1924

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Exchequer Court of Canada

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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

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

PUISNE JUDGE:

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

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

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

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

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

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

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

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

DEPUTY LOCAL JUDGES:

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

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE ERNEST LAPOINTE, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

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

CORRIGENDA

P. 99. The word "and" in line 2 of head-note to be deleted.
P. 150, par. 5. "Parlo vs. Todd" should read "Partlo vs. Todd."
P. 208. *The Franklin*, should read *The Frankland.*

ERRATUM

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

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2. *American Druggist Syndicate* v. *Bayer Co.,* ([1923] Ex. C.R. 65). Appeal allowed. Leave to appeal to Privy Council granted.
3. *Lakes & St. Lawrence Transit Co.* v. *N. St. C. & T. Ry.,* (1924, Ex. C.R. 1). Appeal allowed.
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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT

1923
Dec. 1.

THE NIAGARA, ST. CATHARINES & TORONTO RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

THE LAKES & ST. LAWRENCE TRANSIT COMPANY (PLAINTIFF). RESPONDENT.

Shipping—Canal navigation—Navigable waters—Swing or draw bridges over same—Rules of Board of Railway Commissioners—Validity—Collision—Negligence.

The defendant owned and operated a swing bridge over the Welland Canal. Plaintiff's ship the *L.*, on the night preceding the accident was forced to tie up on account of stormy weather. Next morning, the weather being still stormy with a high gusty wind blowing across the canal, the *L.* cast off, steamed up towards the bridge and attempted to pass through before it was fully opened. When the *L.* was partly through the opening, the swing of the bridge was stopped by a great gust of wind and the bridge was blown back striking the *L.* which had ventured into the gap, causing her considerable damage. Hence the present action. The bridge had been in operation for years, and its brakes had been inspected a few days before and found in perfect condition.

Held: On the facts (reversing the judgment appealed from) that neither the machinery nor the handling of the bridge in any way caused or contributed to the accident, but that the *L.*, in attempting to pass through before the bridge was fully opened, was *per se*, apart from any rules forbidding it, guilty of negligence and of reckless and unseamanlike manoeuvre, which was the sole originating and determining cause of the accident.

2. That under section 22 of the rules and regulations for the guidance and observance of those using and operating canals, the onus is thrown upon the master in charge of any vessel to ascertain for himself, by careful observation, whether the bridge is prepared to allow him to enter or pass; and furthermore that the regulations of the Board of Railway Commissioners of the 30th of April, 1914, passed under sections 30 and 232 of the Railway Act (R.S. 1906, c. 37), governing the opening of railway bridges and providing that a bridge is not so prepared until it is fully opened are valid and binding on vessels passing through the same.

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3. That, the fact that it may have been customary to enter the bridge before the swing was fully opened did not absolve the ship from negligence; such a custom being dangerous and unreasonable could not be the foundation of a claim against another person where an accident had occurred by the injured ship putting the custom into practice.

(*Turgeon* v. *The King*, 15 Ex. C.R. 331; 51 S.C.R. 588 referred to.)

APPEAL from the judgment of the Local Judge of the Toronto Admiralty District (1) maintaining plaintiff's action.

September 18th, 1923.

Appeal now heard before Honourable Mr. Justice Audette, at Toronto.

D. L. McCarthy, K.C., and *E. J. Reid, K.C.*, for appellant.

S. Casey Wood, K.C. and *G. M. Jarvis* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., this 1st of December, 1923, delivered judgment (2).

This is an appeal from the judgment of the Local Judge of the Toronto Admiralty District, pronounced on the 24th day of April, 1923, and condemning the defendant, the appellant herein (1).

The facts of the case are exhaustively set out in the reasons for judgment of the learned trial judge, and I am thereby relieved from the necessity of repeating them here on appeal.

The controversy between the parties—the question submitted for determination—practically resolves itself into the very narrow compass as to whether or not the ship *Lakeport*, at the season in question with a strong gusty wind and gale prevailing, was justified in entering or attempting to pass through the railway bridge over the canal in which she was navigating, before the bridge was fully opened.

Under sec. 22 of the Rules and Regulations for the guidance and observance of those using and operating the canal (Exhibit No. 4), the onus is thrown upon the

master in charge of any vessel on approaching any bridge to ascertain for himself, by careful observation, whether the bridge is prepared to allow him to enter or pass, etc.

(1) [1923] Ex. C.R. 202.

(2) Appeal has been taken to the Supreme Court from this judgment.

The directions embodied in these words are not meaningless and placed there for naught. They obviously throw upon the master the duty of carefully ascertaining for himself whether or not the bridge is prepared to let him pass, or whether, in other words, the bridge is fully open.

These directions contained in sec. 22, and more especially those which *duly* cast upon him the duty

to ascertain for himself whether the bridge is prepared to let him pass,

would seem also to let in the regulations governing the opening of railway bridges (Exhibit 3), as directed by the regulation hereinafter mentioned, because the bridge is not

prepared to allow the vessel to enter

until the railway official has opened his bridge in the manner defined in the regulations concerning such matter.

Indeed, by order in council of the 29th June, 1910 (Exhibit No. 4), passed in accordance with sec. 32 of Chapter 115, R.S.C., 1906, as amended by sec. 6, ch. 28, of 8-9 Ed. VII, regulations to govern draw or swing bridges, other than railway bridges, over navigable waters were duly made, approved and published in the *Canada Gazette*, vol. 44, p. 79. (See also Dominion Statutes, 1911, p. cxii.) By section 4 thereof it is, among other things, provided that

no vessel shall pass through the bridge until the swing or draw is fully open.

By sec. 32 of the Act the Governor in Council is given power and authority to make the regulations of the 29th June, 1910, with respect to

(*c*) the opening and closing of any swing or draw bridge over any navigable water;

and sec. 31 of the Act excludes railway bridges from that class of bridges.

Then, on the 30th April, 1914 (Exhibit No. 3), the Board of Railway Commissioners for Canada, adopted these rules of the 29th June, 1910, and made them applicable to railway bridges, by providing that

no such vessel shall pass through the bridge until the swing or draw is fully open.

These regulations (Exhibit No. 3) are made under the provisions of sections 30 and 232 of the Railway Act, Ch. 37, R.S.C., 1906. By sub-sec. 2 of sec. 232, the Board is given power and jurisdiction to direct when, under what conditions and circumstances, and subject to what precau-

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tions, etc., the bridge shall be operated,—and by the first paragraph of the section it is given jurisdiction in connection with railway bridges carried over

any navigable water or canal.

It would seem also that the water of the canal made artificially navigable, must be treated as navigable water, as mentioned in the Act.

Now the *Lakeport,* on the night preceding the accident (the 19th April), had to tie up, because of stormy weather —as it was blowing a terrific hurricane with a western or northwestern wind of a velocity of 70 to 80 miles, and it was raining and snowing. The canal had only been opened on the 17th for the first time that season. The accident occurred on the morning of the 20th when the *Lakeport* cast off and started again in stormy weather, when, as witness Lapointe says, it was blowing a steady gale; it was still blowing a high and gusty wind across the canal,—a blustering heavy wind with flurries, as put by some of the witnesses. The *Lakeport* steamed up and attempted to pass through the bridge before it was fully opened,—in fact it was never fully opened at the time of the accident, —it was only partly opened when, under a great gust of wind it quivered, came back west and struck the *Lakeport* which had ventured into the gap before the bridge had been fully opened. No signal was ever given that the bridge was fully opened,—and it was not necessary, as by sec. 22 above cited, the *onus* was upon the vessel to ascertain for herself if the bridge was prepared to let her pass.

The bridge had been in operation for years; its brakes had been fully inspected a few days before and found in perfect condition; and the bridge when open is safely checked on the eastern shore. Therefore, I am unable to accept the contention that either the machinery or the manoeuvring of the bridge in any way caused or contributed to, the accident. The sole cause of the accident, on the day in question, was the act of the *Lakeport* attempting to pass through the bridge before the same was fully opened, and before ascertaining by herself whether the bridge was prepared to allow her to pass,—the whole for the reasons adverted to herein.

The accident would seem to have been the result of the modern tendency to take chances of danger in order to gain

speed of locomotion,—so especially noticeable in the traffic of automobiles,—and the *Lakeport* must therefore abide by the result of imprudence by those in charge of her.

It has been alleged that it was customary to venture through the bridge before it was fully opened, but a custom which is dangerous and unreasonable cannot be made the foundation of a claim against another person where an accident has occurred by putting the custom into practice. The violation of the Rules and Regulations above referred to and the transgressing of the plain notions of elementary prudence and safety cannot give a vessel any right of action merely because other vessels have shared with her in that violation (1).

It would seem further that the notice to bridge-tenders, under the signature of the Superintendent Engineer, with respect to the use of a red flag, and cited in the judgment appealed from, has no application in the present case, and deals exclusively with the case when the bridge is not to be opened or cannot be opened. Nothing in this notice detracts from the Rules and Regulations above mentioned which remain in full force and effect.

The vessel cannot be relieved or exonerated from the obligation of observing the rules and regulations (Exhibits 3 and 4) formulated with respect to navigation where a bridge has to be passed through, any more than it can transgress the Rules of the Road when travelling in a canal.

Moreover, within the ordinary practice of seamen, due regard must be had, in navigating, to any special circumstances, with the object of avoiding danger, and be always guided by the rules dictated by safety and prudence, avoiding carefully all reckless ventures. The weather was abnormal at the time of the accident, in that it was blowing very hard, and that should have called for extra precaution and prudence.

I have therefore come to the conclusion that it was the act of the *Lakeport* in venturing into the gap, so to speak, that is, in attempting to pass through the bridge before it was fully opened, and without ascertaining by herself if the bridge was prepared to let her pass, that was the originating and determining cause of the accident. That, apart

(1) *Turgeon* v. *The King*, 15 Ex. C.R. 331; 51 S.C.R. 588.

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from any rules and regulations, *per se* alone, the *Lakeport* by thus recklessly manoeuvring and attempting to pass through the bridge before being opened, in such stormy weather, became guilty of negligence and cannot in any way take advantage of such negligence. That it was under the circumstances of the case against all elementary rules of safety and prudence to attempt to pass before the bridge was opened,—and much more so when it is considered that a high and gusty wind was prevailing in an inclement season.

It must be found that by section 22 of the Regulations, the *onus* was upon the *Lakeport* to ascertain for herself, whether or not the bridge was prepared to let her pass, or whether in other words it was fully open, as provided by Exhibits 3 and 4, which are let in, as above mentioned.

These bridges must be opened for navigation in the manner provided by the Rules and Regulations made under statutory provision; and, there is also, on the other hand, an implied duty and responsibility cast upon any ship to approach these bridges with precaution dictated by safety and prudence.

The accident was the result of the reckless manoeuvring of the ship. She was the victim of her own negligence.

The appeal is allowed with costs, and the action is dismissed with costs.

Appeal allowed.

1923
Nov. 15.

THE PERMUTIT COMPANY.....PLAINTIFF;

VS.

G. L. BORROWMAN.....DEFENDANT.

Patents—Conflicting applications—Interference—Motion to amend claims in the application filed before Commissioner and now filed in court after notification of interference—Functus officio—Jurisdiction of the Court—Practice.

Both plaintiff and defendant applied for a patent and the Commissioner found that there was conflict between the two applications and gave notice of such finding to both parties. Thereupon plaintiff took action in this court to have it declared he was the first inventor of the patent in question. After the institution of the action, defendant presented further claims to the Commissioner to be added to his application which were refused owing to the action having been instituted. At trial defendant moved to add said further claims to his application as filed before the Commissioner and now filed in court. Subsequent to the

notice declaring conflict, correspondence was carried on between the defendant and the department from which, it is alleged, it might be implied that the department was still dealing with such application, and the defendant contended that this kept the matter open in the department and that it was not yet ripe to be brought before the court.

Held, that all acts of the Commissioner of Patents or the department, subsequent to the notice given to the parties, declaring a conflict, were irregular, the Commissioner having then become *functus officio*. That the Court had no jurisdiction to pass upon any claims other than those which are referred by the department and which have already been passed upon by the Commissioner of Patents, and that the motion to amend should be dismissed.

2. That the court, in allowing defendant to make the proposed amendment at the trial, after he had had communication of plaintiff's application, would be giving him an unfair and oppressive advantage over the plaintiff. That such a judgment would be against the very spirit and letter of the Act which requires absolute secrecy until the full completion of the application.

MOTION of defendant to amend the claims in his application by adding further claims.

November 14th and 15th, 1923.

Motion now heard before the Honourable Mr. Justice Audette at the opening of the trial, at Ottawa.

W. N. Tilley, K.C., and *W. L. Scott, K.C.*, for defendant.

Russell S. Smart and *J. Lorne McDougall*, contra.

After hearing the argument on this motion the Court rendered judgment dismissing the said motion.

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

AUDETTE J. (this 15th day of November, 1923) delivered judgment.

Considering that in September, 1921, the Department notified both the plaintiff and the defendant that there was a conflict of applications and that the matter should be decided upon this conflict, as provided by section 20 of the Patent Act. *Attorney-General* v. *DeKeyser's Royal Hotel Ltd.* (1).

Considering that the proceedings herein were instituted in September, 1923, and that by the statement in defence filed the defendant acquiesced in the situation as framed at that time.

Considering that any correspondence which took place as between the Commissioner and the defendant after the

(1) [1920] 36 T.L.R. 600, at p. 609.

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matter had been referred to arbitration or to the court, under the Exchequer Court Act, was in itself an irregularity on behalf of the department; because after the Commissioner had advised the parties that there was a conflict and that that conflict should be settled under the provision of sec. 20 of the Act, the Commissioner was from that date *functus officio*, and that no letter or act by him or on his behalf, after September, 1921, should be considered upon the merit of the present case.

Considering moreover that the action of defendant in seeking to add additional claims to his application is against the very spirit and letter of the Act, in that when any application is made for a patent the matter remains absolutely secret, and that in this case one party is now afforded the opportunity of answering any of the conflict in the application by looking at his rival's application. In allowing the proposed amendment at this date I would be doing something against the very spirit of the Act which requires secrecy up to the full completion of the application, and would furthermore be giving an unfair and oppressive advantage to the defendant by allowing him to amend his application after having had communication of the plaintiff's application.

Therefore the motion is dismissed with costs.

Judgment accordingly.

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Dec. 15.

THE PERMUTIT COMPANY.....PLAINTIFF;

VS.

