attention to pp. 299, 300, 301, 303, 305, 306. See also the cases of *The Panama* (3) and *The Great Eastern* (4). There are some cases where it is discussed whether the master had a maritime lien in England on

(1) L.R. 2 Ad. & E. 254.
(2) L.R. 2 Ad. & E. 289.
(3) L.R. 2 Ad. & E. 390.
(4) L.R. 2 Ad. & E. 88.

a vessel for liabilities incurred in a foreign port because in such foreign port he would have had a maritime lien.

There are also cases going to show that if the owner has an agent at a foreign port the master could not make a bond so as to create a maritime lien, because the agent of the owner at that port is the proper person to create a lien or liability.

I submit that under the cases from 1861 down to the present time the master has not been allowed under circumstances that exist in this case, where the master is in a home port and the owner could have been communicated with, to create a maritime lien as against the ship.

Mr. *Caniff* for the respondent: The Imperial statute of 1889 was passed in consequence of the decision in the case of *The Sara* (*ubi sup.*) It was supposed until the time of that decision in the House of Lords that a maritime lien existed for master's wages and disbursements. In *The Sara* it was held that he had a right *in rem* against the ship, but that right would be subject to any mortgages on the register. This Act of 1889 gives a lien for wages and disbursements for the master although your lordship, I think, makes some distinction in the case of *Bergman* v. *The Aurora* (1) as to vessels running between home and foreign ports and those confined altogether to home ports. But as to that it appears in evidence in this case that this boat did also run to foreign ports.

But however that might be it has been decided in Canada in the case of *Reide* v. *Queen of the Isles* (2), that the master has a maritime lien for his wages as well as for disbursements and liabilities. By the Canadian Admiralty Act of 1891 it is enacted (section 4) that all persons shall have all rights and remedies

(1) 3 Ex. C. R. 228. (2) 3 Ex. C. R. 258.

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Argument of Counsel.

in all matters arising out of or connected with navigation, shipping, trade or commerce which may be had or enforced in any colonial Court of Admiralty under *The Colonial Courts of Admiralty Act*, 1890. That Act of 1890 gives all the rights and remedies which could be enforced in England. I submit that the Act of 1889 did apply and does apply under the Canadian Admiralty Act of 1891; and that we have a binding judgment of a judge of this court, in the case last cited, deciding that the master has a maritime lien in Canada. That being so, I submit that using the same words in the Act of 1893 amending *The Inland Waters Seamen's Act* as the Parliament of Canada has done that we must apply the rule that where a judicial interpretation of a statute is made and an Act is passed in the terms of the judicial interpretation it must be taken as a legislative sanction of such interpretation.

If it had not been for the decision in *The Orienta* case, it would not have been so clear that a maritime lien could not have been acted upon. But I submit that the decision in that case is not an authority in the present one because in that case there was a fraud upon the mortgagee. It was said there that it was an ingenious device to create a maritime lien to get ahead of a mortgage. That is a very different case from this one. I say that the test applied by Sir Francis Jeune is an artificial one. He admits that the master would have a right *in rem* if there were no mortagees intervening. His test of a lien arising under the Act of 1889 is whether the disbursements or liabilities of the master are such as would, without express authority, have pledged the owner's credit. Now in this case of ours there are letters from the owner to the master to the effect that the latter must try and make the vessel pay her own way.

My learned friend has said there are no cases which show that the master has a maritime lien in a home port. I call your lordship's attention to the arguments of counsel in the *Orienta* appeal. I refer your lordship to the cases there mentioned, as by so doing it will obviate any more detailed reference to them. They are the *Glentanner* (1); *The Chieftain* (2); *The Mary Ann* (3); *The Feronia* (4).

It becomes necessary for us to apply the test referred to by Mr. Justice Jeune. What is the implied authority? Now in the first place your lordship must remember that this steamer was a ship carrying freight where it could be got. She was a general ship, advertised to run two trips daily. The master had to have provisions, had to have coal and to get it from day to day in order to keep faith with the public if she was to be kept on that route.

I refer your lordship to *Maclachlan on Shipping*, 3rd ed., at pp. 133 and 142. The rule laid down by Maclachlan, and adopted by the learned judge of the court below, is that the master has an implied authority to borrow money on the ship and to pledge the ship, whether the owner is communicated with or not, for necessaries. (He cites *Johns* v. *Simons* (5); *Arthur* v. *Barton* (6). My learned friend has said that the cases cited do not bear on this point. Now Mr. Justice Macdougall shows in his judgment that the master could not have got goods on the owner's credit. Then he had to get them on his own credit, and he has a lien therefor. (He cites *Webster* v. *Seakamp* (7); *Gunn* v. *Roberts* (8); *The Red Rose* (9).

(1) Swab. 415.
(2) Br. & Lush. 104.
(3) L. R. 1 Ad. & E. 8.
(4) L. R. 2 Ad. & E. 65.
(5) 2 Q. B. 425.
(6) 6 M. & W. 138.
(7) 4 B. & Ald. 354.
(8) L. R. 9 C. P. 331.
(9) L. R. 2 Ad. & E. 80.

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Argument of Counsel.

The position the plaintiff holds is this: he comes to court and says, I am liable for these necessaries although I have not paid for them, but I am entitled to be indemnified out of the boat. There is no difference whether they are disbursements or liabilities, that is clearly laid down in the *Orienta* case.

The rule of law laid down as a test is this: is the power of communicating with the owner correspondent with the necessity? [(He cites *Maclachlan on Shipping* (1).] Your lordship will not find any reason to reverse the finding of fact on this point.

Mr. *Fleming*, in reply, cites the *Fleur de Lis* (2). He maintains that the case of *Reide* v. *Queen of the Isles* (*ubi sup*). is entirely overruled by the *Orienta* case.

Mr. *Caniff*, in reply on cross-appeal, cites *Kay on Shipping* (3); *Smith on Mercantile Law* (4).

THE JUDGE OF THE EXCHEQUER COURT now (September 7th, 1895,) delivered judgment:

This is an appeal by the defendants, The Third National Bank of Detroit and The Peninsular Savings Bank of Detroit, from a decree of the Judge of the Toronto Admiralty District whereby he pronounced in favour of the respondent, the master of the ship *The City of Windsor*, for part of his claim for disbursements made and liabilities incurred for necessaries on account of the ship, and for damages for wrongful dismissal. There is also a cross-appeal by the respondent in respect of the part of his claim that was disallowed.

The City of Windsor was a steamer registered at the port of Windsor, in the Province of Ontario. In 1894, during the time that the respondent was master of her, she was employed as a passenger and freight boat between the cities of St. Catharines and Toronto, and

(1) 3rd. edition, pp. 131, 139.
(2) 1 Ad. & E. 49.
(3) 2nd ed. p. 47.
(4) 10th ed. 338.

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was subject to the provisions of *The Inland Waters Seamen's Act* (1). By an amendment of that Act made on the 1st of April, 1893, it is provided that "the master of any ship subject to the provisions of this Act shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, and for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as by this Act or by any law or custom any seaman not being a master has for the recovery of his wages." (2).

The appellants, who were mortgagees of the ship, and who in August, 1894, took possession of her and dismissed the master, contend that under the circumstances of this case the master has no maritime lien in respect of any liability incurred by him on account of the ship; that she was registered and employed in the Province of Ontario, and that the owner was at the time domiciled there; that recourse could have been had to him, and that the master had no authority to incur liabilities for necessaries for the ship, or if he had such authority that he could not by incurring them create a maritime lien for such necessaries. The owner could not himself so contract for necessaries for the ship as to create any such lien; and it was argued that his agent in a home port was in this respect not in any better position. It is clear of course that there is no maritime lien for necessaries supplied to a ship, and that the owner has no power to create any such lien. The High Court of Admiralty in England has jurisdiction over any claim for necessaries supplied to any ship elsewhere than at the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in Eng-

(1) R. S. C. c. 75 s. 2 (f). (2) 56 Vict. c. 24.

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land or Wales (1). This court has in a like case a like jurisdiction where there is no owner or part owner domiciled in Canada (2). But the person supplying such necessaries has no maritime lien on the ship, whether they are ordered by the owner or master.

That, however, is not the question at issue in this case. The question is: Has the master by virtue of the amendment of *The Inland Waters Seamen's Act* (3), a lien for disbursements properly made by him and for liabilities properly incurred by him on account of the ship, and is his claim to be preferred to that of the mortgagee? The language of the statute is that so far as the case permits he is to have the same rights, liens and remedies for such disbursements and liabilities as a seaman has for the recovery of his wages. In the case of seamen's wages there is such a lien and it has priority of any claim by the mortgagee. That is not disputed; and there can be no doubt, I think, that the object of the amendment to which I have referred was to give the master of a ship navigating the inland waters of Canada above the harbour of Quebec a lien for disbursements made and liabilities incurred by him on account of the ship in the cases in which, prior to the case of *The Sara* (4), it had been thought that a master of a ship had such a lien for his disbursements. The amendment is founded upon and follows closely in that respect the first section of *The Merchant Shipping Act*, 1889 (5). It was passed after a construction had been put upon the latter statute in the case of *The Castlegate* (6), and should be construed in the same way as that statute. The Act and the cases in the light of which it is to be

(1) 24 Vict. U. K. c. 10 s. 5.
(2) *The Colonial Courts of Admiralty Act* 1891, s. 2 ss. 3 *(a)*.; *Admiralty Rules* No. 37 *(b)*.
(3) 56 Vict. c. 24.
(4) 14 Ap. Cas. 209.
(5) 52 & 53 Vict. (U. K.) c. 46.
(6) [1892] A. C. 38.

construed have been very fully and ably discussed by the learned Judge of the Toronto Admiralty District; and I content myself with saying that I agree with him in the construction that he has put upon it. It cannot be doubted, I think, that in such a case as this the master has a maritime lien not only for his wages, but also for disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, that is for disbursements necessarily made, and for liabilities necessarily incurred by him on account of the ship while acting within the scope of his authority as master. What that authority may be in a particular case will depend upon the facts and circumstances of the case. The general rule as stated in *Maclachlan on Shipping* (1), is that the master has authority to borrow money on the ship and to pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity. With reference to sea-going ships the means of communication between the master and the owner, and the latter's opportunities for personal interference and direction are ordinarily greater in a home port than in a foreign port, and in that way the master's authority is usually larger, and more readily conceded where the ship is in a foreign port. But while it may require stronger circumstances to establish the fact of its being necessary to make the disbursement or incur the liability where the ship is in a home port, the principle in both cases is the same. [*Arthur* v. *Barton* (2).] In fact with reference to vessels navigating the inland waters there is little room for any distinction, and it is not at all clear that any should be made. If *The City of Windsor* had been at Detroit in the United States, the means of communication between the master and owner would have been the

(1) 4th Ed. p. 146. (2) 6 M. & W. 138.

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same practically as if she had been at Windsor where she was registered and where the owner resided, and much greater than when she was at St. Catharines or Toronto.

That disposes of the principal question of law raised on the appeal. The other questions discussed have reference to the findings of the learned judge with respect to the particular items of the claim that should be allowed or disallowed. Of the amount of $1,326.17 for which the respondent had judgment, the sum of $130 was allowed for wages and board in lieu of a month's notice of dismissal, and the sum of $7.50 for a disbursement actually made for coal for the use of the vessel. To these two items the appellants do not object. Their objection is to the sums allowed for liabilities incurred by the master. These liabilities were incurred for the most part for repairs and for fuel and provisions for the ship. The fuel and provisions had to be procured from day to day to enable the vessel to make her daily trips between St. Catharines and Toronto. The owner had no agent and little or no credit at either city. He had not provided funds to meet the necessary expenditure for such necessaries and the earnings of the vessel were not sufficient to enable the master to provide them without incurring a personal liability. In the master's incurring the liability there was no attempt to give, and no thought of giving, the persons supplying the goods any priority or advantage over the mortgagees. On the contrary the owner appears to have been ready to do what he could to assist or protect the latter, as was right enough, and equally willing apparently to let the master and the tradesmen look out for themselves as best they could. The case is not in respect of any part of the claim that was allowed analogous to the case of *The*

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Orienta (1). Of the items allowed I have had more doubt about those for advertising than I have had about the others. But these questions, both as to the items allowed and those disallowed are questions of fact, as to which the findings of the learned judge are not to be lightly disturbed.

Appeal, and cross-appeal, dismissed with costs.

Solicitor for appellants: *O. E. Fleming.*

Solicitors for respondent: *Caniff & Caniff.*

(1) [1894] P. D. 271; [1895] P. D. 5.

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June 3.

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

AND

CHARLES T. D. BECHER..... DEFENDANT.

Dominion lands—R. S. C. c. 54 s. 57—Homestead entry issued through error and improvidence—Cancellation.

Where a homestead entry receipt for Dominion lands has been issued through error and improvidence the holder thereof is not entitled to have a patent for such lands issued to him, and the court may order his entry receipt to be delivered up to be cancelled as, outstanding, it might constitute a cloud upon the title.

INFORMATION for the recovery of the possession of a certain portion of Dominion lands in the North-West Territories.

By his information exhibited in this matter Her Majesty's Attorney-General for the Dominion of Canada alleged, in substance, as follows :—

1. That the tract of land and premises situate in the fifty-second township, in the twenty-fourth range, west of the Fourth Principal Meridian, in the North-west Territories, and being composed of the north-east quarter of section twenty in said township and range, was part of the public domain known as "Dominion lands."

2. That on the 2nd day of October, 1890, the said tract of land was withdrawn from ordinary sale and settlement by the Minister of the Interior, and notice thereof duly sent to the Secretary of the Dominion Lands Board at Winnipeg, with instructions to that officer to advise the agent of Dominion lands at Edmonton, within whose district the said lands were situated, of such withdrawal.

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3. That on the 9th of October, the secretary of the said board at Winnipeg notified the said agent at Edmonton, by letter, of the fact of such withdrawal; such letter being received by the agent at Edmonton on the 20th October, 1890.

5. That while it was the duty of such agent to enter the withdrawal of the said lands from ordinary sale and settlement in the books of his office, owing to illness at the time, he failed to do so.

6. That on account of the continued illness of the said agent at Edmonton, an acting agent was appointed in his place.

7. That on or about the 15th day of December, 1890, the defendant applied for a homestead entry under the provisions of *The Dominion Lands Act*; and the said acting agent at Edmonton on receiving such application searched in the books of his office and finding no entry or instructions recorded against the said parcel of lands, and in ignorance of the said withdrawal, issued to the defendant on the 15th day of December, 1890, a homestead entry receipt therefor.

8. That upon learning the fact of such withdrawal, the said acting agent at Edmonton, on or about the 23rd day of January, 1891, notified the defendant that the entry had been granted in error and must be cancelled.

9. That the defendant was in possession of the said tract of land, and had refused to surrender his said entry receipt.

The Attorney-General then claimed that as the said homestead entry receipt had been issued through error and improvidence, the defendant should be ordered by the court to deliver up possession of the said tract of land to the Crown, and that the court should also order the said entry receipt to be delivered up to be cancelled.

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By his statement in defence, the said defendant alleged that the said lands were open to homestead entry at the time of his making entry under his entry receipt, and that the said entry was valid and binding on the Crown. He further alleged that if any error was made in the issue of such entry, it was through the negligence and laches of the Department of the Minister of the Interior; and claimed that he should be paid all his outlays, expenses and damages in connection with making his homestead entry for the said lands, in erecting buildings and making improvements thereon, and that he should also be compensated for the loss of profit which he would uffer by being deprived of such lands, before being ordered to deliver up the possession of such lands and to deliver up the said homestead entry receipt to be cancelled.

The evidence, which was entirely documentary, substantiated the allegations of fact in the information.

The case was heard at Winnipeg on the 1st day of October, 1894.

Culver, Q.C. for the plaintiff:

So much of the matters of fact alleged in the information as the defendant has not specifically denied, he must be taken to have admitted. [Cites Rules 36 and 39 Exchequer Court Practice; *Thorp* v. *Holdsworth* (1); *Harris* v. *Gamble* (2); *Byrd* v. *Nunn* (3); *Wilson's Jud. Acts* (4); *Roscoe on Evidence* (5).]

Under the provisions of R.S.C., c. 54, (*The Dominion Lands Act*), the entry receipt is void by reason of the fact that before its issue the lands in question had been withdrawn from ordinary settlement and sale. [He cites *The American and English Encyclopædia of Law* (6)].

(1) 3 Ch. Div. 637.
(2) 7 Ch. Div. 877.
(3) 7 Ch. Div. 284.
(4) 7th ed. p. 209.
(5) 16 ed. p. 77.
(6) 23 vol. p. 52.

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Argument of Counsel.

By *The Dominion Lands Act* (R. S. C. c. 54, sec. 5), the Minister of the Interior is charged with the administration and management of the Dominion lands. By sec. 2 of R.S.C. c. 22, provision is made for the appointment of his deputy. By clause 40 of section 7 of *The Interpretation Act* the deputy of any Minister of the Crown is clothed with the same power to perform any official act as the Minister himself has. The withdrawal of the lands from ordinary sale and settlement could be made by the Deputy Minister as well as by the Minister of the Interior.

As to the laches or negligence of the agent at Edmonton, the Crown is clearly not chargeable with the results of this. It is incontrovertible doctrine that the Crown in Canada cannot be charged for the torts of its servants except by statutory provision therefor. There is no statute rendering the Crown liable in this case.

Again, if this land were in any way opened for ordinary sale and settlement, there was a former applicant for homestead entry who was refused, and he should have the benefit of the change in the status of the lands, if there be any change. [He cites *Attorney-General* v. *Garbutt* (1); *Stevens* v. *Cook* (2); *Manser* v. *Back* (3); *Willmott* v. *Barber* (4); *McKenzie* v. *Hesketh* (5).]

The entry receipt having been issued through error and improvidence it must be delivered up to be cancelled. [*Fonseca* v. *The Attorney-General* (6).]

Aikins, Q.C. followed, citing sections 29, 30, 32 and 35 of *The Dominion Lands Act* (R.S.C. c. 54).

Howell, Q.C. for the defendant:

The object of the Dominion Government in getting control of this domain was not to make money by

(1) 5 Gr. 181.
(2) 10 Gr. 410.
(3) 6 Hare 443.
(4) 15 Ch. Div. 96.
(5) 7 Ch. Div. 680.
(6) 17 Can. S. C. R. 612.

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speculation, but to develop the country by encouraging settlement. [He cites sections 22, 23, 26, 29, 30 and 32 of *The Dominion Lands Act.*]

I submit that as section 90 of *The Dominion Lands Act* vests the general power of carrying out the provisions of such Act in the Governor-General in Council, and especially invests that body with the power of reserving from general sale and settlement such Dominion lands as are required to aid in the construction of railways in the Territories; that the land in question here could not be withdrawn from sale and settlement without an order in council for that purpose. The letter of the Deputy Minister to the secretary of the board at Winnipeg was but an inchoate act, and the withdrawal referred to therein should have been completed and consummated by an order in council.

Section 29 applies only to sales of lands and not to homestead entry. Under section 30, it is true, the Minister may withdraw from homestead entry any tract of land, but must lay them out into town or village lots. That was not his object in withdrawing the lands here in question. [He cites *The Canadian Coat and Colonization Company* v. *The Queen* (1).]

As to the jurisdiction of the court to entertain this action, it depends upon section 57 of *The Dominion Lands Act* and section 17 (*d*) of *The Exchequer Court Act*, 1887. Now this entry has not been revoked or cancelled by the Minister, and, under section 97 of *The Dominion Lands Act*, I maintain that until this revocation or cancellation takes place, the court has no jurisdiction under the enactments mentioned to entertain this suit. If fraud had been established on the part of the defendant in obtaining entry, then I grant that under the old Equity procedure the court would

(1) 3 Ex. C. R. 157.

have jurisdiction to avoid the entry; but the facts do not raise any presumption of fraud, and there is none.

Again, assuming that the case fell within the provisions of section 57 of *The Dominion Lands Act*, I maintain that there was no "error" here within the meaning of that section. There was no error to which defendant was a party. [He cites *Attorney-General* v. *Contois* (1); *Attorney-General* v. *Fonseca* (2)]. Then there is no case made for "improvidence." If the lands were withdrawn, they were not open to homestead entry, I must admit that. But I submit, that they were not properly withdrawn; the proceedings were void as affecting the character of the lands; and there can, therefore, be no "improvidence" in the issuing of the entry.

Now, while I admit that the circumstances surrounding the issuing of the entry receipt in this case would amount to error within the doctrine of the Ontario cases, I contend that the Exchequer Court is not bound to follow them. The Supreme Court of Canada did not in the case of *Holland* v. *Ross* (3).

I submit upon all the facts of this case, that there was a good contract between the Crown and the defendant for homestead entry. The acting agent at Edmonton was acting within the scope of his duty in selling the land for homestead entry, and it was a proper subject of contract. The lands having been disposed of in this way, the Minister cannot put them back into another class. The plaintiff, therefore, must fail, and judgment go for defendant.

Perdue followed, citing sections 29 (4) of *The Dominion Lands Act* and *Middleton* v. *Power* (4).

Aikins Q.C. replied: 1st. There was a valid and proper withdrawal of the lands. 2nd. If any one was

(1) 25 Grant 354.
(2) 17 Can. S.C.R. 649.
(3) 19 Can. S. C. R. 566.
(4) 19 L. R. (Ir.) 1.

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entitled to a homestead entry it was clearly the first applicant, who was refused, and not the defendant. 3rd. A homestead entry is not a contract in the sense that a patent is. It confers no absolute rights, and may or may not be followed up by a grant in fee of the lands at the option of the Crown.

THE JUDGE OF THE EXCHEQUER COURT now (June 3rd, 1895,) delivered judgment.

Upon the facts of this case, I have come to the conclusion that the homestead entry receipt was issued to the defendant in mistake and through error and improvidence, and that the Crown is in no way bound to issue to him a patent to the lands in question under such entry,—more especially, but not as being material to the issue, as the defendant had early notice of the mistake. That being so it follows as a matter of course that the Crown is entitled to the possession of the lands; and I also think that the Crown is entitled to have the homestead entry receipt delivered up to be cancelled as, outstanding, it might constitute a cloud upon the title.

There will be judgment that the plaintiff is entitled to the relief claimed in the information. The plaintiff is also entitled to Her costs.

Judgment accordingly.

Solicitors for the plaintiff: *Aikins, Culver & McCleneghan.*

Solicitors for the defendant: *Perdue & Robinson.*

THE NOVA SCOTIA ADMIRALTY DISTRICT. 1895

April 17.

HER MAJESTY THE QUEEN .....PLAINTIFF;

AGAINST

THE SHIP *HENRY L. PHILLIPS.*

Fishing by foreign vessel in British Waters within three marine miles of the coast of Canada—Forfeiture for want of license to fish—R. S. C. c. 94, sec. 3—Burden of proof.

By section 3 of R. S. C. c. 94 *(An Act respecting fishing by Foreign Vessels)* fishing by a foreign vessel in certain British waters within three marine miles of the coasts of Canada, without a license from the Governor in Council, renders such vessel liable to forfeiture.

Where the Crown alleged in its petition, in an action *in rem* for condemnation and forfeiture, that a certain vessel had violated the provisions of the Act by fishing in prohibited waters without a license, but offered no evidence in support of such allegation,

Held, that the burden of proving the license to fish was upon the defendant.

THIS was an action *in rem* for the condemnation of a ship for an infraction of the provisions of *An Act respecting fishing by Foreign Vessels* (R. S. C. c. 94).

The facts are stated in the reasons for judgment.

The case was heard before the Honourable James McDonald, C. J., Local Judge for the Admiralty District of Nova Scotia, commencing on the 12th day of November, 1894.

W. B. A. Ritchie and *J. A. Chisholm* for the plaintiff;

W. Ross, Q.C., *F. G. Forbes* and *W. H. Covert* for the ship.

MCDONALD, C. J., L. J. now (April 17th, 1895) delivered judgment.

This is an action by the Attorney-General for Canada, in which he claims, on behalf of Her Majesty the Queen, the condemnation of the United States schooner *Henry*

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L. Phillips, her cargo, stores, &c., for violation of the Fishery laws of Canada. The statement of claim sets out the several grounds of complaint, in some fourteen or fifteen paragraphs which I need not repeat, because substantially the complaint is founded on two specific violations of the statute relating to fishing by foreign vessels in prohibited waters, namely, fishing and taking fish on the north side of the Island of Anticosti, in the mouth of the Gulf of St. Lawrence, within three miles of the coast, and buying bait in Fox Harbour, in the same Island, and preparing to fish within the prohibited distance.