G. L. BORROWMAN.....DEFENDANT.

Patents—Conflicting applications—Action to have declared who was first inventor—United States rule of reduction to practice—Applicability in Canada.

Held: Where the Commissioner of Patents, under section 20 of the Patent Act, has declared a conflict between two applications for patents for the same invention, and one of the applicants institutes proceedings in this court to have it declared who was the first inventor, the court ought to assume that the Commissioner of Patents has found that the patent applied for is meritorious and involves invention, and should restrict its finding solely to the issue of priority of invention between the parties.

2. That the American rule in *interference* cases of reduction to practice, requiring corroboration of the discovery by way of disclosure, drawings and even models, being based upon an elaborate code of patent office rules, has not been adopted in Canada, and ought not to be applied by the court in dealing with conflicting applications.

ACTION to have it declared who was the first inventor, as between two applicants for patents.

November 14th and 15th, 1923.

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

Russell Smart and *J. Lorne McDougall* for plaintiff.

W. N. Tilley, K.C., and *W. L. Scott, K.C.*, for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., this 15th December, delivered judgment (2).

This is a case of conflicting applications for a patent (or of "interference" as it is called in the United States) such as is referred to in section 20 of the Patent Act (R.S.C., ch. 69). It comes before this court as a matter within its ordinary curial functions under section 23 of the Exchequer Court Act, see *Burnett* vs. *The Hutchins Car Roofing Company* (1).

The patent consists in a process of softening or purifying water by means of a zeolite, such as greensand or glauconite—a term which may be used interchangeably.

The question in controversy coming before the court for determination is narrowed down or limited to the question of priority of inventorship between the plaintiff or its assignor Spencer, and the defendant, each of whom is now seeking a patent for the same invention.

The consideration of this question of priority must be approached on the assumption that the Commissioner of Patents has found that the patent applied for is a meritorious one and involves invention.

Therefore, the determination or decision of the question of priority or interference depends on the date of conception of the process patent referred to in this case.

Having said so much it becomes unnecessary to go into the question of the validity of the patent. The conception of the invention as provided by section 7 of the Canadian Patent Act must be of an invention new the world

(1) [1917] 54 S.C.R. 610.

(2) An appeal has been taken to the Supreme Court of Canada.

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over, while under the American Patent Law, (section 4886 R.S.U.S.) it is limited to a process new in the United States.

Quite a number of cases were cited at bar, on behalf of the defence by Mr. Scott, in respect of the requirement of corroboration of the discovery by way of disclosure, drawings and even models. Apart from the patent that we are dealing with here; (a process patent, where drawings and models are out of the question) it is well to bear in mind that the cases cited are all American cases, and that in the United States the proceedings on interference are governed by an elaborate code of Patent Office Rules, which are as binding as the law itself. Walker on Patents, 5th edition 166. This doctrine of reduction to practice has no application in Canada and cannot have application until similar legislation has been enacted by the Canadian Parliament.

The fundamental question, capable of being stated in a few words, is who has priority, who first conceived the discovery or invention that hard water can be softened by being treated with greensand or glauconite, as mentioned in the applications by the respective parties?

The whole question resolves itself into a question of fact —a question of evidence establishing when the invention was conceived.

Walker, on Patents, 5th edition, page 167, says:—

> The first applicant has a *prima facie* case of priority which entitles him to a decision in his favour, unless it is overcome by a proper weight of evidence for a junior party.

Were I to go into the details of the evidence as adduced at the trial it would mean labouring through a very long and cumbersome series of facts upon this interesting but complex question, leading me simply to a determination as to whether I can rely on the evidence as adduced in finding the first inventor. Therefore, I will limit myself to finding who was the first to conceive of the process in question in this case and make it an invention.

The evidence is clear, preponderant and conclusive, leaving the court in no uncertainty.

Spencer invented this process long previous to Borrowman.

Spencer is a geologist, engaged in scientific researches. He has already taken out a patent for a process of recovering potash (Exhibit 11), wherein this question of glauconite

and hydrated zeolites are mentioned. His mind is employed in that direction. He tells us that previous to May 3rd, 1912, he conceived and invented the process in question.

In that he is corroborated and supported by his manuscript notes filed as Exhibits 7 and 8.

He is corroborated by Mr. McElroy, a patent solicitor of good standing who gave his evidence in a satisfactory manner.

He is further corroborated by Dr. Duggan, a refined gentleman, graduate of a college in England, and who has a record of scientific training.

He is further corroborated by Professor Jackson, a gentleman now occupying the position of Professor at Columbia University, whose rectitude could not be questioned.

I have had the advantage of seeing these gentlemen on the witness stand, to observe their demeanor and manner of testifying, and I have come to the conclusion to accept their testimony. There is not a tittle of evidence upon which I could in justice and in reason rely, in order to disregard their testimony; and I would have to do so to find in favour of the defendant.

Moreover, these four witnesses, who are men of standing and repute, did not in testifying rely exclusively upon their unaided memory; each and every one of them had a land-mark, so to speak, upon which they could rely to recall the facts as well as the dates. Spencer's manuscript, McElroy's letters and entries in his books, the bag of glauconite—are all a source of recollection from which their testimony is a natural effusion.—Roscoe on Evidence, 19th edition 41. Spencer besides the recollection of what had occurred in Mr. McElroy's office had also Mr. McElroy's letter, and moreover he had committed the matter to manuscripts duly testified to by a witness, namely: exhibits 7 and 8, which were prepared by him at the time. Witness McElroy had his books of account, and the accounts themselves sent to Spencer for the work done and his correspondence, all of which were made in the ordinary course of discharging his professional business. Dr. Duggan remembers the fact of making tests, remembers receiving the bag sent to him by witness McElroy, and remembers when the bag was in their office where it remained for a

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very long time. Professor Jackson fixing the dates, the time and place, by his return from Europe when the bag was shown to him of which he has a perfect recollection.

All of this cannot be deemed a scheme to deceive the court, and I unhesitatingly accept their testimony as the truth.

Therefore I have come to the conclusion to adjudge and declare that Spencer, the plaintiff's assignor, is the first inventor of the process above referred to. The whole with costs against the defendant.

Judgment accordingly.

1923
Dec. 4.

QUEBEC ADMIRALTY DISTRICT

GEORGE HALL CORPORATION (PLAINTIFF);

AGAINST

THE SHIP *FIFETOWN.*

Shipping—Collision—Canal—Rule 22 of Rules of the Road for the Great Lakes—Unseamanlike manoeuvre—Negligence.

The *M.* was upbound on the Soulanges Canal, light in ballast, being high out of water forward, drawing 3 feet 2 inches forward and 12 feet 8 inches aft, and being 30 feet out of the water forward and only 15 feet aft; and the *F.* was coming down with the current loaded with grain. The night was fine and clear with southwest wind of 18 to 20 miles, blowing across the canal. The vessels had all regulation lights burning and the *M.*, before leaving Lock No. 3, saw the lights of the *F.* There is a slight bend in the canal about three-quarters of a mile above this lock and when the *M.* had rounded the bend the ships were four or five boat lengths apart. A two-blast signal was then given by the *M.* and answered by a similar signal from the *F.* Both ships were in mid-canal at the time and when they met and were passing, the bluff of the *M's* starboard bow, 25 feet abaft the stem, collided with the bluff of the *F's* starboard bow, about 15 feet abaft the stem.

Held: That under the facts as stated above the *M.* should not have attempted to pass the *F.*, which had the right-of-way under the rules, but should have moored to the bank until the *F.* had passed her; and to continue her course was not good seamanship on the part of the *M.*

2. That the *F.*, coming down the canal with the current had the right-of-way, under rule 25 of the Rules of the Road for Great Lakes.

3. That the burden of proof was upon the *M.* to establish that the collision was caused by the improper navigation of the *F.*

ACTION *in rem* for damages arising out of collision between the steamship *A. D. MacTier* and the steamship *Fifetown.*

November 15th, 1923.

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GEORGE HALL CORPORATION v. THE SHIP *Fifetown.*

Action tried before the Honourable Mr. Justice Maclennan at Montreal.

A. W. Atwater, K.C., and *Lucien Beauregard* for plaintiff.

A. R. Holden, K.C., and *R. C. Holden* for defendant.

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

Maclennan L.J.A.

MACLENNAN, *L.J.A.* (this 4th December, 1923) delivered judgment.

This is an action *in rem* for damages arising out of a collision between the steamship *A. D. MacTier* and the steamship *Fifetown* on the night of 2nd October, 1923, in the Soulanges Canal.

The *MacTier* was upbound light in ballast, her length was 256 feet, beam 43 feet, drawing 12 feet 8 inches aft and 3 feet 2 inches forward; she was 30 feet above the water forward and 15 or 16 feet at the stern. The *Fifetown* downbound was loaded with grain; her length was 230 feet and her beam 30 feet. The collision took place between locks Nos. 3 and 4 of the Soulanges Canal. The night was fine and clear with a southwest wind of 18 or 20 miles blowing right across the canal. Both ships had all navigation lights brightly burning. The master of the *MacTier* before leaving lock No. 3 saw the lights of the *Fifetown* coming down the canal. There is a slight bend in the canal which ends about three-quarters of a mile above lock No. 3, and when the *MacTier* had rounded the bend the ships were four or five boat lengths apart, when a two-blast signal was given by the *MacTier*, which was immediately answered by a similar signal from the *Fifetown*. Both ships were then in the middle of the canal, and when the ships met and were passing the bluff of the *MacTier's* starboard bow, 25 or 30 feet abaft the stem came into contact with the bluff of the *Fifetown's* starboard bow about 15 feet abaft the stem. Each accuses the other of sheering immediately before the collision. The evidence of what took place between the two-blast signals and the collision is most contradictory. . . . [His Lordship having here discussed the evidence, proceeded]:—

I am advised by my Assessor that the effect of the wind on the *MacTier* would be to swing her bow to starboard, that when her port bilge fetched up on the canal bank, her way through the water would be reduced and the shock

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GEORGE HALL CORPORATION v. THE SHIP *Fifetown.*

Maclennan L.J.A.

would tend to give her a sheer to starboard even against her helm, and this would be aggravated by the force of the wind on her port bow. My Assessor also advises me that the *Fifetown* was navigated with proper caution and that the position of the damage to her disproves any claim to a sheer to starboard on her part, and further, having regard to the strength of the wind blowing across the canal and that the *MacTier* was high out of the water forward and of light draft and that the *Fifetown* was plainly in sight coming down, it was not good seamanship for the *MacTier* to try to pass the *Fifetown* and that she should have been moored to the north bank until the *Fifetown* had passed.

The *Fifetown* was coming down the canal with the current and, under Rule 25 of the Rules of the Road for the Great Lakes, had the right of way. The evidence clearly shows that the *MacTier* had constant trouble from the wind on her port bow and that for some considerable distance before the collision she was zigzagging between the south bank and the centre of the canal with her stern about midchannel. The burden of proof was upon the *MacTier* to establish that the collision was caused by the improper navigation of the *Fifetown*, and having regard to all the evidence and the advice of my Assessor, in my opinion the plaintiff has failed to establish its case and its action fails. There is no blame imputable to those in charge of the *Fifetown*.

Action dismissed.

Solicitors for plaintiff: *Atwater, Bond and Beauregard.*

Solicitors for defendant: *Meredith, Holden, Hague, Shaughnessy and Heward.*

HIS MAJESTY THE KING.....PLAINTIFF;

1923
Nov. 15.

AND

THE SAYWARD TRADING & RANCHING COMPANY, LIMITED, and Others.....DEFENDANTS.

Crown—Soldier Settlement Board—Principal and Agent—Right to sue in Crown's name—9-10 Geo. V, c. 71, sections 4 and 41—Agreement by settler disposing of property—Validity.

Under the provisions of the Soldier Settlement Act, B.H.M. & A. four of the defendants, applied for a loan from the Soldier Settlement Board, which thereupon entered into an agreement to sell to them certain land, stock, machinery, etc. The Board then acquired such land, stock, machinery and conveyed same to said B.H.M. & A., under the agreement and placed them into possession thereof. Previous to their said application (namely, on the 25th of June, 1919) B.H.M. & A., had entered into an agreement with the S. Co., the other defendant, for the acquisition of the K. property (afterwards purchased by the Board), the purchase price to be procured out of a loan to be obtained by B.H.M. & A. from the Board. In compliance with the said agreement, B.H.M. & A., assigned to the S. Co., all redeemable interest they might have in the property, and the company thereunder took possession and assumed ownership of the same, and still hold a certain part thereof as against the Board. Said assignments were not deposited with the Board, and B.H.M. & A., without having obtained the permission of the Board for the purpose, were not living on their farms. Action was brought to recover said property and to have the agreements and the assignments with the S. Co. declared null, etc. The defendants contended that the action should have been brought in the name of the Board, and not in that of the Crown.

Held, that the present action was properly instituted in the name of the Crown.

2. That as the Soldier Settlement Act was passed solely for the benefit of returned soldiers, the Board could not recognize transactions between the settler and the S. Co., whereby others than the returned soldier would benefit, and that all such transactions were contrary to the provisions of the Act and were illegal.

3. That inasmuch as the settlers were still indebted to the Board for advances made in their behalf, nothing passed under the agreement of the 25th of June, 1919, and the assignments referred to above, with respect to the property in question. *The King* v. *Powers,* 1923 Ex. C.R. 131, referred to.

INFORMATION exhibited by the Attorney-General of Canada for an order declaring certain agreements between the soldier-settler and third parties null and void and for recovery of property.

September 27th and 28th, 1923.

Case now heard before the Honourable Mr. Justice Audette, at Vancouver, B.C.

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THE KING v. THE SAYWARD TRADING & RANCHING CO., LTD.

M. A. Macdonald and *C. L. Fillmore* for plaintiff.

J. E. Bird for Sayward Trading and Ranching Company and J. E. Armishaw.

R. M. Macdonald for G. B. Armishaw.

A. L. Kent for H. A. Armishaw.

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

Audette J.

AUDETTE J. (this 15th November, 1923) delivered judgment.

This is an information exhibited by the Attorney-General of Canada whereby the Crown is asking, *inter alia*, for an order that certain land, stock, machinery and building materials purchased by The Soldier Settlement Board, for the four soldier-settlers, defendants herein, namely: Morton, Bradley, Hart and G. B. Armishaw, and now alleged to be in possession of The Sayward Trading and Ranching Company Limited and J. E. Armishaw,—be delivered to the plaintiff. The information asks further that all assignments or agreements made by the said settlers, in violation of the provisions of The Soldier Settlement Act, 1919, be declared illegal and void and delivered for cancellation.

Among the many questions discussed at bar there is one which lies at the very threshold of them all and that is, as contended by the defence, that the action should have been instituted in the name of The Soldier Settlement Board of Canada, and not in the name of the Crown.

The Act in question (1) is

An Act to assist returned soldiers in settling upon the land,

that is providing for the Crown's assistance to them, and by sec. 4 thereof the powers of the Board are therein defined and consist, among other things, in

acquiring, holding, conveying and transferring any of the property which it is by the Act authorized to so acquire, hold, convey, and transfer, etc.

Then the section proceeds by stating that

the Board shall be and be deemed a body corporate, but for such purpose only, and as such shall be the agent of the Crown in the right of the Dominion of Canada.

There is no enactment in the Statute expressly declaring that the Board might sue or be sued. There is, however, in sub-sec. (*b*) of sec. 61 of the Act a provision allowing an action to be instituted in the name of the Board,

(1) 9-10 Geo. V, c. 71.

as agent of His Majesty, in the special case of the recovery of a commission wrongly paid. It is a specific clause dealing with procedure only and not with a substantive right of action. That is, under the statute, the only instance where the Board is given the power to sue,—it is a specific power given in a specific case—and the action is to be taken as agent of the Crown. Therefore it would seem to fall within the doctrine of construction as contained in the maxim: *Expressio unius, exclusio alterius.* But it is clear that this provision as to agency does not affect the issues in the case at Bar. That being so the point need not be pursued further.

Section 41, dealing with procedure for compulsory purchase, provides that where the owner of land claims inadequate compensation, the Board may cause an information to be exhibited in the Exchequer Court. That is that the Crown shall sue and not the Board.

The Board was created and established by the Crown with the object of facilitating the purchase of land for the returned soldiers and of settling them upon the same; these lands to be purchased and the advances made to the soldiers, with the Crown's money.

There is nothing in the Act which takes away the Crown's prerogative to sue for the recovery of its property. The King is also supposed to be always present in Court, Chitty's Prerogative of the Crown, 244. In the construction of the Act, the principle must be recognized that an intention to take from the Crown the right to sue is not to be presumed and the statute is not to be regarded as changing the existing state of the law beyond what its enactments declare, either in express terms or by unmistakable implication. It is not to be assumed that Parliament would overthrow fundamental principles, take away the Crown's prerogative, or alter the general principles of law, without expressing itself with irresistible clearness. Maxwell, Interpretation of Statutes, 2nd ed. 126,188. Endlich, Interpretation of Statutes, pp. 95, 153 and 173. Chitty's Prerogative of the Crown, 244.

However, we have in the present case, a very important enactment in sec. 4 which, by itself, should decide this important question, and that is, that the Board is created for " the purposes of acquiring, holding, conveying and

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transferring" some specific property,—and "for such purposes only, the Board shall be and be deemed a body corporate and as such the *agent* of the Crown, etc."

If the Board is, under section 4 of the Act, the agent of the Crown it is not acting *sui generis* and if it is only an agent, it follows that the principal, the Crown, apart from the prerogative, and as a principal, has obviously the right to sue. The Board is the agent of the Crown, therefore the Crown is the principal and as such has that right. The Act defines the powers of the Board, creates it the agent of the Crown for the purposes mentioned in the Act and no more. *The King* v. *Vancouver Lumber Co.* (1), *British American Fish Co.* v. *The King* (2).

The Soldier Settlement Act, 1919, was assented to on the 7th July, 1919, and it was contended by counsel for the defendants that the Act was in force on only part of that day, that is from the time the clerk of Parliament had endorsed the assent on the Act. There is no fraction of a day in such cases. Moreover it is provided by sec. 11 of the Interpretation Act, that when an Act is expressed to come into operation on a particular day, it shall be construed as coming into operation on the expiration of the previous day. I have therefore come to the conclusion that all the material transactions in question in this case must be treated as made under the Act of 1919, both from the assent given the Act on the 7th July, 1919, and from the reading of sec. 64 thereof.

Upon application made therefore, under the said Act, by the defendants Bradly (2nd September, 1919), Hart (1st July), Morton (7th July), and G. A. Armishaw (29th August, 1919), the Board entered into an agreement with them to sell them certain land, stock, machinery and equipment, and placed them in possession of the same, under the terms of the said agreement.

Previous to their application, these soldier-settlers had entered into an agreement, dated 25th June, 1919, which is recited in full in par. 16 of the Information, whereby, among other things, it was agreed that the Sayward Co. was to sell to the four above-mentioned settlers and H. A. Armishaw who in turn were to purchase the King property

(1) [1914] 17 Ex. C.R. 329; 50 D.L.R. 6; 41 D.L.R. 617.

(2) [1918] 18 Ex. C.R. 230.

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(the one afterwards purchased by the Board), etc., and that the purchase price was to be procured out of a loan to be obtained by the soldier-settlers from the Board.

Furthermore, in compliance with the said agreement, these settlers on the 21st August and 23rd October, 1919, assigned to the Sayward Co. all redeemable interest they held or might hold with the Dominion Soldier Settlement Board in the property allotted to them under their applications and the company thereunder assumed possession, control and ownership of the same and the company and J. E. Armishaw, its manager and president, have since held and are now holding possession of certain of the said stock, machinery and equipment as against the said Board. These assignments were not deposited with the Board and they only came to the knowledge of its officers during April, 1920, when it was found the settlers were not living on their land, etc.

Now it is quite clear that these transactions are not allowable and are illegal under the Act, and moreover it is established, under clear and distinct evidence, that each settler is responsible to the Board for all his obligation and that the Board could not and would not recognize such a company, whereby other than returned soldiers could benefit from such loans made by the Board. No consent in writing was ever given by the Board to allow these settlers to depart from their obligation and to live outside their farm (sec. 52).

This is so clearly stated in the Act that it becomes unnecessary to do any more than to state these bare facts. I will however, on these questions, refer to the case of *The King* v. *Powers* (1).

I therefore find that as far as the Crown or the Board is concerned that nothing passed under the Agreement of the 25th June, 1919, and the four assignments above mentioned, with respect to the property in question, the settlers being still indebted to the Board for the purchase price of the said land, stock, equipment and improvements.

I refrain from passing upon the effect of these assignments and agreement as between the parties to the same, excepting the Crown and the Board, and do not make any

(1) [1923] Ex. C.R. 131.

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order as to the cancellation and the delivery of the same, as prayed for by the Information. All I need do is to protect, as provided by the Act, the loans made by the Crown under the circumstances.

The Information further prays for an order that all land, stock, machinery, equipment, and building materials purchased by the Board for and on behalf of Morton, Bradly, Hart and George B. Armishaw, or any of them, now in possession of the defendants, The Sayward Trading and Ranching Company, Limited, and John Edward Armishaw, or either of them, be delivered forthwith to the plaintiff and that the said company and John E. Armishaw have not now and since the purchase thereof by the Board have never had any right, title or interest therein, and I hereby give an order accordingly.

However, with respect to the order of delivery (unless the said company and J. E. Armishaw recognize the ownership of the Crown and willingly hand over all and any of the stock, machinery, equipment, and building materials so purchased by the Board and in their possession) the order will have to be limited to such which, under the evidence, is clearly described and identified, the Court being unable to adjudicate upon the balance for want of certainty.

I find that the goods clearly described and identified are as follows:—

One rubber tired waggon; one cream separator; one plough; one seeder; one hay unloading gear or outfit; one Durham cow, with tail torn off—3 years old in January last; one Holstein cow, under name Daisy; one cow, yellow and white mottled, 5½ years old; three horses: one old mare called Fanny; one team which was seen driven by H. A. Armishaw in execution of his mail contract, as testified at trial.

There are quite a number of other items of stock mentioned in the evidence, but for want of proper identification and certainty, I have to leave them at large. However, it is well to bear in mind that J. E. Armishaw was heard as a witness and testified after the evidence had been adduced in his presence by witnesses Wood, Hart, Bradly and Morton, with respect to the stock, machinery, equipment and building materials which they claimed to be in

his possession while the ownership of the same was in the Board or the Crown and yet he did not speak as to that, he did not attempt to contradict the evidence. His silence is significant as against him. No question was asked him, either on behalf of the plaintiff or defendants, as to these chattels in his possession or in that of the company. However, it is impossible for the Court to extend the order of delivery to cover calves, heifer, young sheep and pigs in 1919, which are now beyond description as compared to the year 1919.

Counsel for the Crown abandoned at bar the claim with respect to paragraph 4 of the prayer of the Information.

The defendants Morton, Bradly and Hart, although duly served with a copy of the Information herein, did not file any statement in defence and did not appear at trial.

Therefore, there will be judgment against all the defendants herein, in the following manner:—

1. The action is declared properly instituted in the name of the Crown, under the circumstances of the case.

2. Nothing passed under the agreement of the 25th June, 1919, and the assignments above referred to and the rights and ownership of the Crown in the property in question remain unaffected by these assignments and agreement which are declared null and void in this respect.

3. The land, stock, machinery, equipment and building materials purchased by the Board for and on behalf of the said defendants Morton, Bradly, Hart and George B. Armishaw, or any of them, now in possession of the defendant company, and John Edward Armishaw, or either of them, are ordered to be delivered forthwith to the plaintiff—the said defendant company and John Edward Armishaw having not now and since the purchase thereof by the Board any right, title or interest therein.

4. The said company and John Edward Armishaw are ordered to deliver forthwith to the plaintiff the following property which has been clearly identified by the evidence as being in their possession, namely: One rubber tired wagon; one cream separator; one plough; one seeder; one hay unloading gear or outfit; one Durham cow with tail torn off—3 years old in January last; one mottled, yellow and white cow 5½ years old; one Holstein cow under the name of Daisy, together with three horses, one of which

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being an old mare called Fanny and a young team or two horses—the same which has been seen driven by H. A. Armishaw on his mail contract.

5. The plaintiff will have the costs of the action against all the defendants who filed a statement in defence and joined issue on the plaintiff's claim, namely against The Sayward Trading and Ranching Company, Limited, John Edward Armishaw, George B. Armishaw, and H. A. Armishaw. (*Treo Co.* v. *Dominion Corset Co.*) (1).

6. There will be no costs to either party on the issue as between the Crown and the defendants Morton, Hart and Bradly.

Judgment accordingly.

(1) [1918] 18 Ex. C.R. 115, at pp. 131, 132.

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Oct. 22.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

T. W. MAGEE AND OTHERS.....DEFENDANTS.

Expropriation—Land under water—Changing nature of a creek—Possession —Title—Lost grant—Practice—Costs.

1. Where in 1765 an aboiteau (dyke) was constructed in a creek as a permanent work, which has ever since retained its permanent character, and which changes the nature thereof from one used or susceptible of being used for navigation into what is practically an inland creek, the bed thereof may be acquired by possession; and the defendants and their predecessors in title having been in possession thereof as against the Crown for upward of 60 years such adverse possession gave them title thereto.
2. While the practice (following *McLeod* v. *The Queen*, 2 Ex. C.R. 106) is not to allow costs to defendant where the amount recovered does not exceed that tendered as compensation to defendant, yet where the Crown files an undertaking at the trial whereby the defendant recovers some substantial benefit or advantage over and above the compensation, costs may be allowed him.

INFORMATION by the Attorney General of Canada to have certain lands expropriated by the Crown for the purpose of enlarging a yard of the Canadian National Railways valued by the court.

June 15th and 16th, 1923.

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

C. F. Inches, K.C. and *E. C. Weyman* for plaintiff.

J. K. Kelly and *W. A. Ross* for defendants.

The facts are stated in the reasons for judgment.

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THE KING v. MAGEE.

AUDETTE J., this 22nd October, 1923, delivered judgment.

This is an information exhibited by the Attorney General of Canada, whereby it appears that certain lands, belonging to the defendants, were taken and expropriated by the Crown, under the provisions and authority of The Expropriation Act (R.S.C. 1906, ch. 143), for the purpose of enlarging the yard of the Canadian National Railways, at St. John, N.B., known as "The Island Yard," by depositing of record, both on the 4th March and 9th July, 1920, plans and description of the said lands in the office of the Registrar of Deeds for the city and county of St. John, N.B.

The total area expropriated, as shewn by the amended information is 20.422 acres (twenty and four hundred and twenty-two thousandths acres) for which the Crown offers $400 per acre or $8,168.80 with interest from the date of expropriation to the date of the tender.

The defendants, by their statement of defence, claim the sum of $110,000 with interest and costs.

[His Lordship here discusses the question of value, the facts affecting the same and the principles of law to be followed in estimating the compensation. He cites the case of the *King* v. *Trudel* (1) in which it was decided that

> the estimation of compensation to be awarded to the owners of the lands should be made according to the value of the lands to such owners at the date of the expropriation. The prospective potentialities of the land should be taken into account, but it is only the existing value of such advantages at the date of the expropriation that falls to be determined,

as well as the cases of *Fitzpatrick* v. *Township of New Liskeard* (2), *and Dodge* v. *The King* (3) as to the most cogent evidence of market value, and the *Cedar Rapids Case* (4) to the effect that in estimating the value of the land, it is the value to the owner and not to the taker which is to be estimated, and proceeds.]

It was contended at bar, on behalf of the Crown, that the land in the creek and under water is vested in the plaintiff and that the defendants should not be compensated for the same. As far back as about 1765 the aboiteau in question in this case was constructed as a permanent work and has ever since retained its permanent character. This

(1) [1914] 49 S.C.R. 501.
(2) [1909] 13 Ont. W.R. 806.
(3) [1906] 38 S.C.R. 149.
(4) [1914] A.C. 569, at p. 576.

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aboiteau reclaimed a large portion of the lands in that neighbourhood and changed the nature of the creek to one used, or susceptible of being used, for navigation into what is practically an inland creek. That the defendants and their predecessors in title appear to have been in possession as against the Crown for upward of 60 years, and such adverse possession would seem to give the present holders title thereto. Moreover, from the evidence of assertion of ownership and possession since the erection of the aboiteau in 1765, a lost grant might, if necessary, be presumed in favour of the defendants or their predecessors in title. *Tweedie* v. *The King* (1).