The facts as disclosed by the evidence are substantially as follows:

The *Henry L. Phillips*, on or about the 5th May, 1894, with a crew of ten or twelve men, and commanded by George Leonard Cross, left Rockland, in the State of Maine, United States of America, on a fishing voyage to the Straits of Belle Isle, and the Gulf of St. Lawrence. After calling at several ports on the voyage, on or about the ninth day of June, 1894, the *Henry L. Phillips* came to anchor on the north coast of the Island of Anticosti, at some point between Cape Observation and Charlton Point on that coast. Whether or not the place at which the vessel then anchored is within three miles of the shore, is really the only point of inquiry as to this part of the case; because it is admitted by all the witnesses for the defence that, while anchored there, the crew of the schooner caught fish and continued to fish for several days, without changing the vessel's berth. The defendants, however, deny that they fished within the three-mile limit or that they fished on the 13th June, the day specially alleged in the statement of claim as the time when the offence was committed and to which the evidence of the prosecution was specially directed. The defend-

ants allege that they did not fish or catch fish within the prohibited limits at any time and, especially, that they did not do so, on the 13th of June. It appears that a schooner, called the *Kate*, was last year employed by the Government of Canada to carry the mails during the summer months, twice a month from Gaspé to Fox Bay, at the eastern end of Anticosti, calling, on her way to Fox Bay, at several places on the south shore of the mainland,—the last in that direction being Natasquan Point—then crossing to Fox Bay, and thence westerly along the north shore on her way back to Gaspé. Richard Miller, the master of the schooner *Kate*, testified that on the 13th June, 1894, while on his voyage west to Gaspé, from Fox Bay, and while making for his next place of call at McDonald's Cove, he was passing a place called Cow's Point, situated between Cape Observation and Charlton Point. That the wind was ahead and he was beating up against it. That he saw a fishing schooner, called the *Henry L. Phillips*, at the east end of Cow Point, a little east of Cow Point. He first saw her about noon of the 13th June, and she was then at anchor. The *Henry L. Phillips* was headed to the west, and, in tacking, the *Kate* passed under her stern coming towards the shore, and crossed her bow going out within a quarter of a mile or less. He says the *Henry L. Phillips* was anchored on or near a line drawn from Cape Observation to Charlton Point—at any rate, she was not more than half a mile at most off that line; but, in his opinion, she was nearer to the line referred to than half a mile, and, in his judgment, was at the most two miles from the shore and, in his opinion, not more than a mile and a half, as a line drawn from the point of Cape Observation to the head of Charlton Point would not be more than a mile and a half from the shore. The *Henry L. Phillips*, when he passed her,

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had trawls out, which were within two and a half miles from the shore, that the men attending the trawls came to the *Kate* as she was passing them, were taken opposite the *Henry L. Phillips* when they left in their dories and went on board of her, one of the trawls being between the *Henry L. Phillips* and the land. He states distinctly that this was on Wednesday the 13th June. This witness says he has been sailing around the shores of Anticosti for the last fifteen years, making two trips a month carrying the mails.

The next witness, John Suddard, says he was one of the crew and mate of the schooner *Kate*. Had been going to sea for six years and for the last two years of these in the schooner *Kate*, on the north shore of Anticosti. In passing the bows of the *Henry L. Phillips*, this witness read the name with a glass. He also says she was anchored on a rear line drawn from Cape Observation to Charlton Point, and he saw one boat playing out a trawl about two and a half miles from the shore. It would serve no useful purpose to copy this evidence at length, it is sufficient to say that he substantially corroborated the former witness, Miller, as did the next witness, William Patterson, also a member of the crew of the schooner *Kate*. The next witness, Arthur Holland, is a fisherman who resides at Gaspé and fishes in summer on the north shore of Anticosti, off Cow Point, and has fished there for fifteen years. This witness corroborates the other witnesses as to the position of the vessel and says he saw the crew fishing and catching fish on the thirteenth of June, and hauling their trawls on the fourteenth.

William Holland, brother of the above, who fished at Cow Point for twenty years and is thoroughly familiar with the place, saw the *Henry L. Phillips* at anchor on the 13th June, 1894, while anchored. When he first saw her, was not more than one mile and three-quarters

from the shore. He saw the crew of the *Henry L. Phillips* fishing within three miles of the shore and generally corroborates the other witnesses.

Captain Spain, of the Fishery Protection Ship *Acadia*, testified that a line drawn from Cape Observation to Charlton Point would be a mile and a half from the shore. The sounding at 31 fathoms would be a little over two and a half miles from the shore, under three miles. The soundings on the line between Cape Observation and Charlton Point are from twenty to thirty fathoms. This is the testimony on this point of the complaint on the part of the prosecution.

The first witness for the defence, Wilber V. Coulson, appeared to be a man of some intelligence. He kept a record of the voyage which he called his private log, which appeared, on general details, to be correct enough; but on the all-important point of the position of the vessel it appeared to be defective in some important particulars. He says they were fishing on the 13th June off Cape Observation. He says from where the *Henry L. Phillips* was anchored, Cape Observation bore south half west and Cow Point bore north-west half west. He says he took that bearing of the land when he set his gear that afternoon, and that his vessel was five miles off the land, and that they were fishing in 70 fathoms on the 13th June. The crew he says did not set trawls on the fifteenth. He says he took the compass's bearing of Cape Observation and Cow Point. He did not know about Charlton Point. Anchored in the same place from the 9th to the 15th June. Knows the distance from Cape Observation by measuring on the chart. This witness directly contradicts the witnesses for the prosecution as to the position of the *Henry L. Phillips*, on the days referred to. This was his first visit to that locality. The next witness, Frank E. Carroll, is the charterer of the *Henry*

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L. Phillips for the season 1894. He was not on board the schooner on the voyage. He was asked "Suppose a vessel to be between Cape Observation and Charlton Point, and Cape Observation bearing south half west and Charlton Point west by north, will you place where a vessel anchored with those bearings would be?" A. "She would be at the point marked "P. J. M. G." on the chart, and that is five miles from land. It is difficult to fix distances with the high land behind."

George L. Cross, the master of the *Henry L. Phillips*, says: "The day the *Kate* passed we were anchored, —Cape Observation bore south half west and Charlton Point bore west by north. We anchored there on the night of the 9th and remained there till the 15th, when we went in within two miles of the land and anchored. We went in for water. He says it was on Friday, the 15th, that the *Kate* passed under his stern. He fixes the point "P" on the chart from the same bearings as last witness, where they had ninety fathoms of water, and he denies that they fished within three miles. The next witness, Stanton, did not appear to recollect anything of importance to the inquiry, except that they did not fish within three miles of the land. The witness Coulson was recalled and fixed the bearings of Cape Observation and Point Charlton, as the preceding witnesses for the defence had done. Although I understood him in his direct and cross-examination to decline to speak of Point Charlton, confining his statement of bearings to Cape Observation and Cow Point, on recall, he says that when he said in his direct examination that Cow Point bore N.W. half W., he meant not from where they were anchored on the 13th, but from where they were anchored when getting water or ice on the 15th. This is significant when we are told by this witness, immediately afterwards, that he took bearings wherever

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they anchored, and it is especially significant when we learn from Capt. Spain that this bearing of Coulson, namely, Cape Observation bearing S. half W. and Cow Point N.W. half W., would put the vessel at "X" on the chart, or about $1\frac{1}{2}$ or $1\frac{3}{4}$ miles from the nearest land. It is impossible to reconcile the testimony of these witnesses. The witnesses for the defence seek to do so by suggesting that the crew of the schooner *Kate* and the fishermen at Cow Point are mistaken as to the day the *Kate* passed the *Henry L. Phillips*. That she passed on Friday, the 15th June, instead of Wednesday, the 13th, and that therefore they saw her within three miles of the shore, but that they were mistaken in saying she was fishing there, as she had run in only to get water. To accept this theory, however, is to reject the positive testimony of all these witnesses on the crucial point of the case. Are we justified in doing so? The witnesses Miller, Suddard, Patterson, and the two Hollands appear to be respectable men. They have been thoroughly familiar with the locality in question for years. Some of them as sailors passing and repassing the coast at this place for years, while the Hollands have fished off Cow Point every year for fifteen and twenty years, respectively. They all agree as to the date when the *Kate* passed the Point, and as to the position of the *Henry L. Phillips* and the employment of her crew on that day. The only testimony for the defence worthy of consideration as to the distance of the vessel from the shore, is that of Coulson and the master of the *Henry L. Phillips*. They both declare that they rely solely on the observations and bearings taken from the schooner, and the chart measurements from these bearings, to place the position of the vessel; and they say that they could not pretend to fix the distance within reliable limits from a view of the land without such measurements. This is reasonable when

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we consider that Coulson had never been in that place before, and Cross had been there only once before, and I cannot exclude from my consideration the attempt of Coulson when recalled, after the court had adjourned over the night, to make the terms of his evidence more applicable to actual conditions, as these conditions appeared to be. When he was recalled, he was asked: "Now, on the 13th June can you tell us where the vessel was? A. We were fishing, on the 13th June, off Cape Observation. Q. What does the log say? A. It does not give the place, except that I caught 240 fish; we were off Cape Observation and Cow Point. Q. Where were you anchored? A. Cape Observation bore south half west and Cow Point north-west half west, that is the course I took from the land, when I set my gear that day; I should judge about five miles from the land." There would appear to be no mistake about what he intended to say as to this, or no confusion in his mind as to the points on which he relied for his bearings, and yet, when recalled, he says these bearings did not apply to the place of anchorage on the 13th June, but to that nearer the shore on the 15th; and when we learn from Capt. Spain that the bearings which Coulson gave, as fixing the position on the 13th, would place the vessel at the place marked "X" on the chart, and within two miles of the shore, we cannot help suspecting the motive for the explanation he sought to give when recalled. Then, in seeking to ascertain the comparative reliability of the evidence on both sides, we cannot waive the element of interest. The witnesses for the Crown have no interest whatever in the result, while the witnesses for the defence have each of them a large personal interest. Their season's work is at stake. I should be sorry to say that such a result would induce them wilfully to pervert the truth; but in considering the probabilities

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of conflicting evidence, this element cannot be left out of consideration, and finally I cannot understand the contention of the defendants' witnesses that those seamen and fishermen who were examined for the Crown, must be looked upon with suspicion, because they undertook to swear to the distance of the *Henry L. Phillips* from the shore. I should have supposed that nothing was more likely than that people accustomed to all the features of a particular coast for years, whose safety depended to a large extent on their knowledge of distances and the various changes of weather and atmospheric action, should be as competent to estimate he distance of a particular object on the water, as an intelligent surveyor or engineer would be to make a similar estimate on the land. On the whole, I have come to the conclusion, after the most careful consideration I can give the subject, that the evidence of the witnesses for the prosecution should be received in preference to that of the witnesses for the defence, where the parties are in conflict. It was agreed at the trial that the complaint of buying bait should stand over for argument till judgment on the point of fishing within prohibited waters had been delivered. In the result, I find as follows:—

1. The vessel seized has been fully identified as the same vessel proved to be fishing off Cow Point on 13th June, 1894.

2. The allegation of fishing within the prohibited limits has been proven.

3. The burden of proving the license to fish is on the defendants.

There will be judgment of condemnation and forfeiture against the vessel, her furniture and cargo, with costs.

Judgment accordingly.

Solicitor for the plaintiff: *J. A. Chisholm.*

Solicitor for the ship: *F. G. Forbes.*

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Oct. 8.

JOHN PENNY.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injurious affection of property by construction of public work—Petition of Right—Defence of statute of limitations—50-51 Vict. c. 16 (The Exchequer Act, 1887)—Retroactive effect.

Held, following the case of *The Queen* v. *Martin* [20 Can. S. C. R. 240], that the court has no jurisdiction under the provisions of 50-51 Vict. c. 16 to give relief in respect of any claim which, prior to the passing of that Act, was not cognizable in the court, and which, at the time of the passing of that Act, was barred by any statute of limitations.

THIS was a claim for the injurious affection of the suppliant's property at Halifax, N. S., occasioned by the construction of the extension of the Intercolonial Railway into that city in the year 1881.

By *The Government Railways Act*, 1881, it was provided (sec. 27) that if any person should have a claim upon the Government for alleged direct or consequent damage to property arising from the construction of any Government railway, such person might give notice of his claim to the Minister of Railways and Canals, stating the particulars thereof and how the same had arisen; and if the Minister, from want of sufficient or reliable information as to the facts relating to the claim, or on account of conflicting statements of facts, did not consider the case one in which a tender of satisfaction should be made, he might refer the claim to one or more of the Official Arbitrators for examination and report both as to matters of fact involved, and as to the amount of damages, if any, sustained. Section 30 provided that any such claim should not be submitted to, or be entertained by, the

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Official Arbitrators unless the claim and particulars thereof had been filed with the Secretary of the Department within twelve calendar months next after the loss or injury complained of.

No claim was made by the suppliant and no proceedings taken in the matter before the Official Arbitrators under the provisions of these sections.

By the 18th section of *The Exchequer Court Act* (50-51 Vict. c. 16) it is enacted that "the laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province."

By the 58th section of this Act the Board of Official Arbitrators was abolished, and all their powers and duties were transferred to the Exchequer Court.

The suppliant proceeded with his claim by a petition of right some twelve years, or thereabouts, after the cause of injury arose in 1881. His petition, with a request for a fiat, was received in the Department of the Secretary of State on the 12th June, 1893; the fiat was granted on the 5th October, 1894, and the petition with the fiat thereon was filed in the Exchequer Court on the 12th October, 1894.

In its answer the Crown set up by way of defence to the claim that the same was barred by certain limitations in the Act of the Parliament of Canada 50-51 Vict. c. 16, secs. 16 and 18; the *Revised Statutes of Nova Scotia*, 5th Ser. c. 112, s. 1; the *Revised Statutes of Nova Scotia*, 4th Ser. c. 100, s. 1; *The Revised Statutes of Canada*, c. 136, s. 8 and c. 40, s. 8; 39 Vict. c. 27, s. 7; and 44 Vict. c. 25, s. 30.

The case came on for hearing on the 5th, 7th and 8th days of October, 1895; and, amongst other defences,

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'Argument of Counsel.

that of the limitations in the above statutes was relied on by the Crown.

T. J. Wallace for the suppliant:

It has been raised on the pleadings, and will doubtless be relied on by counsel for the respondent, that this claim is barred by the statute of limitations. I submit that there is no authority to show that the Crown might avail itself of the statute of limitations in bar of the right of the subject. Even if such a defence could be raised it is not available to the Crown here, because the statute could not be said to run when there was no court that had jurisdiction to try this case before the constitution of the Exchequer Court as it now exists. The jurisdiction in such matters conferred upon the Official Arbitrators was, I contend, an exclusive one, and not enjoyed by them concurrently with some other court. The matter of petition of right was confined to the court, but the subject could either proceed by petition or by reference to the Official Arbitrators.

Under *The Exchequer Court Act*, whenever the subject is injured he has the right to have his claim heard in this court and have it adjudicated upon. (He cites section 16 of 50-51 Vict., c. 16). This section is wide enough to include all claims against the Crown, and I have always understood this statute to mean that the moment you admit there is a claim, that very moment you establish a right by petition. The right to petition exists essentially under our Constitution, and I doubt very much if the legislature could curtail or limit the subject's inherent right to prefer his petition to the Sovereign at any time.

With reference to the period of limitation applicable to this class of cases, under *The Exchequer Court Act* the period of limitation applicable to such actions in the Province of Nova Scotia must prevail. Then, I take it that the period of limitation for bringing actions

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such as this under *The Nova Scotia Railway Act*, 1880, sec. 25, must regulate the proceedings here, and that would be six months after the doing of the damage ceases; and it is a continuous damage, and has not ceased yet. Now, under the 30th clause of *The Government Railways Act*, 1881, it is provided that claims for land taken or injured by the construction of any government railway, must be filed with the Secretary of the Department of Railways and Canals within twelve calendar months after the injury was occasioned, or else it could not be entertained by the Official Arbitrators. Now, admitting for the sake of argument that the railway was completed about the time of the expropriation, although the plan and description of the property was not filed until 1882, I contend that this section from *The Government Railways Act*, 1881, which I have read from, in its latter clauses refers to that section of *The Nova Scotia Railway Act*, 1880, limiting the bringing of actions. That being so, then we have a period of six months in which to bring the action after the "accruing of the claim." In the case before the court the time is not very well fixed when the claim accrued; but I contend that it could not accrue until the Government had completed the railway, and under another provision in *The Government Railways Act*, 1881, the claimant was not in a position to make his claim. The suppliant was bound to wait to see if the Government would not substitute some new street for the old way that was taken. Under the Act, the Government had the right to substitute another street for a portion of the one which they had taken.

I submit that the suppliant would not be in a position to press his claim the moment the expropriation was made, without waiting to see if the Government intended to give the abutting owners a new street.

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The court should say that it was only proper for the suppliant to give the Government time to substitute a new street for the one taken, before bringing his petition.

I submit, further, that if we are bound by *The Government Railways Act*, 1881, we ought to have the benefit of it. Now, I say it was compulsory on the Minister of Railways to submit cases to the Official Arbitrators the moment that he found that damage had been sustained. He might have, for instance, submitted this case to the Official Arbitrators within two or three days after the taking of the street. It was clearly his duty to refer cases where land had been injuriously affected only, as well as cases where land had been taken.

The Petition of Right Act, 1876, reserved all the rights of the subject to bring his petition of right as formerly. Therefore, I submit, in this case the suppliant would have the right to come into this court and proceed on his petition, even if no such Act had been passed. It must also be remembered that the provincial legislation which *The Government Railways Act*, 1881, invoked, gave the party six years within which to prosecute his claim.

My contention is that the suppliant had six years from the time of the filing of the plan and description wherein to bring his petition. I maintain that under the Acts in *The Revised Statutes of Canada* regulating the limitation of such an action as this, this action was not barred, because *The Revised Statutes of Canada* did not come into operation until the 1st of March, 1887, and so there was really only about three or four months that the provision in *The Revised Statutes* was in force before it was repealed by *The Exchequer Court Act*, 1887 Before the six years expired under that Act we would be down to the time this court got jurisdiction. The

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Official Arbitrators had none of the jurisdiction that this court had formerly, so that the only thing that could work against us would be the limitation in this statute of 1887 (*The Exchequer Court Act*).

I submit with great confidence that this statute which my learned friend contends gives the Crown the right to plead the statute of limitations is *ultra vires*. There is a statute passed by the Imperial Parliament which enacts that no colonial parliament or legislature can make a law contrary to the law of England.

[Mr. *Borden*, Q.C. My learned friend is here referring to *The Colonial Laws Validity Act*, 1865. That prohibits legislation contrary to Imperial statutes, not to the *laws* of England which would curtail the powers of colonial legislatures to an absurd extent.]

I submit that colonial legislation limiting the fundamental right of the subject to petition the Sovereign is in excess of the powers of any colonial legislature. Moreover, I submit that it is a most demoralizing example to the people of this country that the Crown should set up such a plea as the statute of limitations to the just claim of the subject. (He cites 7 & 8 William III, c. 22, and *Chitty on Prerogatives*, page 31). The statute I have just cited enacts that all laws which shall be in practice in any of the colonies repugnant to any law made or to be made in this Kingdom relative to the said plantation shall be utterly void and of none effect. (He cites 33 Henry VII, chap. 39, ss. 7 and 9; also *Chitty on Prerogatives* pp. 310 and 366). I maintain that the authorities show that the subject under a petition of right cannot be denied justice by the Crown pleading the statute of limitations. (He cites *Chitty on Prerogatives*, pages 370-361; 2 *Manning's Exch. Pr.* 581, 613, 614).

I submit that so far as it was possible for the suppliant, he brought the claim within six years after the

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coming into force of *The Exchequer Court Act*, 1887. This petition was prepared and filed in the office of the Secretary of State and kept more than a year or fifteen months after they received it. They had a whole year in which to make up their minds to grant it, it was received by them on the 12th June, 1893, and the fiat was not granted until October, 1894. Therefore I say that it is inequitable on the part of the Crown to plead the statute of limitations now.

R. L. Borden, Q.C., for the respondent: Dealing first with the statute of limitations, our contention is that under the 27th section of *The Government Railways Act*, 1881, my learned friend should have had his claim referred to the Official Arbitrators in the mode directed therein, and under the 30th section it must have been referred within the time limited, that is within twelve calendar months after the cause of injury arose. He did not do so, and so far as these provisions of the statute go there is an end of the question. On the other hand he contends that he had a right of action under *The Petition of Right Act*. Then if this contention on his part is a proper one, the grounds upon which he would base his petition existed in 1881, and so he is equally out of court whichever course he takes. Now as to the law on the question of the statute of limitations, I submit that it has been decided in the Supreme Court of Canada in the case of *McQueen* v. *The Queen* (1), that by way of defence to a petition of right the statute of limitations can be pleaded by the Crown. The judges in that case were only divided as to whether the 7th section of *The Petition of Right Act* was retroactive, but they had no doubt that the Act gave the Crown the right to invoke the statute of limitations. (He refers to the judgment of Chief

(1) 16 Can. S. C. R. p. 1.

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Justice Ritchie, at page 61 of 16 Can. S. C R.; and also to pages 80-82, 97, 113, 114, 117 and 118.)

The suppliant's claim accrued in the year 1881, the fence complained of was erected in 1882, and in that year the Crown filed the plan and description, and inasmuch as the petition of right was not filed until March, 1894, and was furthermore not presented for a fiat until the year 1893, it is quite clear that under *The Government Railways Act*, 1881, and the provisions of the Nova Scotia statute, which the former Act makes applicable to this case, the claim is wholly barred. With regard to the other alternative, assuming that my learned friend had also an opportunity of giving notice to the Minister of Railways of the claim and obtaining and prosecuting a reference to the Official Arbitrators under *The Government Railways Act*, 1881, then I say his claim would be barred under the provisions of section 30 by something like twelve years. Now then, is there anything in *The Exchequer Court Act* of 1887 which would counteract the effect of *The Petition of Right Act* 1876, or the provisions of section 30 of *The Government Railways Act* 1881? So far as petition of right is concerned, you don't find anything there to aid the suppliant; but, on the contrary, you find in section 18 a provision that the laws relating to prescription and the limitation of actions in force in any province, between subject and subject, shall apply to any proceeding against the Crown in respect of any cause of action arising within such province. Therefore, it is plain that, as under the Nova Scotia statute of limitations the suppliant's claim would be barred in six years, my learned friend is still out of court. Under *The Government Railways Act*, 1881, section 30, the suppliant's claim must have been proceeded with before the Official Arbitrators within twelve months after the claim had accrued, and *The Exchequer Court*

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Act, 1887, does not have any retrospective operation in the way of rendering it possible to prosecute claims before the Exchequer Court as now constituted, which were barred before the Act of 1887 came into force. That *The Exchequer Court Act*, 1887, has no retroactive effect for such a purpose was decided by the Supreme Court of Canada in the case of *The Queen* v. *Martin* (1). The result of the judgment in that case would seem to be that if the party brings his action in the Exchequer Court after the year 1887, in respect of a claim which had accrued before the Act came into force, the court has no jurisdiction to entertain it. In order to take the benefit of the Act, the right of action must have accrued after the Act came into force. I think that your Lordship's jurisdiction to entertain claims like this is denied by the Supreme Court in the case of *The Queen* v. *Martin*. The facts in that case are not dissimilar in all respects to those present here. The cause of action was barred in the Province of Quebec before *The Exchequer Court Act* came into force. It was decided by the Supreme Court that claims of this character were not revived by the provisions of the Act.

Counsel for the suppliant has argued that *The Petition of Right Act*, 1876, is unconstitutional, inasmuch as it affords the Crown the right to plead prescription in defence to a petition. I do not propose to take any time in dealing with that, because it is familiar constitutional law that all the powers or authorities that could be exercised by the Legislature of Nova Scotia before Confederation, are now vested in the Parliament of Canada or in the Legislature of Nova Scotia. Now, it is undoubted that the Parliament of Canada has the right to legislate upon the subject of petitions of right to the Crown in the right of Canada; and that being so, then Parliament would have the right to regulate

(1) 20 Can. S.C.R. 240.

the conditions under which the petition of right should be proceeded with. It is pretty clear that the right to legislate on this subject does not exist in the Legislature of Nova Scotia, and therefore it must of necessity be vested in the Parliament of Canada. It is plain from *The Colonial Laws Validity Act*, 1865, that every colonial legislature has full power to establish courts of judicature within its jurisdiction and to make provision for the administration of justice therein. [He cites and discusses the cases of *Beckett* v. *The Midland Railway Co.* (1); *The Queen* v. *Archibald* (2); *The Queen* v. *Barry* (3); *Cripps on Compensation* (4); *City of Glasgow Union Railway Co.* v. *Hunter* (5); *Hammersmith, &c.*, v. *Brand* (6)].

[*By the Court.*—What have you to say, Mr. Wallace, against the view that I am bound in this case to follow the decision of the Supreme Court in the case of *The Queen* v. *Martin* ?] (*supra*)

Mr. *Wallace.*—I think that that case was decided contrary to the principles laid down by the English courts in their judgments in similar cases. I do not think that the Exchequer Court is bound to follow that decision if it is bad law.

[*By the Court.*—I am not able to distinguish this case from that of *The Queen* v. *Martin* in respect of the retroactive effect of *The Exchequer Court Act*, 1887.]

I think that the date of the institution of the action should be the date when the petition was received in the Department of the Secretary of State with the request for a fiat. Surely the Government ought not to be allowed to keep the petition one or two years before granting the fiat, and then plead the statute of limitations.

(1) L.R. 3 C.P. 82.
(2) 3 Ex. C.R. 251.
(3) 2 Ex. C. R. 333.
(4) 119, 120 and 121.
(5) L.R. 2 Sc. App. 78.
(6) L.R. 4 H.L. 171.

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THE JUDGE OF THE EXCHEQUER COURT.—I think that in this case the suppliant cannot succeed. In principle I do not see any difference between *Martin's* case (*supra*) and this. If, prior to 1887, the suppliant's only remedy was, as probably it was, by a proceeding before the Official Arbitrators, then he is out of court; because his claim was not made in the time prescribed by the provisions of the statutes regulating such proceedings.