Therefore, in consideration of all the circumstances of the case, the above mentioned facts, and more especially that the surrounding lands were sold under similar expropriation at the same time for the sum of $350 to $400 an acre, I have come to the conclusion to fix the compensation for such lands at the sum of $400 an acre, and for the full area of 20.422 acres.

The defendants are further entitled to the execution of the undertaking filed on behalf of the Crown and which reads as follows, namely:—

Whereas the defendants herein by their statement in defence filed on the second day of December, A.D. 1921, by section 7 of the said statement in defence, allege *inter alia*, that at the time of the filing of the expropriation plans herein they owned, possessed and enjoyed a right of way from the Great Marsh Road over and across lots numbers one and thirteen on said plans to lands to the northward of said lots numbers one and thirteen, for which no tender had been made by the said plaintiff, and which said right of way had been destroyed by the said expropriation.

Now this undertaking witnesseth that the Attorney General of Canada on behalf of His Majesty the King hereby undertakes to grant to the defendants, their heirs and assigns, a right of way from their property shown on the plan hereto annexed as lying between the Great Marsh Road and the Canadian National Railways, to the said lands to the northward of said lots numbers one and thirteen, along, across and over that part of the common road shown in red on the said plan hereto annexed which lies between the southern boundary of the Canadian National Railways and the said lands to the northward of said lots numbers one and thirteen, said right of way thus undertaken to be given to be used in common with His Majesty, his successors and assigns, and with all other persons now entitled to use the same, and that His Majesty will, as may

(1) [1915] 52 S.C.R. 197.

reasonably be required, execute such conveyance or assurance if any as may be necessary to give full effect to this consent or undertaking.

Dated this fifteenth day of June, A.D. 1923.

C. F. INCHES,
of counsel for plaintiff.

This undertaking is a valuable one, notwithstanding it leaves with the defendants the maintenance of the road.

The Crown's counsel declared at bar that the plaintiff did not object to an allowance of interest on the compensation from the 22nd June, 1922, to date. However, in view of the fact that while only $400 an acre is allowed as tendered, yet the owners recover over and above that sum what is given through this undertaking; therefore there will be interest allowed as of the date of the expropriation to the date hereof.

There is the further question of the dower of the defendant Nanette C. Magee. The compensation moneys will be made payable to the three defendants upon giving to the Crown a good and clear title, free from all incumbrances, and a release to any claim flowing from such dower. Failing, however, the defendants to give such release there will be a reference to the Registrar of the Court to ascertain, apportion and determine the interest flowing from such dower, as there is presently no evidence on the record and nothing before the court to enable it to deal with the same.

Coming to the consideration of the question of costs which, I must confess, primarily appears somewhat complexing under the circumstances of the case, when the amount tendered is practically allowed and the amount claimed is extravagant. *McLeod* v. *The Queen* (1). However, considering that the defendants, through the undertaking, recover something over and above that amount and that in a case of expropriation the subject is brought into court somewhat against his will, I will exercise my discretion in allowing the defendants their costs of the action, save, however, three-quarters of the costs of their evidence.

I have considered the case under the facts set forth in the information as amended at trial. The information has not as yet been amended; but direction is hereby given that the formal judgment must not issue until after the

(1) [1889] 2 Ex. C.R. 106.

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information has been duly amended, pursuant to the order given at trial.

[Judgment was rendered declaring lands vested in the Crown, and the defendants entitled to have performed the undertaking of the Crown, and fixing the compensation for lands taken at $8,168.80 with interest and costs.]

Judgment accordingly.

1923
Oct. 29.

JOSEPH BESNIER .....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Negligence of servant—Damages—Jurisdiction—Exchequer Court Act, section 20 ss. C.

There is a bridge over the Lachine Canal, at Lachine, with gates at the north and south ends thereof to prevent persons crossing when boats are going through. When S's wife arrived at the south gate, the bell, used to warn traffic against crossing and to notify the gate-keeper to lower his gate, had already been rung by the keeper of the north gate, and the south gate had already been lowered. S's wife asked as a favour to be permitted to go through, which was granted. While she was crossing, the north gate-keeper, whose back was turned to her, began lowering his gate and when she was passing under the same it struck her.

Held, that the act of the gate-keeper in permitting S's wife to cross, was not negligence within the meaning of sub-section (*c*) of section 20 of Exchequer Court Act, and did not give rise to an action against the Crown for damages.

PETITION OF RIGHT claiming a certain amount for damages suffered by reason of alleged negligence of a gate-keeper on the Lachine Canal.

October 23rd, 1923.

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

J. Léon Pouliot for suppliant.

R. Taschereau, K.C., for respondent.

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

AUDETTE J. now (October 28th, 1923) delivered judgment.

Le Pétitionnaire, par sa pétition de droit, réclame la somme de $98 comme représentant les dommages qu'aurait subis son épouse, le 15 juin 1920, lorsqu'elle passait du sud

au nord sur le pont de l'écluse du Canal Lachine, à Lachine.

Il est allégué que lorsque Madame Besnier fut arrivée au bout nord du pont, qu'on lui a rabattu sur la tête une barrière du pont avec telle force qu'elle a été jetée sur le sol, blessée douloureusement au bras gauche, que l'on a déchiré sa robe et mis son chapeau en pièces.

Les particularités des dommages réclamés sont comme suit:—

Robe déchirée	$30 00
Chapeau hors d'usage	12 00
Pansements et remèdes	2 00
Médecin	4 00
Perte de temps (et service d'une auxiliaire)	50 00
	$98 00

Il est en outre allégué que ces dommages ont été causés par, et résultent de la négligence des officiers, serviteurs et employés de la Couronne agissant dans la sphère de leurs devoirs et dans l'exercise de leurs fonctions et la garde du dit pont, encadrant ainsi la présente action dans la sous section (*c*) de la section 20 de l'Acte de la cour de l'Echiquier.

L'accident est arrivé le 15 juin 1920, et la pétition de droit a été produite entre les mains du secrétaire d'Etat, tel que pourvu par la sec. 4 de l'Acte de la Pétition de Droit, le 11 mai 1922. Conséquemment tous dommages résultant d'injures corporelles étaient à cette date prescrits en vertu de l'article 2262 C.C. et le droit d'action pour les recouvrer entièrement éteint.

A l'audition de la cause, avant d'entrer dans la preuve, ordre a alors été donné d'éliminer les trois derniers items de la réclamation relativement aux injures corporelles et statuant que la preuve ne serait entendue que relativement aux deux premiers items se rapportant à des dommages découlant de quasi-délits, qui ne se prescrivent, en vertu de l'article 2261, que par deux ans.

La preuve démontre que, lorsque Madame Besnier est arrivée du côté sud du pont, la cloche avait déjà été sonnée, arrêtant ainsi tout traffic et ordonnant l'ouverture du pont. La barrière sud était fermée, mais Madame Besnier ayant demandé au gardien la faveur de la laisser passer et l'ayant

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obtenue, autorisée de ce privilège, s'est engagée sur le pont; mais pendant ce temps le gardien de la barrière du côté nord, qui était aussi le préposé pour sonner la cloche pour arrêter le traffic, s'était déjà mis—le dos tourné au sud—à descendre sa barrière au moyen de l'appareil à cette fin. Madame Besnier a alors accéléré le pas et même pris la course et est arrivée aveuglément et tête baissée en dessous de la barrière nord au moment où cette dernière arrivait à la hauteur de sa tête.

Ce laissez-passer, concédé par le gardien dans les circonstances, ne saurait être interprété autrement que comme ayant référence à sa bienveillance et à son bon vouloir et ne saurait en aucune manière donner lieu à un droit d'action de la part de la personne qui reçoit la faveur.

Il résulte des circonstances que Madame Besnier s'est engagée dans cette traverse dans des circonstances qu'elle connaissait et elle a de son plein gré assumé tous les risques qui s'en suivaient. Elle n'a qu'elle à blâmer pour l'accident. En s'engageant ainsi sur le pont après le signal arrêtant le traffic et après que la barrière fut déjà fermée —et elle passait à cet endroit très souvent et en connaissait les conditions—elle assumait tous les risques qui en découlaient et la Couronne ne lui devait aucun devoir, si ce n'est celui de ne pas la molester ou la blesser volontairement; la barrière nord était descendue dans le cours ordinaire des choses et le préposé à cette barrière ne l'a pas frappée intentionnellement; c'est bien elle qui, en courant, est venue se jeter sous la barrière.

Après une juste appréciation des circonstances et des faits j'en suis donc arrivé à la conclusion que la preuve ne révèle et n'établit aucun droit d'action, aucune négligence de la part des employés, et le tribunal adjuge que la demande du pétitionnaire est déboutée et que ce dernier n'a droit à aucun des remèdes demandés par la pétition de droit.

Action renvoyée.

LAWRENCE KIDD .....SUPPLIANT:

AND

HIS MAJESTY THE KING.....RESPONDENT.

1923
Oct. 22.

Crown—Dismissal of a civil servant or military officer—Prerogatives of the Crown—Power of Parliament to take away—Conditions.

Held, that the right of the Crown to fix the amount of a pension or superannuation allowance, must be deemed to be imported into every appointment of a civil servant or a military officer. This is a right of the Crown in virtue of its prerogative, which Parliament may take away, but its intention so to do must be clear beyond all manner of doubt. In case of doubt the courts should regard the prerogative as unimpaired.

PETITION OF RIGHT to recover military pension under R.S.C., 1906, c. 42, secs. 11 and following.

11th September, 1923.

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

R. M. Fielding for suppliant.

J. E. Routhledge for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J.—Now October 22nd, 1923, delivered judgment.

The suppliant, by his Petition of Right, seeks to recover an annual military pension, dating from 15th March, 1920, and interest on alleged overdue instalments of the same, the whole under the provisions of sections 11 et seq. of ch. 42 of R.S.C., 1906, being "An Act respecting Pensions to Permanent Staff and Officers and men of the Permanent Militia and for other purposes."

Before the amendment to this Act, in 1919 (1), sec. 11 thereof read as follows:—

> 11. Subject to the provisions of this Act, every militiaman shall be entitled to retire and receive a pension for life who,—
>
> (*a*) has completed not less than twenty years service, or etc., etc.

This Act was amended on the 7th July, 1919 (1), by, among other things, substituting for this period of "twenty" years a period of "ten" and this period of twenty years was restored, in 1923 (2).

(1) 9-10 Geo. V, c. 61, sec. 5. (2) 13-14 Geo. V, c. 58.

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The period of the suppliant's services, as set forth in the Petition of Right, is as follows:—

	Yrs.	Mos.	Dys.
1. Served in Boer War in South Africa, 23rd December, 1899, to 30 July, 1902	2	7	7
2. As Lance-Corporal in Royal Canadian Regiment, a unit of Permanent Militia, from 10th January, 1906, to 4th November, 1916. This period includes time served in France on active service, in war commenced on 4th August, 1914	10	9	24
3. Served as private in 66th Regiment, Princess Louise Fusiliers, a unit of Canadian Expeditionary Force, on active service in war from 4th Nov., 1916, to 31st May, 1918	1	6	27
4. Served as Acting Company Sergeant-Major, with pay of that rank in Canadian Military Police Corps,—a unit of Permanent Militia of Canada and of the Canadian Expeditionary Force, on active service in war, from 31st May, 1918, to 15th March, 1920	1	9	15
	16	9	13

Now the primary or paramount question submitted to the court for determination is really whether an action will lie against the Crown for the recovery of such a military pension as that claimed.

I have already had occasion to consider whether an action would lie against the Crown for a military gratuity in the case of *Bacon* v. *The King* (1). However, the present issues are quite different.

A careful study of the cases concerning the rights of military officers and civil servants to obtain compensation for pensions or superannuation allowances seems to lead to the conclusion that the Crown's absolute power to allow and fix the amount of its bounty as expressed in a pension or superannuation allowances must be deemed to be imported into every appointment of a civil servant or a military officer. *Mitchell* v. *The Queen* (2); *Dunn* v. *The Queen* (3); *In re Tufnell* (4); *Gibson* v. *East India Co.* (5); *Grant* v. *Secretary of State for India* (6); *De Dohsé* v. *The Queen* (7); *Shenton* v. *Smith* (8); *Yorke* v. *The King* (9); *Gould*

(1) [1921] 21 Ex. C.R. 25.
(2) [1896] Q.B.D. 121.
(3) [1896] Q.B.D. 116.
(4) [1876] 3 Ch. D. 164.
(5) [1839] 5 Bing (N.C.) 262, 275.
(6) [1877] 2 C.P.D. 445.
(7) [1886] 3 T.L.R. 114.
(8) [1895] A.C. 229.
(9) [1915] 31 T.L.R. 220.

v. *Stuart* (1); *Young* v. *Waller* (2); *Rederiaktiebolaget Amphitrite* v. *The King* (3); *Edmunds* v. *Attorney-General* (4); *Balderson* v. *The Queen* (5), 25 Hals. 89, 90, There is also the case of *Sutton* v. *Attorney-General* (6) which stands by itself in that the engagement in that case amounted to a contract.

However, the Crown's right to dismiss or to superannuate or pension a civil servant or a militiaman may be entirely regulated by statute, cutting out the prerogative rights. In the case of *Williams* v. *Delohery* (7) it was held that a member of the Civil Service of New South Wales had an absolute right under the Civil Service Act, 1884, to superannuation allowances. The judgment of the Colonial Court allowing the plaintiff his claim for superannuation allowances was affirmed by the Judicial Committee. But these cases depend wholly upon the terms of the Acts under consideration in each case. Of course the Crown's prerogative may be taken away by Parliament in respect of any such matter, but, that the prerogative should be taken away beyond all manner of doubt by the Statute, is insisted upon in all the cases, and when there is a doubt upon the face of the Act it is the duty of the Court to hold that the prerogative is maintained.

Now, without deciding whether or not the Canadian Act, section 11, ch. 42, R.S.C., 1906, takes away the prerogative and gives the subject a right of action, I will, for the purposes of argument in this case assume that it does. Even upon that assumption the suppliant is out of court, as we shall see.

Section 11, as above recited, states that

> every militiaman shall . . . be entitled to a pension.

The first question to consider is what is a "militiaman"?

Referring to the Interpretation clause of that Statute (8) we find that a

> militiaman means a non-commissioned officer or private of the force.

And that "force" means

> the officers, non-commissioned officers and men of the permanent militia corps and includes the permanent staff of the militia.

(1) [1896] A.C. 575
(2) [1898] A.C. 661.
(3) [1921] 3 K.B. 500 at p. 503.
(4) [1878] 47 L.J. Ch. 345.
(5) [1898] 28 S.C.R. 261.
(6) [1923] 39 T.L.R. 294.
(7) [1912] 29 T.L.R. 161.
(8) R.S.C. [1906] Ch. 42.

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Therefore, the suppliant to succeed must show a complete service in the Permanent Militia, not less than twenty years' services up to the 7th July, 1919, or ten years if between 1919 and 1923.

It is admitted by both parties, as per the admission filed at trial, that the Canadian Military Police Corps was not, at all times material to this proceeding, a unit of the Permanent Militia of Canada. Therefore the suppliant's time of service up to the 31st May, 1918, did not amount to twenty years as a militiaman, and he accordingly does not come within the provisions or ambit of section 11 above referred to. It is unnecessary to advert to or consider the other questions raised during the argument of the case.

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

Judgment accordingly.

1923
Dec. 29.

QUEBEC ADMIRALTY DISTRICT

GEORGE HALL COAL & SHIPPING CORPORATION ..... } PLAINTIFF;

AGAINST

THE SHIP *LORD STRATHCONA*

Shipping—Collision—Overtaking vessel—Article 24 of the Rules of the Road—Force of suction—Evidence—Negligence.

1. *Held:* That applying the rule that ordinarily the testimony of one who testifies to an affirmative is to be preferred to that of one who testifies to a negative, where the evidence of those on board one vessel was to the effect that they saw the two vessels coming into contact, and felt the shock caused by the impact, while the evidence of those on board the other vessel was that no shock was felt and no impact seen, the court ought to hold that a collision did take place.
2. The collision took place on the St. Lawrence River below Champlain between the *S.D.*, plaintiff's ship, and the *L.S.*; the channel there being 400 feet wide. The *L.S.* was of greater size and draft than the *S.D.* and in overtaking and passing the *S.D.* attempted to pass too close to her, and the latter was drawn towards the *L.S.* by the force of suction until they came into collision.

Held: That having regard to the fact that the force of suction is a source of danger in close navigation, especially in shallow water, and as it was the duty of the *L.S.* as an overtaking vessel, under article 24 of the Rules of the Road, to keep out of the way and clear of the overtaken vessel until finally passed, she was, under the above facts guilty of negligence and responsible for the collision.

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GEO. HALL COAL & SHIPPING CORPORATION v. SS. *Lord Strathcona*

ACTION *in rem* for damages arising out of a collision between the steamer *Senator Derbyshire,* a steamer belonging to the plaintiff, and the steamer *Lord Strathcona,* in the St. Lawrence river on the morning of July 4, 1923.

November 29, 1923.

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

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

W. C. Nicholson for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A. this 29th December, 1923, delivered judgment.

[His Lordship here states the pretensions and allegations of the respective parties, and proceeds.]

The *Senator Derbyshire* was a wooden steamer 220 feet long, 40 feet 6 inches wide and drawing 13 feet 4 inches forward and 14 feet 6 inches aft. She was loaded with pulpwood. The *Lord Strathcona* was a steel ship 475 feet long, 58 feet wide, loaded with coal, drawing 26 feet forward and 26 feet 6 inches aft. Both were coming up the river. The *Senator Derbyshire* was ahead going at full speed 7 to 8 miles an hour. The *Lord Strathcona,* which was following, gave a two blast signal which was answered by a similar signal. The *Lord Strathcona* then began to pass on the other's port side. The channel was 400 feet wide and the *Senator Derbyshire* was to the north side of the channel. She held her course and speed until she changed to starboard after the quarter of the *Lord Strathcona* came into collision with her port side forward of amidships. The first officer of the *Senator Derbyshire,* who was on duty, testified to the collision and a shock resulting therefrom which he says occurred at 2.05 a.m., on the morning of 4th July, 1923. The pilot of the *Senator Derbyshire* at the trial swore that the quarter of the *Lord Strathcona* hit his ship and caused a shock. He had previously made a written report that the vessels came very close together but did not come into contact and that no damage was caused to either. At the trial, however, he was positive in his testimony that there had been a collision. The wheelsman, on duty on the *Senator Derbyshire,* testified that he

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GEO. HALL COAL & SHIPPING CORPORATION v. SS. *Lord Strathcona*

Maclennan L.J.A.

felt the shock of the collision although he did not see the ships come together. The engineer, on duty in the engine room, testified that he felt the shock, and the master, the second mate and another wheelsman, not on duty, who were in bed at the time, all testified that they were wakened by the shock of the collision. The master says he immediately came on the bridge to inquire what had happened. The *Senator Derbyshire* was on a voyage from the Little Saguenay to Ogdensburg and from there she proceeded to Thorold, Ont. The first stop after the collision was at Montreal, at the entrance to the Lachine Canal, when the master notified plaintiff's manager by telephone that there had been a collision, and having been requested to make a written report he wrote a letter on 6th July, 1923, reporting that the covering board on the port side of the vessel had been damaged for at least 15 feet, also the two planks just below the covering board, and that the head of one of the rods running across the deck was broken off and the plate holding the rod on the side was gone and giving other details of the collision as he ascertained them from the pilot, mate and wheelsman on duty at the time of the collision.

The defence is that there was no collision, that the ships were not in contact and that no shock was felt on the *Lord Strathcona*. The latter's pilot does not appear to have paid any attention to the *Senator Derbyshire* after the ships were abreast and he says he felt no shock. The second officer of the *Lord Strathcona* was on duty on the bridge and he testified that he felt no shock or bump and that the vessels were not in contact. While the *Lord Strathcona* was passing, this officer stayed at the telegraph to give signals as required and it may be that he was not in a position to observe the starboard quarter of the *Lord Strathcona* come into contact with the port side of the other vessel. The master was in the chartroom but came out before the vessels had cleared. The chief engineer was in his berth and came out on deck when the *Lord Strathcona* was almost past. He says he felt no shock.

I am advised by my assessors that there was ample room to the south side of midchannel for the *Lord Strathcona* to have passed the *Senator Derbyshire* in safety and that

apparently the *Lord Strathcona* was directing her course on the range lights in the midchannel and came so close to the *Senator Derbyshire* that the ships were drawn together by the force of suction, the *Lord Strathcona* being a ship over twice the length and drawing 26 feet draft against the *Senator Derbyshire's* 14 feet 3 inches.

I am also advised that the mate and pilot on the *Lord Strathcona* were not in a good position to observe whether or not the starboard quarter of their ship came into contact with the port side of the *Senator Derbyshire* forward of amidships. The bridge of the *Lord Strathcona* was over 200 feet from the poop where the impact took place.

The evidence of the witnesses on board the *Senator Derbyshire* is to the effect that each of them saw the two vessels come into contact or felt a shock caused by the impact, while the evidence of the witnesses on board the *Lord Strathcona* is to the effect that no shock was felt and no impact seen. The evidence shows, and my assessors have called my attention to the fact, that the mate and pilot on the *Lord Strathcona* were not in a good position to observe whether or not the starboard quarter of their ship came into contact with the port side of the other vessel forward of amidships. It is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, and on this principle the evidence of the witnesses for the *Senator Derbyshire* is entitled to greater weight than the evidence of the witnesses called on behalf of the other vessel. I therefore hold that a collision took place, fortunately it was not very serious, but the vessels did come into contact.

The deep water channel where the collision occurred is 400 feet wide. The *Senator Derbyshire* was to the north of midchannel which left over 200 feet in which the *Lord Strathcona* could pass. The latter was the overtaking vessel and under Article 24 of the Rules of the Road, it was her duty to keep out of the way and keep clear of the overtaken vessel until she was finally past and clear. She failed to do so, evidently attempting to pass too close and, as she was necessarily going at a speed greater than the *Senator Derbyshire* and being of greater size and draft, the overtaken vessel was drawn towards her until they came into

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contact. Suction is a force that has been recognized as a danger in close navigation, especially in shallow waters, and always results from a too close approach. For these reasons, in my opinion, the *Lord Strathcona* is responsible for the collision, as she attempted to pass too close and failed to keep clear in violation of Article 24.

There will therefore be judgment against the *Lord Strathcona* and her bail for damages and costs, with a reference to the Deputy District Registrar with merchants to assess the damages.

Judgment accordingly.

Messrs. Meredith, Holden, Hague, Shaughnessy & Heward, solicitors for plaintiff.

Messrs. Cook & Magee, solicitors for defendant.

QUEBEC ADMIRALTY DISTRICT

1924
Jan. 4.

No. 566.

THE KAMOURASKA SHIPPING COMPANY, LIMITED, ET AL..... } PLAINTIFFS;

AGAINST

THE SHIP *FANAD HEAD*

AND

No. 567.

THE ULSTER STEAMSHIP COMPANY, LIMITED ..... } PLAINTIFF;

AGAINST

THE SHIP *KAMOURASKA*

Shipping—Collision—Moderate speed—Fog—Article 16 of the Regulations for the prevention of collisions at sea—Evidence.

On the morning of June 20, 1923, at the hour of 3.20 according to the *K's.* clocks and 3.26 according to the *F.H.'s* clocks—the difference between them being accidental—a collision occurred on the St. Lawrence River near Red Island and Bicquette Island, between the *K.* outbound and the *F.H.* inbound. Both ships ran into dense fog half an hour or a little more before the collision. The *K.* stopped her engines at 2.50 a.m.; about three o'clock she heard a fog signal ahead, started at slow at 3.05 and her engines continued going ahead until 3.18 when they were put full speed astern. Repeated long blasts were heard by the *K.* from the other ship, which, however, was not seen until the ships were within 60 feet from each other. The speed of the *K.* from the time her engines were put at slow ahead until they were put full speed astern was at least 4½ to 5 knots, which was more than necessary to keep steerage way, and when she put her helm hard a-starboard, she swung around to port and her stem struck the port bow of the *F.H.* At 2.53 the engines of the *F.H.* were put at "stand by," then at 2.56 at slow, stopping at 3 when the lights of the other ship were seen 2½ to 3 miles ahead. She then proceeded slowly, stopping her engines at intervals. The *F.H.* had the tide and wind against her and merely had steerage way, making very little, if any, speed over the ground. She did not run into the *K.*, but the *K.* ran into her. Two minutes before the collision the *F.H.* again having the *K.* in sight gave one short blast putting her helm hard aport. This was answered by the *K.* with two short blasts, who put her helm hard a-starboard. The *F.H.* again gave one blast answered by the *K.* with two, and immediately followed by three short blasts. When the cross signals were given the *K.* was four points off the *F.H.'s* port bow. The *K.* contended that the *F.H.* was to starboard, its witnesses basing their opinion of direction on the whistles heard.

Held, that it was bad seamanship for the *K.* to give cross-signals and to put her helm hard a-starboard when she did, and that this, with her excessive speed, was the sole cause of the collision.

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2. That a ship is not justified in altering her course in a fog until there is sufficient indication of the other's position, sufficient indication being a matter of circumstances in each case.
3. Where there is conflict of testimony as to the respective positions of the ships, the court, in view of the fact that sounds in a fog are notoriously unreliable, as between witnesses who testify to the position of a vessel as having seen her, and those whose testimony is only an opinion based upon hearing the whistle, ought to accept the version of the former.
4. That "moderate speed" within the meaning of Article 16 of the rules for preventing collision at sea, is such speed as will permit a vessel to pull up within the distance that she can see.

ACTIONS to recover damages due to a collision between the ships *Kamouraska* and *Fanad Head,* which occurred on the St. Lawrence River between Red Island and Bicquette Island. The former claiming $25,000 and the latter $50,000.

November 28, 1923.

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

W. C. Macdonald, K.C. and *C. Gordon Hyde, K.C.* for the SS. *Kamouraska.*

A. R. Holden, K.C. and *R. C. Holden* for SS. *Fanad Head.*

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

MACLENNAN, L.J.A., January 4, 1924, delivered judgment.

These two actions arose out of a collision between the *Kamouraska* and the *Fanad Head* which took place in the River St. Lawrence on the morning of June 20, 1923. Both ships were single screw steel steamers. The *Kamouraska* was registered at Halifax, N.S., and was owned by the Kamouraska Shipping Company, Limited; her gross tonnage was 4,903 tons; she had a length of 360 feet and 54 feet beam and was drawing 10 feet forward and 15 feet 6 inches aft and was bound from Montreal to Sydney. The *Fanad Head* was registered at Belfast and was owned by the Ulster Steamship Company, Limited; her gross tonnage was 5,200 tons; she had a length of 390 feet and 52 feet beam and was drawing 11 feet 6 inches forward and 17 feet 6 inches aft and was bound from Sydney to Montreal.

The case of the *Kamouraska,* as set out in her preliminary act and statement of claim is that early on the morning of 20th June, 1923, she was proceeding down the River St. Lawrence when she met the *Fanad Head* coming up. The tide was ebb with a current of approximately one and a half knots. About 2.30 a.m. the weather became very foggy; the order " Stand by " was given by the master, and at 2.50 a.m., when the fog had become dense, the engines were stopped and at all times subsequent thereto the vessel was navigated with caution and gave the regulation sound signals for fog. The engines were stopped from 2.50 to 3.05 a.m., when the fog signals of the *Fanad Head* were heard on the starboard bow. The order " Slow ahead " was given at 3.05 a.m. and the vessel continued to be navigated with caution. At 3.15 a.m. a white light was seen two points off the starboard bow and according to the preliminary act this was five minutes before the collision, and the statement of claim states that a minute after this light was seen the fog signals of the *Fanad Head* were heard 4 points off the starboard bow and the speed of the *Kamouraska* then was dead slow ahead, sufficient only to permit her to steer. At approximately 3.18 a.m. one short blast from the *Fanad Head* was heard. The *Kamouraska* immediately answered with a cross-signal of two short blasts and her helm was slightly starboarded. The *Fanad Head* replied by another short blast. The *Kamouraska* immediately gave 3 short blasts and went full speed astern. The *Fanad Head,* with her course altered to starboard and attempting to cross the bow of the *Kamouraska,* came directly on that vessel, her port bow striking the starboard bow of the *Kamouraska.* The fault and negligence attributed to the *Fanad Head* and those on board of her are, that she neglected to reverse her engines and go full speed astern when she got the *Kamouraska's* signal of 3 short blasts; that she wrongfully altered her course to starboard and attempted to cross the bow of the *Kamouraska* rendering a collision inevitable; that she did not keep her course in violation of article 21; that she had no proper or sufficient lookout and did not pay any attention to the signals of the *Kamouraska;* that she was navigated at an improper rate

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of speed under the circumstances and failed or neglected to stop her engines or to navigate with caution and otherwise violated article 16 and neglected the precautions required by ordinary practice of seamen and by the special circumstances of the case.