If, however, it were thought that he might, prior to 1887, have proceeded by petition of right, then it is clear that the claim is barred by the statutes of limitations. *Martin's* case (*supra*) must, I think, be taken to establish this proposition at least, that this court has not, under *The Exchequer Court Act*, 1887, jurisdiction to give relief in respect of any claim which, prior to the passing of that Act, was not cognizable in the court, and which at the time of the passing of the Act was barred by the statutes of limitations.

The judgment is, that the suppliant is not entitled to the relief which he seeks, or to any part of it, and the petition is dismissed with costs.

Judgment accordingly.

Solicitor for suppliant: *T. J. Wallace.*

Solicitor for respondent *R. L. Borden.*

JOHN MORRIS ROBINSON.....SUPPLIANT; 1895

AND Nov. 23.

HER MAJESTY THE QUEEN.....RESPONDENT.

Public work—Injurious affection of property arising from construction—Damage peculiar to property in question—Compensation.

To entitle the owner of property alleged to be injuriously affected by the construction of a public work to compensation, it must appear that there is an interference with some right incident to his property, such as a right of way by land or water, which differs in kind from that to which other of Her Majesty's subjects are exposed. It is not enough that such interference is greater in degree only than that which is suffered in common with the public.

PETITION OF RIGHT for damages arising from the alleged injurious affection of property by the construction of a public work.

The suppliant was the owner of a certain wharf property situate on the harbour of St. John, N.B., which was granted to his predecessors in title by the City of St. John, in whom the property in the said harbour was vested by Royal Charter in the year 1785.

In constructing the Courtenay Bay Branch of the Intercolonial Railway along the water front of the said harbour, it was deemed necessary to build a trestle across a slip or cove in the harbour upon which the suppliant's property fronted. The construction of this branch railway along certain public streets in the city to the harbour front was authorized by the Act of the Legislature of New Brunswick, 54 Vict. c. 51. Subsequently, an agreement with respect to the location of this railway was entered into between the city and the Dominion Government, which was ratified by 56 Vict. (N.B.) c. 40. In conformity with this agreement the railway was constructed. No part of the suppliant's

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property was expropriated, but the trestle, by protruding some little distance in front of his wharf, rendered the approach thereto from the harbour more difficult and reduced the capacity of the property for docking purposes by occupying a part of the harbour not granted to suppliant, but which he theretofore used. There was a draw made in the trestle for the purpose of facilitating access to the suppliant's and other properties; but this did not render such access as convenient as it was before the erection of the work in question. On account of such interference with the access to the suppliant's property, he was obliged to reduce the rents obtained by him from tenants of his wharf and stores, and he also lost dues for side-wharfage which he had been accustomed to collect from vessels using the adjoining wharf—a practice which could not be continued after the trestle was constructed. It was also shown that at the head of the wharf vessels could not lie and discharge cargo with the same convenience as theretofore, by reason of the proximity of the trestle. The evidence, on the whole, established that the damage suffered by suppliant by reason of the construction of the trestle was in part peculiar to his property, and different in kind from that suffered by the adjoining owners.

The case was tried at St. John, N.B., on the 5th, 6th and 12th days of June, 1895.

The argument took place at Ottawa on the 24th day of June, 1895.

J. A. Armstrong Q.C., for the suppliant, cites Local Public Statutes, N.B., vol. 3, p. 998, and the Royal Charter of the City of St. John, at page 998 thereof. He cites the Acts of 1840, 3 Vict. c. 81, to be found in the same volume as above, page 60; also cites from the evidence to show what application this Act has to the *locus* in dispute. He maintains that the Act in ques-

tion does not affect this property in any way. He refers to page 164 of the same book 15 Vict. c. 11. This Act, he contends, does not interfere with this property, at least where the wharf is now. The City of St. John got power from the legislature, in 1854, to make a new harbour line. This new line does not apparently extend over the front of this property. He reads from the Act of 1864, which regulates all wharfs to be erected on the eastern side of the harbour, sections 3 and 5. It would be unjust for the legislature to alter the line of the harbour and interfere with the rights of lessees without giving compensation therefor. The Act of 1886 distinctly reserves the rights of parties who have leases from the city. It reserves them from the operation of the Act. But in 1891 an Act, 54 Vict. c. 51, was passed to authorize the City of St. John to aid in the construction of wharves on the eastern side of the harbour. (He refers to the Act.) But this Act is of no moment here for the reason that it was not acted upon, and in 1893 by 56 Vict. c. 40, which provides as follows, (reads 3rd section). Her Majesty was given power to extend the railway as has been done, but only on compensation to lessees for any injury done. Now injury has been done to the suppliant. The land was leased by the city to one Reed in 1844. In whatever way the right to the seashore had arisen, whether by grant by the Crown or through the legislature, the subject matter of the grant was freehold, but a shifting one as the sea recedes. The receding of low-water mark below the point in respect of which Mr. Robertson could originally have claimed accrues to the benefit of the suppliant. [He cites *Hunt on Boundaries* (1).] There is nothing to show, however, that low-water mark had either receded or advanced. Therefore, if there is any space below that portion of

(1) 3rd ed. p. 11.

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the land which is occupied by the wharf which could be called low-water mark it belongs to the suppliant. [He cites *Scratton* v. *Brown* (1); *Attorney-General* v. *Terry* (2); *Bickett* v. *Morris* (3).] The soil of the alveus is not common property. [He cites the Acts relating to the Harbour of St. John in 3 P. & L.S. N.B. p. 68; *Hartlepool* v. *Gill* (4).] Our case is still stronger than these cases, as we have an Act of the legislature making our rights perpetual. [He refers to 23 Vic. ch. 60.] The most important case I have to present is *Lyon* v. *Fishmonger's Co.* which is to be found in 10 Ch. App. 579 and 1 App. Cas. 662. It was said in that case that the rights of a riparian owner might be likened to the case of a man having a property fronting on the street—having his front door on the street. He might have no title in the street but he has a right to the uninterrupted use of it, and the city has no right to place any obstruction upon the egress and ingress to and from his property. The *Lyon* case is a case in point. This work was attempted to be done under the Act of Parliament which reserved the rights of the lessee. This authorization does not amount to more than this that the boundaries might be changed upon compensation being made to the person who holds the lease. This Act authorizes wharfs to be built. Here it is not a wharf that is built at all. It is a trestle built for the purposes of running railway trains. The statute does not authorize the building of such a work. I maintain that where this has injured the suppliant's property he is clearly entitled to damages. Here we have a wharf which the evidence establishes has brought in a sum of $225 a year, that is the part which is bounded by the alveus and goes down to low-water mark. So far back as *Magna Charta* the alveus was

(1) 4 B. & C. 485.
(2) L. R. 9 Ch. Ap. 423.
(3) L. R. 1 H. L. Sc. App. 47.
(4) 5 Ch. Div. 713.

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free. Such a wharf as this would never have been built if it had been possible for the access to have been cut off at any time without compensation. Now, the wharf has been practically destroyed. Its whole value depended on vessels going there and discharging cargo. The loss suffered by the suppliant is the difference between $225 a year and nothing. [He cites *Bell* v. *The Corporation of the City of Quebec* (1).] If Mr. Robertson succeeds in this case it does not follow that the other owners along there may succeed, because though it is an interference with their access to some extent they might not be able to prove any damage. In our case we have proved substantial damages.

[BY THE COURT: It would not follow that if the lands in question were injuriously affected the proprietor would have a right to damages. The strongest point in your case is that the trestle overlaps your wharf. The test is not mere injurious affection, because one's property may be injuriously affected, and he not be entitled to damages.]

The trestle deflects and comes in front of our property. Suppose a vessel came there, she would find that the front of the first bent is 10 feet in front of our wharf.

The damages are said by suppliant to be $3,000. It was made up on a basis of 7 per cent., the actual loss to him being about $225 per year.

E. McLeod, Q.C. followed for the suppliant: I will not trouble your lordship as to the title. It is not denied that we occupy and own the property in dispute. We claim we are injuriously affected. We claim we are entitled to compensation. I think that the rules laid down in the *Chamberlain* case (2), *McCarthy's* case (3), *Caledonian Railway* case (4), *Wal-*

(1) 5 App. Cas. 84.
(2) 2 B. & S. 605.
(3) L. R. 7 H. L. 243.
(4) 2 MacQ. H. L. C. 229.

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ker's Trustees case (1), and *Becketts'* case (2), laid down the rules very clearly. *Ricketts'* case (3), and others of that class go upon a different ground. It was decided in those cases that the injury arose from operating the railway, that the damages were personal, if any, and not to the land, and that they were too remote to be considered.

Taking that class of cases as governing this particular one, then we have two kinds of damages in respect of which we are entitled to be indemnified. First, we cannot lay a vessel at our wharf now as we were able to do before the trestle was built; secondly, in addition to this the trestle coming in front of our wharf cuts off our access. The main part of the trestle comes within 29 feet of our wharf.

I submit that the interference with the mode of access to our wharf is one peculiar to the property, and not such a one as affected property generally there. However, the others might be affected, the trestle is a distinct impairment of our rights of access. As soon as we establish an interference with our access, then we have a right to damages.

[BY THE COURT: If there is physical interference with your right of access, then you have a right to come into court; but if it is an interference with a right common to all the subjects of Her Majesty, then you cannot come here and get damages.]

If you put an obstruction across the highway and thereby shut up the property, the owner whose access has been destroyed has a right to damages.

[BY THE COURT: But in your case you have a draw by which you can go through the trestle.]

But even so, they have made access more difficult. They may not have destroyed the access, but they

(1) 7 App. Cas. 259. (2) L. R. 3 C. P. 82.
(3) L. R. 2 H. L. 175.

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have impaired it, and *quoad hoc* they must pay us damages. What I submit to your Lordship under the authorities is, that supposing this obstruction had been made and no draw put there, the law would not have been different from what it is now. Starting with the proposition that the right to come into the wharf was destroyed and therefore a right to damages arose, I submit that if the obstruction was not absolute, a right to damages for such partial interference with the right of access would still obtain. The cases show that where the property is injuriously affected in its use and occupation, you are entitled to damages. *Brand's* case (1) only goes to show that you are not entitled to damages from the vibration of trains, the property not being affected thereby. [He cites *Ford* v. *The Metropolitan Railway* (2).] I submit that as this man's property is damaged, *qua* property, he is entitled to be indemnified. It is a damage incidental to the property. It is a physical interference with Mr. Robinson's private right of access to his property.

C. N. Skinner, Q.C., for the respondent: The rights of persons to water lots in the harbour of St. John were very fully considered in the case of *Brown* v. *Reed* (3). The charter does not give the city power to grant their rights to any one, but limits it to their successors. This does not mean their assigns, it means their successors in office, the persons who have the local government of the city entrusted to them. So far as the law is concerned, I claim that no private person in St. John has a right to put any wharfs at all on the harbour, except with the authority of the legislature. The city itself cannot give them the power, they can get it only from the legislature. The Act of 1840, 3 Vict. c. 80, only refers to wharfs built

(1) L. R. 4 H. L. 171. (2) 17 Q.B.D. 12.
(3) 2 Pugsley 206.

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by the city. (See sections 3 and 4.) Under that Act, unless a private individual has a legislative authority he has no right to build a wharf there at all. (He reads the *Reeds' Point Act* of 1852, p. 163, vol. 3, N.B. Statutes). Reference has been made to the Act of 1864. This is an Act relating to the harbour of the City of St. John. It establishes that no private individual has a right to put wharfs between high and low-water mark, unless authorized by the legislature especially to do so. Counsel for the suppliant said that the Act of 1864 reserves the rights of private persons. This must be taken to mean owners who have previously the right to build. If counsel mean that the Act reserves the rights of people who have built there without a legislative authority, I join issue with him on that point.

The Act of 1891 was acted on. It was intended that in running along the street the abutting proprietors would have no claim for damages or injuries. [He reads the recital to the New Brunswick Act of 1893]. The Act of 1891, it was contended, was not acted on. I do not concede that point. I say that under the Act of 1891 the railway was built and that the only section at all that applies under the Act of 1893 is the 3rd section. Now what does this 3rd section do and say? [Reads it.] That means that whenever any private property has been taken, as provided in the Act of 1891, it has to be paid for, and so if we had taken any of Mr. Robertson's private property we should have to pay for it, but we did not take any. The road was built and the work done upon it under these two Acts, and they must be read together to show what was done. Now what was the object in erecting this trestle there? This work was built with the idea that by placing it there and running the railway across it, it would have a tendency to bring business to these

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wharves. The object of the whole thing is to enable the freight business to and from the harbour of St. John to be done more expeditiously, so that cars for the transmission of freight coming by water could meet the ships at deep water and so lessen the expense of trans-shipment, etc. The idea was that all these wharves would be enhanced in value. Now how does it effect Mr. Robertson's wharf? The railroad goes quite close to it and thus the idea is realized. Mr. Robertson's wharf might be very much improved in value by this work, because cars can receive freight on the wharf, but as a matter of fact the railway has been of no advantage as yet; still it might become so in the future.