The case of the *Fanad Head* as set out in her preliminary act and statement of claim is, that she was proceeding up the River St. Lawrence towards Quebec when she met the *Kamouraska* coming down. The tide was flood but with some current down stream and the weather was thick with low lying intermittent banks of fog, the wind being about S.S.W., a fresh breeze. The *Fanad Head* was proceeding at slow speed just having steerage way, when those on board her saw the navigating lights of the *Kamouraska* about 3 miles distant and bearing about half a point on the *Fanad Head's* port bow, and the *Fanad Head* then gave one short blast and altered her course a little to starboard. The fog then again set in and the *Fanad Head* proceeded at slow speed stopping her engines at intervals and navigating with caution and giving the regulation sound signals for fog, when about half a mile distant the navigating lights of the *Kamouraska* were again seen bearing about 4 points on the *Fanad Head's* port bow. The *Fanad Head* again gave one short blast on her whistle and ported, but the *Kamouraska* answered with a cross-signal of two blasts and at once turned and came directly towards the *Fanad Head,* her stem and starboard bow striking the port bow of the *Fanad Head* in spite of all the latter could do to avoid a collision. The stem and starboard bow of the *Kamouraska* struck the port bow of the *Fanad Head* about 26 feet abaft the stem. The fault and negligence attributed to the *Kamouraska* as the cause of the collision are, that she gave improper signals, broke Rule 16 of the International Rules of the Road, was navigated at an improper rate of speed under the circumstances and failed and neglected to stop her engines or to navigate with caution; that she had no proper or sufficient lookout and no competent officers or watch on duty; that she improperly starboarded her helm before the collision and broke Rules 27 and 29 of the Rules of the Road.

It will be seen from the pleadings that the contentions of the parties, with reference to the respective positions of the ships shortly before the collision, are in violent contradiction. The evidence in that connection is of the same character. There appears to have been a difference of 6 minutes between the clocks on the ships. The *Kamouraska* states the collision occurred at 3.20 a.m., while the *Fanad Head* put it at 3.26 a.m. The accident happened between Red Island and Bicquette Island in the River St. Lawrence. The *Kamouraska* bound outwards passed Red Island Light Vessel at 1.45 a.m. and set a course of E.N.E.—N. 68 E. The *Fanad Head* passed Bicquette Island at 1.58 a.m. and set a course S. 68 W. These were opposite courses. According to the evidence of the master of the *Kamouraska* fog set in about three-quarters of an hour after passing Red Island Light Vessel and he gave the order "Stand by" at 2.30. The engines were stopped at 2.50 when the fog was dense and the master says he could not see 20 yards. The fog signals were being sounded continuously. About three o'clock a faint prolonged blast was heard for away off the starboard bow. This signal was heard several times and appeared to be broadening out to starboard and indicated to the master of the *Kamouraska* that the other ship was coming along on the same course passing starboard to starboard. The master testified that he started the engines slow ahead at 3.10 and the chief engineer's log book and the engine room scrap log also state that the engines were put slow at 3.10, but in the *Kamouraska's* statement of claim in the action against the *Fanad Head* and in her defence in the action against her, it is stated that the order "Slow ahead" was given at 3.05 a.m. Whether she started slow ahead at 3.05 or 3.10, it is admitted by all the witnesses on the *Kamouraska* that her engines were kept going ahead until 3.18 when she had a speed of about 3 knots through the water. There was a current with her of about one and a half knots and she also had the wind with her so that at 3.18 the *Kamouraska* must have had a speed of at least from 4 and a half to 5 knots over the ground and probably more. The master admits that after running 7 or 8 minutes slow ahead the ship would have a speed of about 3 knots per hour. He claims in his evidence that

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there was no need of stopping his ship as the fog signals from the other ship were in his judgment broadening. At 3.18 one short blast was heard which the *Kamouraska* answered with two short blasts. The other ship then answered with another signal of one short blast and the master states that he immediately reversed his engines full speed astern and gave three short blasts on the whistle. It may be stated here that, according to the witnesses on the *Fanad Head,* after she had given the signal of one short blast in answer to the *Kamouraska's* signal of 2 short blasts, the latter answered by 2 short blasts followed immediately by 3 short blasts. When the *Kamouraska* gave the signal of 2 short blasts in answer to the *Fanad Head's* first signal of one short blast, the helm of the *Kamouraska* was put hard a-starboard and kept in that position until the collision two minutes later. The pilot of the *Kamouraska* says that at 3.15 he saw a white light 2 points off the starboard bow and that one minute later he heard a short blast which he took to be 4 points off the starboard bow. No one else on board the *Kamouraska* has testified to seeing the *Fanad Head* or any of her lights until immediately before the collision when the ships were about 60 feet apart. The master of the *Kamouraska* says there was a dense fog all the time from 2.50 to 3.20 when the collision occurred. He claims that his ship was going astern through the water at the moment of the collision and that the *Fanad Head's* port bow hit the *Kamouraska's* starboard bow and knocked the latter around to the northward about 5 or 6 points, and after the collision both ships were lying side by side. This swing could have been greatly assisted by the current on the *Kamouraska's* stern. The evidence, including the engine room and chief engineer's log show that the engines of the *Kamouraska* were going astern from 3.18 to 3.25 and were not stopped until 5 minutes after the collision.

According to the witnesses on the *Fanad Head* the weather was clear up to about 2.53 when the order "Stand by" was given to the engine room. At 2.56 the engines were reduced to slow ahead; at 3 o'clock a whistle was faintly heard ahead or slightly on the port bow and the engines were immediately stopped. This was the first fog signal heard ahead. The engines remained stopped until

3.03 when the masthead and side lights of a ship were seen half a point on the port bow at a distance of 2½ to 3 miles, when the engines were put at slow ahead and the ship ported half a point bringing her on a course S. 74 W. These lights were seen for a minute and a half or two minutes. At 3.09 the engines were stopped until 3.15 when she went slow until 3.18 when they were stopped again and remained stopped 3.24, having merely steerage way, when the masthead and side lights of the *Kamouraska* were seen by the master, second officer, pilot and lookout 4 points on the port bow at about a quarter of a mile away and then one short blast was given on her whistle, her helm was put hard a-port, the engines were put full ahead for a quarter of a minute and then stopped. This was two minutes before the collision. The witnesses on board the *Fanad Head* have testified that in answer to her one short blast signal she received a signal of two short blasts from the *Kamouraska* which was answered by one short blast from the *Fanad Head* and answered by the *Kamouraska* with two short blasts followed immediately by 3 short blasts. Two witnesses testified that the *Kamouraska's* lights were visible from the time the cross-signals were given until the collision. The *Fanad Head* under the hard a-port helm went off to W.N.W. It is claimed by the *Fanad Head's* witnesses that her engines were put astern at the impact or a few seconds before it, but no signal of 3 short blasts was given on the whistle. The *Kamouraska* swung to port when her helm was put hard a-starboard and her red light had disappeared when she answered the second signal of one short blast given by the *Fanad Head* and she continued to swing to port until her stem collided with the port bow of the *Fanad Head* about 26 feet abaft the stem, at an angle of about 30 degrees according to the master of the *Fanad Head.* The pilot of the *Fanad Head* was certain that the other ship came into his from aft—from abaft her beam. He seems positive of that. The photos filed as exhibits show that very serious damage was done to the port bow of the *Fanad Head* at or about the point stated by the master.

These actions are of considerable importance not only on account of the serious issues of fact and law involved,

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but because of the heavy claims for damages resulting from the collision, the action against the *Fanad Head* being for $25,000, and that against the *Kamouraska* for $50,000. Consideration must be given to the respective speed of each ship before the collision, their respective positions when the cross-signals were given, the starboarding of the *Kamouraska* and the engines of the *Fanad Head* not having been reversed after the *Kamouraska* gave the three blast signal.

Dealing first with the charge which each ship makes against the other of improper speed and violation of article 16 of the Regulations for Preventing Collisions at Sea, it is established that both ships ran into fog half an hour or a little longer before the collision. The *Kamouraska* stopped her engines at 2.50 a.m., about three o'clock heard a fog signal ahead, started slow at 3.05 or 3.10 and her engines continued going ahead until 3.18 or 3.19 when they were put full speed astern. The collision happened at 3.20 according to the clocks of the *Kamouraska*. The master and other witnesses of the *Kamouraska* testified that the fog was dense from 2.30 at the time of the collision, that repeated long blasts were heard from the other ship which was not seen until the ships were within 60 feet of each other. The speed of the *Kamouraska* from 3.05 or 3.10, whichever was the time her engines were put at slow ahead until they were put full speed astern was at least $4\frac{1}{2}$ to 5 knots and when she put her helm hard a-starboard she swung round to port and her stem struck a severe blow on the port bow of the *Fanad Head*. The first fog met by the *Fanad Head* was at 2.53 when her engines were put at "Stand by"; at 2.56 they were put at slow, were stopped at 3 o'clock when the lights of the other ship were seen $2\frac{1}{2}$ to 3 miles ahead, were put slow at 3.03 were stopped at 3.09, slow at 3.15, stopped at 3.18, full ahead for $\frac{1}{4}$ of a minute at 3.24 and then stopped and the collision happened at 3.26. The lights of the *Kamouraska* were seen from the bridge and crow's nest of the *Fanad Head* for the second time two minutes before the collision, and I asked my assessors if there was any reason, if a proper lookout had been kept on the *Kamouraska*, why the *Fanad Head* should not have been seen at the same time as the *Fanad*

Head saw the *Kamouraska* instead of when the ships were 60 feet apart, and I am informed by my assessors that it is quite likely that the *Fanad Head* should see the lights of the *Kamouraska* approaching, while the *Fanad Head* would be shut in from the view of the people on board the *Kamouraska*. The *Kamouraska* was evidently coming down with a bank of fog surrounding her and she was possibly on the leeward edge of the fog bank, which prevented her people from seeing the *Fanad Head* while her lights might shine through that fog bank and be seen from the other ship.

In the half hour before the collision, the *Fanad Head's* fog signals were blowing and her engines had been stopped four times and in the 17 minutes immediately before the collision her engines had been at slow for 3 minutes, full ahead for a quarter of a minute and stopped for 13¾ minutes. She had the tide and wind against her and merely had steerage way and was making very little if any speed over the ground. She did not run into the *Kamouraska,* but the latter ran into her. The *Kamouraska* did not have sternway on, if she had the ships would have gone clear. There is no room for doubt on that question.

Among the questions which I submitted to my assessors with their answers are the following:—

Q. Considering the way in which you find these vessels in fact approaching each other, would each successive whistle tell the officers and pilot of the *Kamouraska* that the other ship was approaching nearer and nearer?

A. Yes, it would prove beyond question that the vessels were approaching nearer and nearer.

Q. When the officers and pilot on the *Kamouraska* heard the whistle of the other ship approaching nearer and nearer, should the engines of the *Kamouraska* have been stopped again or her speed reduced during the eight minutes before the cross signals?

A. Yes, either to stop dead in the water, give two prolonged blasts on her whistle and allow the *Fanad Head* to pass clear of her, or to reduce the speed to barely steerage way.

Q. Could the *Kamouraska* have had steerage way at less speed than she had before the cross-signals were given?

A. Yes.

Q. Was the speed of the *Fanad Head* for 8 or 9 minutes before cross-signals at 1½ miles against tide and wind excessive, considering the fog conditions and the fog signals from the other ship?

A. No, the speed was not excessive, it was necessary to keep her engines turning to keep steerage way on the ship, and this speed with an adverse current and wind against her would allow her to have steerage way without making way over the ground. If the *Fanad Head* had gone at a slower speed, she would have got out of command and lost steerage way.

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The Collision Regulation which governed both ships at the time is article 16, which reads:—

Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Marsden's Collisions at Sea, 8th edition, p. 350, says:—

Moderate speed is a relative term. It cannot be defined so as to apply to all cases; what it should be in each case depends on the circumstances of the particular case; and the terms of Article 16 recognize this fact. It may be stated as a general rule that speed such that another vessel cannot be seen in time to avoid her is unlawful.

This principle has been repeatedly applied by the courts as a few citations will show.

In the case of *The Emily* v. *The Elysia* (1), in the Court of Appeal, Brett L.J., said:—

What is the meaning of that rule?

It is that she shall go at a speed that, if she approaches another vessel, she may have time to perform the proper evolutions to avoid a collision.

In *The Dordogne* (2), decided in 1884 and confirmed in the Court of Appeal, Brett M.R., in rendering the judgment in the Court of Appeal, said at p. 12:

That which was moderate speed when the vessels were two or three miles apart, is not a moderate speed when the vessels are within a half a mile of each other; and as the vessels get nearer, he must bring his own to as complete a standstill as possible without putting her out of command, and if it is a steamer she must go at least dead slow, and if the other vessel is really coming at all near to him he ought to obey Article 18 and stop and reverse.

In *The Campania* (3), Barnes J., at page 105, says:—

As a general rule speed such that another vessel cannot be avoided after being seen is excessive—if the fog be not so dense as to require the vessel to stop,—she can go at a moderate speed within the rules by going slowly ahead and stopping her engines from time to time.

This judgment was unanimously confirmed in appeal by Lord Alverstone C.J., A. L. Smith M.R., and Romer L.J.

In *The Oceanic* (4), Lord Halsbury L.C., in condemning *The Oceanic,* said:—

She was going at a speed which rendered it impossible to stop within the limit of observation.

(1) [1882] 4 Asp. M.C. 540.
(2) [1884] 10 P. 6.
(3) [1901] 70 L.J. Adm. 101.
(4) [1903] 88 L.T. 303.

In *The Sargasso* (1), Sir Samuel Evans said at page 13:—

It is obvious if the vessel was proceeding at a speed which would not allow her to pull up in something like her own length, when you could only see one hundred yards off, and if the vessel could proceed and have steerage way at a smaller speed than she was going, she ought to have gone at that speed, and her speed, in so far as it exceeded that, was excessive.

In *The Counsellor* (2), Bargrave Deane J., said:—

You ought not to go so fast in a fog that you cannot pull up within the distance that you can see. If you cannot see more than four hundred feet, you ought to be going at such a speed that you can pull up in that distance. If you are going in a fog at such a speed that you cannot pull up in time if anything requires you to pull up, you are going too fast. If you cannot retain steerage way at such a speed, then you should manage by alternately stopping and putting the engines ahead.

In 1917, in the case of *Smith* v. *Mackenzie* (3), in condemning a steamer for violation of article 16, I said:—

You ought not to go so fast in a fog that you cannot pull up within the distance that you can see,

and my judgment in that case was confirmed by the Supreme Court of Canada on 10th June, 1918.

The *Kamouraska* for 10 or 15 minutes before the collision had considerable speed; she knew another ship was somewhere ahead getting nearer and nearer; she could have alternately stopped and gone ahead or she could have come to a standstill. She claims to have been stopped from 2.50 to 3 before she heard any signals from the other ship, but after knowing another vessel was in the neighbourhood she put her engines ahead in fog so dense that she did not see the *Fanad Head* until within 60 feet of her, too late to avoid the collision.

The *Fanad Head* was handled in a very different manner, was repeatedly stopped and navigated with caution, merely had steerage way, and if she had gone slower would have got out of command.

When article 16, interpreted by the principles above set forth, is applied to the circumstances of this case, it is clear that the *Kamouraska* was not going at the moderate speed and was not navigated with the caution imperatively imposed by the article and that her speed was improper and excessive, which was sufficient alone to bring about the collision. The speed of the *Fanad Head* was in compliance

(1) [1912] 82 L.J. Adm. 9. (2) [1913] 82 L.J. Adm. 72.
(3) [1917] 17 Ex. C.R. 497.

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with the article and under the circumstances was not excessive and did not contribute to the collision.

Dealing with the position of the ships when the cross-signals were given two minutes before the collision: they were approaching on opposite courses and, if the evidence of the witnesses for the *Fanad Head* is accepted, they were coming along port to port, while the evidence of the witnesses for the *Kamouraska* is that they were coming starboard to starboard. Four witnesses for the *Fanad Head*, her master, second officer, pilot and lookout (who was in the crow's nest) all testify that they saw the light 4 points off the *Fanad Head's* port bow, when the *Fanad Head* gave her first signal of one short blast, to which the *Kamouraska* answered with 2 short blasts, and two of these witnesses say the *Kamouraska* remained in view from that moment up to the collision. The evidence of the witnesses for the *Kamouraska* that the *Fanad Head* was on the former's starboard bow is not based upon seeing the other ship until immediately before the impact, but is a conclusion or inference drawn from having heard fog signals which appeared in their judgment broadening to starboard and the one blast signal of the *Fanad Head* given twice before she came in sight. The master of the *Kamouraska* admitted in his evidence that the direction of sound in fog is uncertain. It is well known to seamen and mariners that reliance cannot be placed on the apparent bearings or direction of a whistle heard in a fog. The courts have frequently called attention to this difficulty and uncertainty.

In *The Britannia* (1), Gorrell Barnes J., said:—

> It is not correct to say that a whistle having been heard, it can be located so as to be certain it is at a precise bearing on the bow. Case after case in this court shows that it is not so.

In *The Aras* (2), the same learned judge said:—

> It must not be overlooked that sound, as is quite notorious, is a very difficult thing to be accounted for in a fog.

In *The Naworth Castle* (3), Lord Loreburn L.C., in rendering judgment in the House of Lords, said:—

> Sounds in a fog are notoriously unreliable . . . .

In *The Chinkiang* (4), Sir Gorrel Barnes, in delivering

(1) [1904] 74 L.J. Adm. 46.
(2) [1906] 76 L.J. Adm. 37.
(3) Smith's Law relating to Rules of Road, p. 111.
(4) [1908] 77 L.J.; P.C. 72.

the judgment in the Judicial Committee of the Privy Council, said at page 76:—

> It is notorious that it is a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog and that it is almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it is heard.

I do not overlook the evidence of the *Kamouraska's* pilot, that a minute before the *Fanad Head's* first short blast he caught sight of a white light for an instant 2 points on the starboard bow. No one else saw that light. I am not disposed, having regard to the whole of his evidence and his record as a pilot, to accept his statement as being trustworthy. I asked my assessors the following question:—

> Q. At the respective speeds of each ship for 8 or 9 minutes before the cross-signals given 2 minutes before the collision, and considering the engine and wheel movements which followed the cross signals, would it have been possible for the ships to have been in their respective positions at the time of the collision if when cross-signals were given the *Fanad Head* had been 4 points on starboard bow of the *Kamouraska*? And their answer was: No, it was impossible.

As between witnesses who testify to having in fact seen the other ship and witnesses who testify on an inference or opinion based on what the highest courts have characterized as notoriously unreliable, I accept the version given by the witnesses on the *Fanad Head* and hold that when the cross-signals were given the *Kamouraska* was 4 points off the former's port bow, and this principle was applied by Gorrel Barnes J. in *The Oravia* (1).

Blame is imputed to the *Kamouraska* for having given a two blast signal and putting her helm hard a-starboard in answer to the first one blast signal from the *Fanad Head.* The *Fanad Head* had seen the lights of the *Kamouraska* before she gave the one blast signal and my assessors advise me it was good seamanship on the part of the *Fanad Head* to give that signal and put her helm hard a-port. The *Kamouraska* was in sight and her position had been ascertained. The situation was very different on the *Kamouraska.* When she gave two blasts and starboarded, she violated article 28, as the *Fanad Head* was not in sight and the inference from the sound of the whistle that the other ship was on her starboard bow was unfounded and erroneous. The sound of the whistles was the only indication

(1) [1905] 10 Asp. M.C. 100.

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she had of the position of the other ship and it was insufficient and should not have been acted on, having regard to the conditions and circumstances existing at the time. I asked my assessors this question:—

Did the *Kamouraska* give improper signals in answer to one short blast from the *Fanad Head* about two minutes before the collision? And their answer was: Yes, it was improper for the *Kamouraska* to give two short blasts against the one of the *Fanad Head,* and it was further wrong to alter her course to port before seeing the other ship.

In *The Vindomora* (1), Lord Herschell, in the House of Lords, said:—

I should be very sorry to say anything to indicate any dissent from the view that where two vessels are approaching one another in a fog, without any sufficient indication to justify action, neither vessel would be justified in altering her course. I think the proper steps to be taken in such a case would be for each vessel to keep the course on which she was proceeding. But, although I entirely agree that that is a good general rule to lay down, yet that rule must nevertheless be interpreted in each case according to the circumstances of that case. It is impossible to lay down an abstract rule of that description which shall be applicable to all circumstances, to all parts of the seas and to all positions of vessels. I do not understand the Court of Appeal to have thrown any doubt upon the suggestion that it is the general rule, and that in each particular case you must look to see what the circumstances were and inquire in each particular case.

In two cases in 1908, referred to in Smith, p. 116, ships were held to blame expressly on the ground of altering the course in fog under a mistaken opinion as to the position of the other ship. In the first case, *The F. Stobart* v. *The Cid* (2), Bargrave Deane J., said:—

But further than that I find her (The Cid) to blame under article 29. I do not think she behaved with due regard to seamanship in porting her helm as she did.

In the second case, that of *Rotenfels v. The Goyerri* (2), the same learned judge observed:—

I think there would have been no collision but for the fact that the Spanish steamer ported. I think it is a very false and dangerous step to take for vessels to manoeuvre in fog . . . . I am of opinion that the only blame in this case rests with the Spanish steamer. She was going too fast and I also think it was unseamanlike action to have ported her helm as she did. Therefore I pronounce her alone to blame.

Another case which shows the great risk of relying on the direction of sound signals in fog is *The Oravia* (3), where the circumstances were almost identical with those now

(1) [1891] A.C. 1 at p. 4.

(2) Smith, Rules of the Road at Sea, p. 116.

(3) [1905] 10 Asp. M.C. 100 and also at pp. 434 and 525.

under consideration, and *The Oravia* was held alone to blame for having starboarded in fog before the other ship was in sight and upon a mistaken assumption as to her actual position. The rule to be deduced from these authorities is that, a ship is not justified in altering her course until there is sufficient indication of the position of the other ship and that what is sufficient indication is a question of circumstances in each case. In my opinion it was bad seamanship for the *Kamouraska* to have given the cross-signals and to have put her helm hard a-starboard when she did and this manoeuvre with her excessive speed was the cause of the collision.

The *Kamouraska* blames the *Fanad Head* for not reversing when the former sounded her three blast signal. Before this signal was given the *Fanad Head* had seen the other ship, sounded one blast, put her helm hard a-port and gave her engines a touch ahead, and on getting two blasts from the *Kamouraska* she again gave a single blast and it was after that the three blasts were given by the *Kamouraska,* whose officers must have known then that the *Fanad Head* was going to starboard under her port helm. I received the following advice from my assessors on this phase of the case.

Q. When the *Fanad Head* saw the *Kamouraska* at what was considered to be 4 points off port bow at a distance of about ¼ mile about 2 minutes before the collision, was it good seamanship to have given one blast on whistle, a kick ahead and put her helm hard a-port?

A. Yes, it was good seamanship.

Q. When considered to have been in that position after cross-signals given, should the *Fanad Head* have put her engines full speed astern when three short blasts were given by the *Kamouraska?*

A. No, it would have opened her broadside to the *Kamouraska* and might have resulted in a more serious collision. The *Fanad Head* had already indicated her alteration of course to starboard by having given one short blast twice, and it would have been folly at this moment to contradict this manoeuvre.

Having regard to this advice which agrees with my own view so far as I am competent to form an opinion on the matter, I do not consider that the *Fanad Head* should be blamed for not reversing her engines when the other ship gave the three blast signal.

The *Kamouraska* claims that the *Fanad Head* wrongfully altered her course to starboard and did not keep her course in violation of article 21. The course was altered

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after the other ship was in sight, I am advised by my assessors that it was good seamanship and, in my opinion, it in no way contributed to the collision.

In my judgment nothing was neglected by those on board the *Fanad Head.* She was navigated in a proper and seamanlike manner and everything was done to avoid coming in contact with the other ship, and my advisers concur in this conclusion.

I am also of opinion, and my advisers agree with me, that if the *Kamouraska* had been going at the speed, after having passed Red Island Light Vessel, given by her witnesses, she could not have arrived at the actual point of collision when it occurred and that her speed must have been greater than was admitted by her witnesses.

I have given this matter very long and careful consideration and have come to the conclusion that the collision was caused by the excessive speed and wrongful starboarding of the *Kamouraska,* that she is alone to blame and that no fault or blame can be imputed to the *Fanad Head* or those on board of her, and in this conclusion both my assessors concur.

There will therefore be judgment against the *Kamouraska* and her bail for damages and costs, with a reference to the Deputy District Registrar assisted by merchants to assess the damages and take an account, and the action against the *Fanad Head* will be dismissed with costs.

Judgment accordingly.

Solicitors for SS. *Kamouraska*: *Messrs. Markey, Skinner & Hyde.*

Solicitors for SS. *Fanad Head*: *Messrs. Meredith, Holden Hague, Shaughnessy & Heward.*

1924
Jan. 14.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

GEORGE McCULLOUGH, ET AL.....PLAINTIFFS;

AGAINST

THE SHIP *SAMUEL MARSHALL*.....DEFENDANT;

AND

HYMAN I. ELIASOPH (CLAIMANT).....APPELLANT;

AND

THE STEEL COMPANY OF CANADA (CONTESTANT) .....} RESPONDENT.

Shipping and Seaman—Maritime lien—Non-transferrable—Wages of seaman—Meaning of seaman.

Held: (Affirming the judgment appealed from), That the claimant not having signed the ship's articles, not having lived on board, and the sum sued for not having been earned on board, he was not a seaman within the meaning of the Act and his claim did not carry privilege.

2. That the maritime lien attaching to a seaman's wages is personal to the seaman, and not, transferrable and no one voluntarily paying the wages of one or more of the crew can claim a lien against the ship for the amount so paid.

This is an appeal from the judgment of the Local Judge of the Quebec Admiralty District, pronounced on the 2nd day of March, 1923, rejecting with costs the appellant's claim (1).

December 15, 1923.

Appeal now heard before Honourable Mr. Justice Audette at Ottawa.

T. M. Tansey for appellant.

O. S. Tyndale for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this (14th of January, 1924) delivered judgment (2):—

This is an appeal from the judgment of the Local Judge of the Quebec Admiralty District, pronounced on the 2nd day of March, 1923, rejecting with costs the appellant's claim.

Having heard counsel at bar for the appellant and the respondent, having very carefully read the evidence and upon considering the same, I am unhesitatingly led to concur in the judgment of the trial judge—who has had the advantage, not shared by me, of seeing the witnesses and

(1) [1923] Ex. C.R. 110.

(2) An appeal has been taken to the Supreme Court.

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observing their demeanor when testifying upon the facts that are the very foundation of the case.

The appellant was never a seaman within the full acceptation of that term and his claim under the circumstances carries no privilege for the nature of the services rendered. The most that could be claimed is that he was Miller's agent. The sum sued for should have been earned on board the ship to carry privilege, and he did not live on board, nor was he ever articled. Roscoe, 4th Ed. 247.

No pursers are kept on vessels such as the one in question in this case, for the obvious reason that there is no work on board for them.

Moreover with respect to Eliasoph's contention of having paid wages, it is answered by the principle that, without the leave of the Court, no person who voluntarily pays wages of one or more of a crew has the rights which they possess against the *res*. In other words their maritime lien is not transferable—it is personal to the seaman. Roscoe, p. 254.

I also share the trial judge's view with respect to the very nature of the claim. Eliasoph who was living with his wife and children, at his father-in-law's house was not earning any money. He has not been paid any wages for the two years he has been employed by the owners of the *Samuel Marshall*. He never offered any documentary evidence to show how and where he procured the moneys for these alleged payments for which he asks reimbursement with privilege; but contented himself in saying he got the money from his father-in-law without ever calling the latter as witness. The whole story of the appellant rests on a vague and unsubstantial basis of fact that suggests fabrication and lacks the support of credible evidence necessary to give it the character of a just and meritorious claim.

Therefore the appeal is dismissed, and with costs on all issues.

Judgment accordingly.

1924
Jan. 30.

BETWEEN

HIS MAJESTY THE KING.....PLAINTIFF;

AND

WM. GOLDSTEIN ET AL.....DEFENDANTS.