Now then it has been contended that as low-water mark recedes the lands become the property of the suppliant. I doubt this very much. Although this was in the nature of a base fee yet, perhaps, the land would belong to the owner of the fee. But there is no evidence that the alveus has been changed or that the land has been increased there.

Although the trestle might be in front of the Robinson wharf it is not above low-water mark. As to the question of suppliant's property overlapping beyond low-water mark, there is a difference between overlapping as a matter of wrong and overlapping as a matter of right. Now the evidence shows that so far as the west side of the wharf goes it is all below high-water mark. He would not have the right under his lease to extend below water mark even on the west side and he could not get below low-water mark anywhere. Therefore I say that their overlapping beyond low-water mark would not be as a matter of right, but it would be a matter that could be interfered with any time by one of the public or by the city.

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The suppliant cannot say he is entitled to compensation because he never had any property below low-water mark. He had not been assigned the rights of the city to the use of this water.

The city being the owners of the bed of the harbour and the conservators of navigation they have a perfect right to authorize the construction of the trestle. The Act of 1893 says that the work was a lawful structure. Now, granting that the city have the right to build a railway and they grant the right to the Crown to build a railway across there, then the case is governed by the 2nd section of the Act of 1893. The Act of 1893 leaves the parties just as they were under the Act of 1891. They cannot get any compensation unless their lands were taken. My learned friends must take it either upon the ground that the Crown was a trespasser or that they got authority under the Act of 1893, which was an Act confirming the Act of 1891.

My idea is that at common law the rights of riparian owners are similar to the rights of the public and the owners here as regards high and low-water mark. The soil between high-water mark and low-water mark is generally granted in the deed. If it is a navigable stream the boundary goes to low-water mark, and in non-navigable streams the boundary goes to the centre of the stream. But in the case of a river like the St. John River the boundary would be at low-water mark, and the soil between high-water mark and low-water mark would be held by the proprietor as a servient tenement, so to speak. The riparian proprietor has certain rights in this stream but they are rights in common with the rest of the public. The riparian proprietor has no right to put any permanent structure there. He has the right to come and go merely. The riparian owner and the public have a joint interest between high and low-

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water mark, the soil remaining in the proprietor. In the harbour of St. John the soil was vested in the city. [He reads the boundaries of the city in the Royal charter.] In this description of territory the city is bounded on both sides of the river. But supposing that the charter had stopped there the city would not have had any rights between low-water mark and high-water mark, except only the necessary rights of a riparian, but the charter went further than that. The city under the charter has the property in the soil in such a way as to leave it substantially and entirely in the public for the purposes of navigation. The city are conservators of the harbour, and the soil is vested in them for that purpose. That is a restricted property in the city. They may be merely said to be trustees for the public, not the absolute owners of the fee; therefore the practice is whenever the city want to build or to do anything of that sort they go to the legislature for authority. That was the principle of the case of *Brown* v. *Reed* (*supra*). I do not see why Brown had not just as much right to build as the suppliant here? Brown had a grant before the charter was given to the city. When he went there to build a wharf the city interfered, and the court held, rightly. With reference to the case of *Lyons* v. *The Fishmonger's Company* (*supra*) I understand counsel's point in reading that case was to show that the City of St. John had no right, as riparian owners between high and low-water mark, to place this structure in front of Robinson's wharf. But the fact is that the suppliant is a trespasser himself. The suppliant had no right to build a wharf there. There is a contention that he had it there for 35 years, but it is established by the evidence that he is there without the slightest authority.

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Beckett v. *The Midland Railway Co.* (*supra*) was cited by my learned friends for the purpose of sustaining the proposition that without legislation it would have been trespass on the part of the city or the Crown to erect such a structure, and the suppliant could have an injunction against the party putting it there. Now if he were a trespasser he would be out of court, and on the other hand if it has been built by virtue of legislative authority and such legislative authority is to be found in the Acts which I have quoted from, and relied on, clearly no damages are recoverable. The case of *Walkers Trustees* (*supra*) affords us no help because it is upon special Acts. The case here arises under an Act of N. B. which confirmed a grant made by the city to the Crown, and that has to be taken and construed with reference to the Act of 1891, and that Act provides that no compensation will be allowed for such a case as this.

Therefore, my argument comprises three propositions. First, we have not taken any lands, the property of the suppliant. Secondly, that if the suppliant has been damaged by what the Crown has done here, he has no remedy for it in a suit of this character because his damages are entirely consequential, and, under this Act and the law we have referred to, the Crown is not answerable here for consequential damages. Thirdly, that the property which the suppliant says has been injured is property which has been placed there contrary to law, and the suppliant can, therefore, get no damages against the Crown or the city.

E. McLeod Q.C. replied: In the case of *Brown* v. *Reed*, (*supra*) Brown proposed to build a wharf out into the harbour and the city came in and stopped him as conservators of the navigation of the harbour. I submit that we had an absolute legal right to build the wharf,

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and if our wharf is a nuisance it has never been abated by the city.

We have seen that the city does from time to time have wharves extended out beyond the harbour line. But this is within the alveus or harbour line, so that on this question it does not seem to me that there should be the slightest doubt. Then, as we are properly there, I do not think that the Crown could have built a wharf which would injure our property without paying damages, and they certainly cannot build a trestle and extend it over the front of our wharf. Our property is injuriously affected and we are entitled to compensation.

THE JUDGE OF THE EXCHEQUER COURT now (November 23rd, 1895) delivered judgment.

The petition in this case is filed to recover damages for the injurious affection of a lot of land and premises situate in the City of St. John, and belonging to the suppliant, which were injuriously affected by the construction of an extension or siding of the Intercolonial Railway, a public work of Canada. There is no question but that the property has been injuriously affected by the construction of this work, and the only question presenting any difficulty is as to whether or not the facts of the case bring it within the class of cases in which the land owner is entitled to damages. I had occasion in *The Queen* v. *Barry* (1) to discuss the rule or principle by which the question as to whether or not the claimant in such cases is entitled to damages, is to be determined, and in *Archibald* v. *The Queen* (2) briefly to state the rule. To entitle the suppliant to succeed, it must appear that the interference with some right incident to his property, such as a right of

(1) 2 Ex. C.R. 333.

(2) 3 Ex. C.R. 257; 23 Can. S. C.R. 147.

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way by land or water, differs in kind from that to which other of Her Majesty's subjects are exposed. It is not enough that such interference is greater in degree only than that which is suffered in common with the public. In this case there is, I think, an interference with rights incident to the suppliant's land and premises, differing not only in degree but in kind, from that to which the public generally are subjected.

There will be judgment for the suppliant for two thousand dollars, and costs.

Judgment accordingly.

Solicitor for suppliant: *J. R. Armstrong.*

Solicitor for respondent: *C. N. Skinner.*

BRITISH COLUMBIA ADMIRALTY DISTRICT. 1895

Nov. 12.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AGAINST

THE SHIP *E. B. MARVIN.*

Maritime law—The Behring Sea Award Act, 1894, *art.* 6, *sched.* 1—*Contravention—Seizure upon mistake of facts—Costs.*

Article 6 of schedule 1 of *The Behring Sea Act*, 1894 (57 Vict. (U.K.) c. 2), prohibits the use of nets, firearms and explosives in the fur seal fishing in certain waters mentioned in the Act, during the season therein prescribed.

A vessel left the port of Victoria, B.C., on the 11th January, 1895, to prosecute a fur sealing voyage in the North Pacific, her equipment including a supply of firearms and explosives. *The Behring Sea Award Act*, 1894, came into force on the 23rd April, 1894. On the 18th June of that year the master of such vessel received notice of the Act, with instructions to proceed to Copper Island for the purpose of getting his firearms sealed up. On the 27th July the vessel reported to the American Custom-house officer there, who informed the master that he had no authority to seal up the arms and ammunition, but after making a manifest of the things on board, gave the master a clearance permitting his vessel to proceed to Behring's Sea for the purpose of hunting for seals. The manifest showed that the vessel had on board a certain number and certain kinds of loaded and empty cartridge shells.

On the 2nd September the vessel was boarded by officers of the U.S.S. *Rush*, and afterwards arrested by them and taken to Ounalaska, and there handed over to H.M.S. *Pheasant*, as being guilty of an infraction of article 6 of *The Behring Sea Award Act*, 1894. The grounds upon which the arrest was based were: (1) The fact that among the 336 sealskins on board, one had a hole in it which might have been caused by a bullet or buckshot; and (2) That there was a less number, as well as another kind, of shells found on board the vessel when arrested than appeared in the manifest. At the trial it was not established beyond a doubt that the hole in the skin in question was produced by a gun shot, or, if so, by one fired by those on board the defendant vessel. On the other hand, it could be reasonably inferred from the evidence that the number

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and the kinds of shells on board the vessel were incorrectly stated in the manifest.

Although the evidence disclosed doubts as to a breach of the provisions of the Act, which the court resolved in favour of the vessel, yet it was held that the circumstances created sufficient suspicion to warrant the arrest, and no costs were given against the Crown in dismissing the petition.

Statement of Facts.

THIS was an action *in rem* for the condemnation of a vessel for an alleged infraction of *The Behring Sea Award Act*, 1894.

By the statement of claim filed on behalf of Her Majesty, it was alleged as follows:

1. The ship *E. B. Marvin* is a British vessel registered at the Port of Victoria, in the Province of British Columbia.

2. The said ship *E. B. Marvin*, W. D. Byers, master, set sail from the Port of Victoria on the 11th day of January, 1895, for the purpose of fur seal fishing in the North Pacific.

3. The said ship *E. B. Marvin*, W. D. Byers, master, was seized by C. L. Hooper, a captain in the revenue cutter service of the United States, commanding the United States revenue steamer *Rush*, on the 2nd day of September, 1895, in the Behring Sea, in latitude 56° 25′ north and longitude 172° 59′ west.

4. The said ship *E. B. Marvin*, at the time of her departure from the said Port of Victoria and at the time of the seizure aforesaid, was fully manned and equipped for the purpose of killing, capturing or pursuing seals, and at the times aforesaid had on board thereof firearms and ammunition, loaded cartridges, powder shot and ball, and had also on board at the time of her said seizure 386 fur seal skins captured during the said voyage including the skin of one fur seal which had been killed in the Behring Sea by the use of firearms by some person in such ship.

5. The said schooner *E. B. Marvin* was continuously engaged in the fur seal fishing within the waters of

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the Behring Sea from the 9th day of August, 1895, to the 2nd day of September, 1895, the date of the seizure aforesaid, and during all this time had on board guns, rifles, shooting implements and loaded cartridges and empty cartridge cases for use in the said guns, and rifles and also powder, ball and shot, and the necessary apparatus for filling cartridges, and during the times between the said 9th day of August, 1895, and the said 2nd day of September, 1895, did employ and use the said guns and firearms and explosives in the fishing for and for the purpose of killing the said fur seals or some, or one of them within the waters of the Behring Sea aforesaid.

6. The said schooner *E. B. Marvin* with her crew, equipment and seal skins were sent to Ounalaska by the said Captain Hooper, and there handed over to Frank A. Garforth, Lieutenant, commanding H. M. S. *Pheasant*, on the 9th day of September, 1895.

7. The Lieutenant-Commander, Frank A. Garforth, endorsed the certificate of registry of the said ship *E. B. Marvin* and ordered the master to proceed direct to Victoria aforesaid, with his said ship and report to the Customs there.

8. Prior to the entry of the said ship *E. B. Marvin* into Behring Sea, G. C. Carmine, 2nd Lieutenant United States revenue cutter service and acting Customs officer at the Port of Attu, endorsed the manifest of stores and ballast of the said schooner *E. B. Marvin* on the 29th day of July, 1895, which manifest showed there were, 1,152 loaded brass shells, 903 empty brass shells, and 138 empty paper shells, 20 shot guns and 3 rifles, 1 bomb gun, 8 sets re-loading tools, 9 cappers, 2 sets rifle re-loading tools, 85 sacks buckshot, 3,130 lbs.; 1 box buckshot containing 300 lbs. (approximately); 16 cans powder, 311 lbs.; 29,000 gun wads, 16,000 primers; gun and cannon.

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Statement of Facts.

Arthur Yerbury Moggridge, Commander of H. M. S. *Royal Arthur* claims the condemnation of the said ship *E. B. Marvin* and her equipment and all on board of her, and the proceeds thereof, on the ground that the said ship at the time of the seizure thereof was in the Behring Sea fully armed and equipped for taking fur seals, and was engaged in fur seal fishing in the Behring Sea from the 9th day of August, 1895, to the 2nd day of September, 1895, continually, and during the whole of the said time had on board the said ship *E. B. Marvin* firearms and explosives for the purpose of killing the said fur seals contrary to the provisions of *The Behring Sea Award Act*, 1894.

The statement of defence was, in substance, as follows:

1. The defendants admit paragraphs 1, 2, 3, 6, 7 and 8 of the plaintiff's statement of claim.

2. The defendants do not admit so much of paragraph 4 as alleges that at the time of seizure the said ship *E. B. Marvin* had on board the skin of one fur seal which had been killed in the Behring Sea by the use of firearms by some person in such ship.

3. The defendants do not admit so much of paragraph 5 as alleges that the said ship *E. B. Marvin* during the times between the said 9th day of August, 1895, and the said 2nd day of September, 1895, did employ and use the said guns and firearms and explosives in the fishing for, and for the purpose of killing, the said fur seals or some, or one of them, within the waters of the Behring Sea aforesaid.

4. The defendants say that at the time when the said ship *E. B. Marvin* left the Port of Victoria she had on board, in addition to the guns and other implements referred to in paragraph 4, 29 spears and at the time of the seizure there were in addition to the articles mentioned in paragraph 8, 43 spears, including 14

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spears which had been purchased by the said Captain W. D. Byers during the month of June at the Port of Hakodate, Japan, and 22 poles on board.

5. In answer to the whole of the plaintiff's claim the defendants say that the said fur seal was killed in the manner as is by the provisions of *The Behring Sea Award Act*, 1894, allowed and not otherwise.

Issue joined.

The case was tried before the Honourable Theodore Davie, C.J., Local Judge for the Admiralty District of British Columbia, on the 11th and 12th days of November, 1895.

C. E. Pooley, Q.C., for the plaintiff;

H. D. Helmcken for the ship.

At the conclusion of the trial, judgment was delivered.

DAVIE, C.J. L.J.:—

This was an action for the condemnation of the British vessel *E. B. Marvin*; her equipment and everything on board of her, and the proceeds thereof, instituted by Arthur Yerbery Moggridge, Commander in H.M.S. *Royal Arthur*, on behalf of Her Majesty, on the ground that at the time of the seizure presently mentioned the said vessel was in the Behring Sea fully armed and equipped for taking fur seals, and was engaged in fur seal fishing in the Behring Sea from the 9th August, 1895, to the 2nd September, 1895, continuously, and did during the said time use firearms and explosives for the purpose of killing fur seals, contrary to *The Behring Sea Award Act*, 1894.

The facts of the case, as proved before me, show that the said vessel, William Douglas Byers, master, left the port of Victoria on the 11th January, 1895, for the North Pacific on a fur sealing voyage, fully manned and equipped with the necessary outfit for seal fishing,

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including a supply of firearms and explosives. *The Behring Sea Award Act*, 1894, which, by article 6 of the first schedule, makes it unlawful thereafter to use firearms and explosives in fur seal fishing, came into force on the 23rd April, 1894, after the *Marvin* had left Victoria and whilst she was prosecuting her voyage. On the 18th of June, 1895, Captain Byers received notice of the Act, with instructions to proceed to Copper Island for the purpose of getting his firearms sealed up, and on the 27th July reported with his vessel to Captain Carmine, the American Custom-house officer at Copper Island, who informed him that he had no authority to seal up his arms and ammunition, but after making a manifest of the things on board gave Captain Byers a clearance permitting his vessel to proceed to the Behring Sea for the purpose of hunting for seals. The manifest with which Captain Byers went to sea from Copper Island included 1,152 loaded brass shells, 903 empty brass shells, and 138 empty paper shells. Having proceeded on her voyage, the vessel was overhauled and searched, but allowed to go free on the 21st August by the U.S.S *Grant*, and by the U.S.S. *Perry* on the 26th August, and on the 2nd September, after the hunters had left the vessel for the day's sealing, the U.S.S. *Rush* hove in sight and boarded her. The cargo then on board of 336 seal skins was diligently examined by the officers of the *Rush*, and, with the exception of one skin, showed no appearance of anything but spearing. In one skin, however, a hole was discovered which might have been caused by a bullet or buckshot, and the officers of the *Rush* believed that it was so caused, and a count of the ammunition on board showed a considerable difference from the manifest; the actual count made by the officers of the *Rush* showing 1,081 brass shell cartridges loaded, 734 brass shells empty, 44 paper shells loaded and 170 paper shells empty. Under these circumstances the *Marvin* was placed under seizure.

The hunters came home in the afternoon of the same day with a further catch of some forty seals, all taken apparently in a perfectly legitimate manner, as the hunters had neither firearms nor ammunition in their boat.

The *Marvin* was taken to Ounalaska and there handed over to Lieut. Garforth, of H.M.S. *Pheasant*, who again counted the ammunition. His count differed somewhat from that of the *Rush*, and besides those cartridges and shells formerly counted by the officers of the U.S. vessel, two cardboard boxes of empty brass shells were produced by Capt. Byers from the *Marvin's* lockers, making together, with those already counted, a total of loaded and unloaded brass and paper cartridges and shells amounting to 2,194, or within one of the number appearing on the manifest, but differing in kinds—Lieut. Garforth's count showing 1,104 brass shells loaded, as against 1,152 on the manifest; 742 brass shells empty as against 903 on the manifest; 305 paper shells empty, as against 138 on the manifest, and 43 paper shells loaded, while there were no paper shells loaded on the manifest.

Capt. Byers tells us that when the officers of the *Rush* made their count, he knew that there were more shells somewhere, and asked the officers to wait until the hunters came back, as they would probably know where the missing shells were, and that when the hunters came back, they did inform him of the shells which were afterwards produced from the lockers. He further tells us that the count made at Copper Island and appearing on the manifest was made by the hunters, whose word was taken for the number entered on the manifest. He accounts for the discrepancy between paper and brass shells by the one being then mistaken for the others.

I am of opinion that Capt. Byers' explanation is a reasonable one. Upon inspection of the cartridges I

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observe that the butt of the brass and paper cartridge is identical, both being of brass, and I can very well believe that in counting them in the boxes this mistake might easily have occurred. I attach no importance to the hole in the skin. Mr. Lubbe, a fur dealer, who was called as a witness, whilst expressing his belief that a hole pointed out by him was a buckshot hole, pointed out a different hole and one which had not been perceived by the officers of the *Rush*. I am by no means persuaded that either hole was caused by a shot, although of course either might have been; but then again, even if caused by a shot, it by no means follows that the shot was from the *Marvin*. On the contrary, it is quite possible that if the hole was a shot wound such shot might have been fired by a stranger some time before, for Mr. Lubbe tells us that the wound would not heal over for two or three weeks, and he also tells us that it is no uncommon thing to find nests of old shot in the skins of seal killed by spearing or in other ways. Captain Byers, who gave his evidence in a straightforward and unequivocal way, assures us that no shooting whatever took place, and the fact that the hunters came back after the seizure without arms or ammunition, and the further fact that no indication whatever of shot were found in any of the other skins, and the tally, within one, of the total count on the manifest, strongly corroborate him.

I think that the discrepancy at first in the number and in the kind between the ammunition found and that described in the manifest created sufficient suspicion to warrant the arrest; but this suspicion, I think, has been satisfactorily cleared up by Captain Byers.

The suit will, therefore, be dismissed without costs.

Judgment accordingly.

TORONTO ADMIRALTY DISTR. 1895

Nov. 26.

WILLIAM RANKIN.....PLAINTIFF;

AGAINST

THE SHIP "*ELIZA FISHER*."

Maritime law—Master's lien for wages—Assignment—Rights of assignee—Action in rem.

The holder of a maritime lien cannot transfer the same, and the assignee of a claim for master's wages has no right of action *in rem* against the ship.

2. There is no distinction to be made between the lien existing in favour of common seamen and that in favour of the master of a ship in relation to the power to assign; and it has always been contrary to the policy of maritime law to invest a seaman with any capacity to transfer this remedy against the *res* to a third person.

ACTION *in rem* by an assignee of a maritime lien for wages alleged to be due to the master of the ship.

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

The case was tried at Toronto before the Honourable Joseph E. McDougall, Local Judge of the Toronto Admiralty District, on the 3rd day of October, A.D. 1895.

T. Mulvey for plaintiff: The point to be decided in this case is, whether a maritime lien can be assigned. Is the maritime lien from its nature inalienable? It differs from the common law lien which requires possession. The only express authorities to the contrary are found in *Coote's Admiralty Practice* (1) and *Abbott on Shipping* (2), which state in express terms that a maritime lien can be assigned.

The chapter in *Abbott on Shipping* referred to, was originally written by Mr. Coote. The substance of the

(1) P. 19. (2) 13 ed. p. 883.

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Argument of Counsel.

chapter is taken from an article which he wrote and published in volumes 48 and 49 of the *Law Magazine*. The language of the section referred to has been modified in the last edition. The cases referred to, *The New Eagle* (1), *The Louisa* (2), and *The Janet Wilson* (3), were cases of seamen's wages and not of master's wages, and they all refer to payment of wages after the arrest of the ship, while all matters were *sub judice*.

Judge Story, in the case of *The Brig Nestor* (4), gives the following definition of a maritime lien: "Now a lien by the maritime law is not strictly a Roman hypothecation, though it resembles it and is often called a tacit hypothecation. It also somewhat resembles what is called a privilege in that law, that is, a right of priority of satisfaction out of the proceeds of the thing in concurrence of creditors. Emerigon says that this privilege was strictly personal and gave only a preference against simple contract creditors, and had no effect against those who were secured by express hypothecation." This definition is commented upon in *The Sarah J. Weed* (5). Regarding the statement that a maritime lien is a personal privilege, Judge Lowell in this case states that Judge Story "does not mean that it is not transferable: to use his expression in that sense is to make a bad pun, or quibble. What he means is, that it is a personal as distinguished from a real privilege according to the classification of the civil law, which has nothing whatever to do with it being assignable or otherwise." In this case the American authorities down to the year 1877 were reviewed. The case of *The A. D. Patching* (6) which decided that a maritime lien was not assignable, and all the cases following that decision were disapproved.

(1) 4 Not. of Cas. 426.
(2) 6 Not. of Cas. 531.
(3) 1 Swab. 261.
(4) 1 Sumn. 83.
(5) 2 Lowell (U.S.) 559.
(6) 12 Law Reporter 21.

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Argument of Counsel.

In the *Hull of a New Ship* (1) the question is considered on authority and principal, and it was held that a maritime lien was assignable. There is no statutory prohibition to the assignment. R.S.C. chapter 74, section 45, does not apply to Ontario; that section is a re-enactment of *The Merchant Shipping Act*, 1854, section 233; that section is not in force in Ontario. The rights of seamen in this province are controlled by *The Inland Water Seamen's Act*, and there is no prohibition of assigning wages or salvage in that Act.

The objections to the assignment of seamen's wages do not apply in the case of a master. Masters are not of such a class as require the paternal care of the court. The history of legislation on the subject shows that they never had such paternal care. It was not until the Act of 1854 that masters had a lien for wages.

It is not the policy of the law that seamen's wages should be inalienable. Section 163 invalidates an assignment or sale which is made before the wages accrue due, and does not relate to wages earned. Section 140 of *The Merchant Shipping Act*, 1894, states that a person "shall not have any right to action, suit or set off against the seaman or his assignment in respect of money so paid," which would clearly indicate that an assignment of wages was contemplated.

This case, however, rests on the assignability of a maritime lien. No English case has been cited nor can be found in support of the statement that a maritime lien cannot be assigned, except in cases of seamen's wages and salvage where there is a statutory prohibition against assignment.

Since the Judicature Acts choses in action are clearly assignable, and unless some authority can be produced showing that from the nature of the lien it is not

(1) Daveis 199.

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assignable, it is submitted that it should be held to be assignable.

J. F. Canniff for mortgagee, intervening: The intervening defendant is a mortgagee of the ship. The lien of the master has been extinguished by the payment to him made by the plaintiff in this action.

The plaintiff has no right of action *in rem*. He is only an assignee of the master's claim for wages.

The court's sanction to payment of wages to seamen is necessary in all cases where the party paying the wages wishes to retain the priority of lien held by the seaman for such wages.

[He cites *Abbott on Shipping* (1); *Coote's Ad. Pr.* (2); *The New Eagle* (3); *The Duna* (4); *The John Fehrman* (5); *The Lyons* (6); *The Fairhaven* (7); *The Bridgwater* (8); *The Janet Wilson* (9); *The Louisa* (10).]

These cases decide that a seaman cannot assign his lien for wages, and the right of the master to a lien for wages is identical with that of the seaman.

(He cites *The Merchant Shipping Act*, 1854, sec. 191.)

The Merchant Shipping Act, 1894, sections 182 and 235, are statutory enactments preventing such assignments, and were held in the *Rosario* (11) to be in aid of the English maritime law and not as a substitute for it.

In the United States an assignee of the wages of a seaman cannot maintain an action in the Admiralty for wages.

[He cites *Pritchard's Digest*, p. 2300, citing the *A. D. Patchin* (12); *Waple's Proceedings In Rem*

(1) 13th ed. p. 883.
(2) P. 19
(3) 4 Not. of Cas. p. 426.
(4) 5 L.T. (N.S.) 217.
(5) 16 Jurist 1122.
(6) 6 Asp. M.C. (N.S.) 199.
(7) L.R. 1 A. & E. 67.
(8) 3 Asp. M.C. 506.
(9) 1 Swab. 262.
(10) 6 Not. of Cas. 532.
(11) 2 P.D. 41.
(12) 12 Law Rep. 21; see also Dunlaps, Ad. Practice 74; 1 Conkling's Ad.Law 107; 2 Parsons on Ad. Law 186.

(American) (1), citing the barge *Geo. Nicholaus* (2); *The Æolian* (3); *The Freestone* (4); *Reppert* v. *Robinson* (5); *Schr. Kensington* (6); *The Tug Champion* (7); *The Gate City* (8); *American Encyclopædia of Law* (9); also, *Carroll* v. *Steamer Leathers* (10).]

Some of the American cases hold that the lien is assignable, but the majority are the other way.

I submit that the English decisions must be preferred to the American, as was decided in *Gaetano* and *Maria* (11).

McDOUGALL, L.J., now (November 26th, 1895) delivered judgment.

This action is brought by William Rankin to recover a claim for master's wages amounting to $126.13, alleged by Robert Rankin to be due him as master of the *Eliza Fisher*, and which claim he assigned to William Rankin, the plaintiff.

The plaintiff claims, by virtue of an assignment, to be entitled to a maritime lien upon the proceeds of the vessel, in priority to a mortgage debt due one Stanley Patterson, under whose mortgage the vessel has been sold and the proceeds brought into court. One R. C. Smith formerly owned the *Eliza Fisher* and executed a mortgage upon the vessel in favour of Stanley Patterson for $2,500; the mortgage is dated September 30th, 1890. On the 6th April, 1893, Smith sold the *Eliza Fisher* to Robert Rankin the elder, father of the plaintiff, subject to the mortgage in respect of which,

(1) P. 560.
(2) 1 Newb. 450.
(3) 1 Bond 267.
(4) 2 Bond 234.
(5) Taney 492.
(6) 8 Am. Law. Reg. 144.
(7) Brown's Adm. p. 520.
(8) 5 Biss. 200.
(9) P. 428.
(10) 1 Newb. 437.
(11) L.R. 7 P.D. 143.

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at the date of the sale, there remained due $1,300, with accrued interest thereon from the 25th March, 1893.

The amount due in respect of the mortgage at the date of the trial of this action was proved and practically admitted, and the proceeds are insufficient to pay the mortgage debt and costs of the mortgage action in full.

On the 15th July, 1895, Robert Rankin assigned his claim to the plaintiff for the arrears of wages sued for in this action. Some question arose as to a portion of the above claim, as to whether it could be properly claimed as master's wages, because the vessel never actually sailed with Robert Rankin, the younger, as master; he having been engaged for the period set out in the statement of claim in fitting up the vessel and awaiting directions from the owner. He avers that the amount of wages coming to him was adjusted with the owner as three months' wages at forty dollars a month, and he says that the engagement was then dissolved by mutual consent. *The Chieftain* (1) decides that a master may recover wages and establish his maritime lien thereto under similar circumstances.

In this case, however, it is not the master who sues, but his assignee, the plaintiff, and the objection taken by counsel for the mortgagees, who dispute the liability of the proceeds to this claim, is that the master cannot assign his claim and by such assignment transfer to the assignee the master's maritime lien against the vessel or the proceeds. The debt is doubtless assignable at common law, but the master having parted with his claim for wages, his lien, which it is contended is personal to the master only, is claimed to be at an end. The following citation from the 13th

(1) B. & Lush. 104.

edition of *Abbott on Shipping* (1) is referred to in support of the contention:

Bottomry bonds have long been regarded as negotiable, but this character does not extend to maritime liens generally. A person who, with the leave of the court, advances money to pay the wages of the crew has long been allowed the same priority the crew would have had, and in proper cases such orders continue to be made.

Also the following from *Coote's Admiralty Practice* (2)

A maritime lien is inalienable, and except in the case of bottomry it cannot be assigned or transferred to another person so as to give him a right of action *in rem* as assignee. A lien may be extinguished in various ways. It is extinguished on payment of a debt by or on behalf of the owner of the *res*; where also a payment is made by another person without the direction or privity of the owner, e. g., where a mortgagee has paid seamen their wages in order to save the vessel, upon which he has security, being wasted by their actions, the lien is equally extinguished and cannot be revived in the person of the payer, who accordingly has no right of action in the Court of Admiralty in respect of his advances.

The cases cited in support of the non-assignability of the lien are the *New Eagle* (3), the *Janet Wilson* (4) and the *Louisa* (5).

The *New Eagle* was the case of a derelict vessel arrested in a salvage suit and sold by the court; the proceeds of the sale (£376) were paid into court, of which the salvors got one-half. The mortgagees asked for the balance. One Brambly, who alleged he had advanced £66 for wages, now asked that this amount be paid out to him from the proceeds. Dr. Lushington stated:

The law of this country has always struggled against such claims being allowed. I must be guided by the case of *The Neptune*, 3 Hagg. 129, and I know of no principle recognized by the common law that allows any person who has made advances on account of a ship, unless it be on bottomry, to come here and make a claim. After the

(1) P. 883.
(2) P. 19.
(3) 4 Not. Cas. 426.
(4) Swab. 262.
(5) 6 Not. of Cas. 532.

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case of *The Neptune*, it is very difficult to make a distinction between the proceeds and the ship itself.

In this case the proceeds were ordered to be paid to the mortgagees.

The *Janet Wilson* was a case of pronouncement for bottomry bond and a subsequent application by the ship owner to be repaid wages advanced. Dr. Lushington (1), says:

> I established in preceding cases the rule that it is not competent to any person without leave of the court to pay wages which might have been incurred and then come to the court and make application to have that money refunded. It is necessary that application should be made to the court prior to the time the money was paid, for leave to make such payment and then the court would judge of the circumstances.

The *Louisa* was a case of advances to salvors; the party advancing asked payment out of the shares. Refused. Dr. Lushington says:

> I think this would be an erroneous principle and one that might be attended with serious consequences by encouraging advances of money which might be exceedingly detrimental to salvors.

In a case in the Court of Admiralty in Ireland, *The Duna* (2), it was held that where the master of a vessel paid off a portion of his crew after his vessel was arrested by the court in a collision case in obedience to orders received from the agent of the owners, he was entitled to get credit for such payments upon settlement of his accounts, but would not in a suit for wages in the names of such seamen be permitted to recover such advances as charges against the ship or proceeds. In this case the claims and the lien of the master and other seamen for wages were postponed in point of priority to the claim for damages, but upon other grounds.

The master for his wages or disbursements was originally without a lien, so that his only remedy was

(1) At p. 262. (2) 5 L. T. N. S. 217 [1861].

personal either by law or equity. Upon this state of the law supervened the statute giving him the same rights, liens and remedies for his wages as were possessed by ordinary seamen.

The words of the statute are as follows:

> Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act or by any law or custom any seaman not being a master has for the recovery of his wages. [*The Merchant Shipping Act* (1854) sec. 191.]

What then is a seaman's lien? It is the right of a mariner to take action against the ship itself for the recovery of his claim. It is a right and a remedy for his own exclusive benefit. It arises by implication and is held to exist independently of possession. It is a privilege conferred by maritime law with the object of securing to the seaman his wages, the fruit of useful and oftentimes perilous services. When, therefore, his wages have been paid, it matters not by whom, the design of the privilege is answered, and his maritime lien is at an end.

It has always been contrary to the policy of maritime law to invest him with any capacity to transfer this remedy against the *res*, to a third person. The legislature by several enactments has signified in no uncertain terms their approval of this restriction. Mariners are proverbially an improvident class; they are easily imposed upon, and, returning from a voyage, would readily become the victims of sharpers and usurers, did the right exist to them to readily dispose of their claims for wages earned on the voyage.

Section 182 of *The Merchant Shipping Act* 1854, enacts:

> No seaman shall by any agreement forfeit his lien upon the ship or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Act, and every

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stipulation by which any seaman consents to abandon his right to wages in case of the loss of the ship or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.

Section 233 of *The Merchant Shipping Act*, 1854, enacts:

> No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or any attachment, encumbrance or arrestment thereon; and no assignment or sale of such wages or of salvage made prior to the accruing thereof, shall bind the party making the same; and no power of attorney or authority for the receipt of any such wages or salvage shall be irrevocable.

Section 182, above quoted, has been expressly held in *The Rosario* (1) to be an enactment in aid of the general law, and not as a substitute for it. [See the judgment of Sir Robert Phillimore (2)]. The learned judge held that in that action, which was an action for salvage, it was no defence for the defendants to set up an alleged agreement whereby fourteen of the sixteen plaintiffs had, for valuable consideration, assigned to the defendants all their respective shares of the salvage award; that such an agreement was void under section 182, above cited, and a demurrer to the statement of defence was allowed.

In *The Lyons* (3), in a mortgage action, it was held that a claim by the plaintiff for necessaries, even though it included items of wages paid to the ship's crew at the request of the owner, was not entitled to precedence to the mortgagee's claim. *Semble*, that precedence might have been gained as to the wages if the prior permission of the court had been obtained to make the payment.

The question for decision in this action has been expressly dealt with in *The City of Manitowoc* in the Vice-Admiralty Court of Quebec (4), (1879), a case

(1) L.R. 2, P.D. 41.
(2) Ibid. p. 45.
(3) 6 Asp. M.C. (N.S.) 199.
(4) Cook, 178.

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not cited before me on the argument. There the court expressly held that the lien of the salvors, which also included a claim for seaman's wages, necessaries, pilotage and towage, was personal and inalienable and did not vest in the plaintiffs, who were assignees, by virtue of the assignment. In the judgment (1) the following language is used by the learned judge:

I do not regret that this court is compelled to decline jurisdiction over the assignment of salvage and the other matters for which this suit is brought, not only because its efficiency would be impaired if it had to determine the validity of assignments and disputed accounts, subjects of municipal law and regulation and involving delay, but because in the case of assignments of claims such as those in question, the assignors, the mariner and the salvor may be subject to gross injustice where their wants compel them to accept a tithe of their due for a claim admitting of no question. I express no opinion on the merits of this case; as it is not opposed, I take it for granted that the claims of the promoters are well founded, and if they are, they have their remedy before the ordinary tribunals of the country, to which they can apply for relief.

I have been referred to a number of American decisions in which the question of the assignment of maritime liens is dealt with. These decisions are conflicting, some affirming the principle that all the remedies and securities, including the lien of the assignor, pass to the assignee, who can pursue them in the same manner as the assignor himself could have done; other cases affirm the contrary doctrine and sustain the view that a maritime lien is purely personal and for the exclusive benefit of the original lien holders, and there is no capacity vested in the lien holder to transfer his lien to third persons. I do not find any assistance from these decisions, for I have to determine this case according to the civil and maritime law of the High Court of Admiralty of England.

(1) P. 189.

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No case has been cited to support the view that the High Court of Admiralty has sanctioned a proceeding *in rem* at the instance of an assignee of a claim for a master's or seaman's wages.

In *Gaetano and Maria* (1), Mr. Justice Brett in the Court of Appeal, dealing with the question as to what law is administered in the English Court of Admiralty, expresses himself as follows:

> The first question raised on the argument before us was, what is the law which is administered in an English Court of Admiralty, whether it is English law or whether it is that which is called the Common Maritime Law, which is not the law of England alone, but the law of all maritime countries. About that question I have not the smallest doubt; the law which is administered in the Admiralty Court of England, is the English Maritime Law; it is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions, traditions and principles has adopted as the English Maritime Law; and about that I cannot conceive that there is any doubt. It seems to me that this is what every judge in the Admiralty Court of England has promulgated (Lord Stowell and those before him and Dr. Lushington after him) and I do not understand that the present learned judge of the Admiralty Court differs in the least from them.

It was urged before me that the lien of a master for his wages as created by the statute was more beneficial in its nature than, and not to be treated as subject to the same restrictions as, the lien existing in favour of common seamen. I cannot perceive that any difference exists or was intended to be created by the statute in the quality or legal incidents to be attached to the master's lien which distinguishes it in any way from the lien in favour of an ordinary seaman.

The master was by the statute placed in the same beneficial position as a seaman; his rights, remedies and privileges were made co-extensive, neither more nor less; his maritime lien for his wages, like that of a seaman, is personal and exclusively for his own

(1) L. R. 7 P. D. 143.

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benefit, and is therefore by the policy of maritime law inalienable.

The plaintiff in this case, therefore, has no right of action *in rem* for the recovery of his claim in the Admiralty side of the Exchequer Court of Canada.

Judgment dismissing action with costs.

Solicitors for plaintiff: *Mulvey & McBrady.*

Solicitors for the mortgagee (intervening): *Canniff & Canniff.*

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