Expropriation—Lease-hold—Compensation for damages to lessee—Loss of estimated profits of business not recoverable—Diminution in good-will—Elements of damage.

Held, that while under the rule observed by the courts in assessing compensation in expropriation cases, allowance ought not to be made for loss of business or estimated profits, yet where a lessee of a store has suffered a diminution of good-will, he is entitled to compensation therefor although it is in the nature of a business loss.

2. That, in addition to an allowance for loss suffered in respect to the good-will, in assessing the compensation to a lessee of premises expropriated, allowance must be made for the reasonable cost of moving, seeking new location, loss of time, storage of furniture, depreciation in fixtures and dislocation of business occasioned by such removal.

EDITOR'S NOTE: Lord Macnaughton in *Trego* v. *Hunt* (1896) A.C. 7, at p. 24, observes: "Often it happens that the good-will is the very sap and life of the business, without which the business would yield little or no fruit."

INFORMATION by the Attorney General for Canada to have the court fix the compensation to be paid to a lessee of a store on premises expropriated by the Crown, for the damage done to them in respect of their tenancy.

January 8, 1924.

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

R. T. Harding, K.C., for the Crown.

George Kilmer, K.C., and *H. H. Davis* for defendants.

AUDETTE, J., now (this 30th day of January, 1924), delivered judgment.

This is an information by the Attorney General of Canada whereby it appears, *inter alia,* that a certain leasehold interest in the expropriated building, corner of King and Yonge streets, in the city of Toronto, was taken, from the defendants, at the time the Crown expropriated the property from the Imperial Bank for "a purpose in relation to a public work," by depositing, on the 23rd February, 1923, a plan and description of such property in the office of the Registrar of Deeds for the Registry Division of East Toronto, for the city of Toronto, Province of Ontario.

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The Crown, by the information, offers $3,000 as compensation for the loss and damages to the defendants resulting from such expropriation.

The defendants, by their plea, aver that the sum of $3,000 is not sufficient and just compensation and claim the sum of $22,554.25, made up as follows:

(*a*) Profits for 8 months from 1st May to 31st December, 1923, based on average profits realized during similar period of the year for the past five years.....	$11,974 56
(*b*) Fixtures depreciation	1,500 00
(*c*) Loss of profit on 6 week's sales at a discount to reduce stock	3,398 55
(*d*) Capital loss on balance of stock undisposed of on 30th April, 1923, being the difference between cost value plus selling expenses and realization value.....	3,630 76
	$20,503 87

together with 10 per cent for compulsory taking.

The defendants have been carrying on the business of tobacconists upon the premises in question for a period of 25 years. They occupied a small store on the ground floor of the building, with a frontage of 20 feet on Yonge street and a depth of 65 feet, for which they paid, under the last lease, an annual rent of $11,000.00—a very high rental indeed, but I presume due to the special desirability of the commercial site of the building, which might be considered as the hub of the retail activities of the trade in the city of Toronto. Moreover, the lessor heated the premises and supplied water. See lease exhibit No. 2.

On the 4th July, 1912, the defendants entered into their last lease of these premises, running for a term of ten years, beginning on the 1st May, 1913, and ending on the 30th April, 1923. This lease is between the defendants and the Dominion Bond Company, Limited, and the ownership of the property changed hands before the expiry of the lease, when the Imperial Bank purchased the same.

The defendants ran a similar store and business at the time of the expropriation, at the King Edward Hotel, in Toronto,—a site quite close to 82 Yonge street, and on Sparks street in the city of Ottawa. Moreover, they had also opened a new store on the 1st December, 1921, at 152 Yonge street, on the same side of the street as No. 82, in question and not very far distant, as would be gathered from the municipal numbering of the street.

The plaintiff filed, as exhibit No. 3, a letter from the Imperial Bank, which both parties agreed set out the facts that did occur prior to the expiry of the lease on the 30th April, 1923, and prior to the date of the expropriation. The letter reads as follows:—

IMPERIAL BANK OF CANADA
GENERAL MANAGER'S OFFICE
Toronto, 28th December, 1923.

R. T. Harding, Esq., K.C.,
714 Temple Building,
Toronto.

Re Northwest Corner King and Yonge Sts., Toronto

Dear Sir:—I have received your letter of 27th inst. and in reply would state as leases in the above building fell in, it was the definite policy of the bank and instructions were issued to our Bank Premises Department to endeavour to renew all leases up to, but not beyond 31st December, 1923, the date when the last lease in existence at the time we acquired the building would expire, the intention of the bank being up to the time notice of expropriation was served by the Government to obtain possession of the premises for its own purposes with a view to the erection of a new building, plans to that end having been considered, but nothing definitely settled.

In accordance with this policy, Mr. Goldstein was advised of the bank's intention and given to understand that he could remain as tenant until 31st December, 1923.

I trust this is the information you require.

Yours very truly,
Signed. W. G. MORE,
Secretary.

It appears from this letter that the defendants did obtain, by verbal arrangement, a temporary extension of their lease from the 1st of May to the 31st December, 1923. Therefore, it is well to bear in mind that the defendants while they had at one time all reason to expect to vacate their premises on the 1st May, 1923, that expectation was mitigated by this verbal extension; but they knew that without this extension they had to leave on the 1st May, 1923. However, they thereby became tenants with a right to retain possession till a fixed and definite short period, when they would have to quit.

Now we are told by the defendant, William Goldstein, that the shop at 152 Yonge street—a few hundred yards from the number 82 shop on the same street—was not opened with the object of taking over the No. 82 shop at the expiry of the lease on the 1st May, 1923, and that he has ever since endeavoured to find another store about 300

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feet from No. 82 Yonge street north of King street. I wish to observe that in making such a statement the defendant is not doing himself either justice or credit, and that contention, under the circumstances, falls short of carrying conviction. This defendant appeared to be a keen business man. Is it possible to believe that he was overlooking the expiry of his lease early in 1923—about 15 months thenceforward? Had he not become acquainted with the fact that the bank had bought the property?

The rent of $11,000 for No. 82 appeared to me to be too heavy for a business of that class which was carried on at a loss during four months in every year—January, February, March and April. At the new shop at 152 Yonge St., the rent is only $7,000—a good saving of $4,000. Under the earlier leases the rental was much lower. The profits decreased materially in the last five years.

The expropriation took place on the 23rd February, 1923, and a notice to quit and deliver up possession on the 30th April, 1923, of the premises known as No. 82 Yonge St., was served upon the defendants on the 13th March, 1923, when from that day on to the 30th April they carried on a special sale. They sold part of the goods on hand. No inventory of the stock was then taken, but an estimate was made. Some of the fixtures have been sold and the balance stored in a warehouse where they are still, and the balance of the stock was very properly taken to the defendants' store at 152 Yonge St.—a few steps, so to speak, from the No. 82 premises. The staff at No. 152 was discharged and replaced by the staff of No. 82 and the business at 152 increased.

Prepared by chartered accountants—one employed by the plaintiff and the other by the defendants—we have on record a number of statements showing the nature, the volume and the evolution of the defendant's business during the previous five years.

It is well to bear in mind in approaching all of these statements prepared by the accountants that in some of them are included revenues from outside the business, such as returns from Dominion of Canada War Bonds, that have nothing to do with the trading business whatsoever.

From the statement prepared by the defendants exhibit No. 6 pp. 17 and 18, it appears that the total profits realized by that business amounted to $331.90 for the fiscal year of 1922—a steady decrease from 1918 to 1922. That very statement had also been certified and used for their income tax returns.

A great deal of information can be gathered from the perusal of both statements filed as exhibits numbers 6 and 7; but it would be too lengthy to analyze them here. Suffice it to state that the profits realized do not reasonably justify the extravagant claim made by the plea which is not borne out by the financial results of the past and is computed on a wrong basis. The defendants are entitled to the damages done to them in respect of their tenancy.

Now, the question submitted for determination under the circumstances of the case, is the fixing of the compensation of this unexpired lease that had but a short time to run, namely a period of eight months and subject to the abatement of the rent.

Under the provisions of section 121 of the English Land Clauses Act, 1845,—decisions under which have been regarded as authoritative in Canada—it is enacted that a tenant for a year or from year to year, required to give up possession before the expiration of the term of the lease, shall be entitled to compensation for the value of his unexpired term and to any just allowance which ought to be made to him for any loss or injury he may sustain.

With the enunciation of such a principle no one can quarrel; (1) but I have to recognize that the decisions of the courts in interpreting all of the compensation provisions of this statute very materially narrowed the literal import of the words used therein.

However, as Nichols on Eminent Domain p. 714 says, it is no simple matter to fix the market value of an unexpired term of a lease; it is almost impossible to apply the customary test of market value to a leasehold interest. It is really no test at all, because a lease rarely has any market value. It would seem that a lease in this country—contrary to custom of trade in France in that respect—might

(1) Bell, Landlord and Tenant, 437. Lewis, Eminent Domain, 3rd Ed., 1256.

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well be held to fall within the class of property not commonly bought and sold, and that consequently the intrinsic value or the value to the owner might be taken as the best and only available test of market value. The value to the owner of a lease, when he is paying the full rental value of the premises as rent—here is an abatement of rent—is the right to remain in undisturbed possession to the end of the term.

Whatever loss the tenant may be entitled to recover, expected profits during the eight months should not be the test. Yet when an allowance is made for diminution of good-will, to some extent that compensation covers loss of profit. It seems that the question of the loss of estimated profits as a mode of arriving at the compensation for the value of this unexpired term, can no more be considered, than can be considered by the expropriating party the probable loss a lessee might make, and claim a set off therefor. The question of the loss of profits *per se* is too remote. It is personal to the individual. Through the ability, skill, sagacity and wisdom of one individual large profits might be realized in a business; while another person dealing with a similar and even the same business, but wanting in those qualities would bring the business into the Bankruptcy Court.

No allowance can be made for loss of profits, *qua* estimated profits.

DeKeyser's Royal Hotel, Ltd. v. *The King* (1); *Gibbon* v. *The Queen* (2); *McPherson* v. *The Queen* (3); *Perram* v. *Town of Hanover* (4); *McMillin Printing Co.* v. *Pittsburg, Carnegie & Western Railway Co.* (5); *McCauley* v. *City of Toronto* (6); *Allison* v. *Chandler* (7); *White* v. *Her Majesty* (8); *The King* v. *Montgomery* (9); *The King* v. *Jalbert* (10); *Rickets* v. *Metropolitan Ry. Co.* (11), Brown and Allen, Law of Compensation, 2nd ed. p. 101.

(1) [1919] 2 Ch. D., 197 at p. 238.
(2) [1900] 6 Ex. C.R. 430;
(3) [1882] 1 Ex. C.R. 53.
(4) [1916] 31 D.L.R. 142.
(5) [1907] 216 Penn S.R. 504.
(6) [1889] 18 Ont. R. 416.
(7) [1863] (7 Cooley) 11 Mich. Rep. 543.
(8) [1870] 22 L.T.R. 591.
(9) [1917] 40 D.L.R. 147.
(10) [1916] 18 Ex. C.R. 78.
(11) [1865] 34 L.J.Q.B. 257; 13 W.R. 455 and annotation in 1 D.L.R. 509.

The defendants had the right to remain in undisturbed possession to the end of the term. Before there was any question of expropriation the defendants knew that they had to leave on the 30th April, 1923. Then that term was extended by the bank to the 31st December, 1923, and the expropriation forced them to leave at the very date of the expiry of the lease, that is in April instead of December. They, however, knew they had to leave on the 31st December, 1923, and they cannot recover loss of business or estimated profits *qua* such loss; but they are entitled to recover for any loss or injurious affection to the good-will of their business, as hereinafter set forth.

If the good-will is the probability of the continuance of a business connection, it is not taken away by the expropriation, but remains the property of the trader and the loss suffered is the diminution in its value in consequence of his compulsory ejectment from the premises he is occupying for the eight months in question. Sometimes this diminution in the good-will is hardly appreciable, as the business may follow to his new premises the individual with whom a part of the public had been in the habit of dealing. Moreover when new premises can be and have been procured in the immediate neighbourhood, the loss in the good-will, if any, may be merely nominal.

The several legal elements of damages to be considered in assessing the compensation are such as will cover any loss of or diminution in the good-will, thereby letting in some loss of business or estimated profits. Then it should further cover the reasonable cost of removing, seeking a new location, loss of time, storage of part of furniture during eight months, depreciation of fixtures,—furthermore a certain amount should also be allowed for the dislocation or disturbance of the business occasioned by such removal,—all of these amounts being very difficult of estimation in detail.

And all of such elements being considered under the circumstances of the case—that is having regard to the fact that the defendants had to leave the premises on the 31st December instead of the 30th April, 1923; and further, a matter which cannot be overlooked, and that is that the defendants had already secured (when they knew their lease

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was expiring 1st May, 1923) in December, 1921, a new place of business on Yonge street, a short distance from the present one; furthermore, that they transferred the balance of their stock at those premises, dismissed their staff at 152 Yonge street, and ran the business with the staff at 82 Yonge street, since moving to the new place, with the result that the volume of business had since increased at No. 152—not overlooking the abatement of a monthly rent of $916.67 and the salaries at No. 82,—I am of opinion, having special regard to the ascertained profits made upon these premises, No. 82, during the last five fiscal years of the defendant—and more especially the last year, in 1922, when the special accountant heard as a witness found them to be $331 for the whole year—that the amount of $3,000 offered by the plaintiff is an ample, fair and just compensation to the defendants under the circumstances. To this amount of $3,000 I will, however, add ten per cent, and costs in view of the action being in the nature of a compulsory taking.

Therefore, there will be judgment declaring that the defendants are entitled to recover from the plaintiff the said sum of $3,300 with interest thereon from the 23rd February, 1923, to the date hereof; the whole in full satisfaction for any loss or damages whatsoever arising out of the expropriation and the ejectment of the defendants from the said premises eight months in advance of the expiry of their term of occupation allowed by their landlord.

The defendants will further be entitled to the costs of the action.

Judgment accordingly.

1924
Feb. 4.

IN THE MATTER OF The Soldier Settlement Act of 1919, and its amendments.

BETWEEN

THE HONOURABLE SIR LOMER GOUIN, HIS MAJESTY'S ATTORNEY GENERAL FOR CANADA..... } PETITIONER;

AND

ALFRED EDWARD PUGH.....RESPONDENT.

Crown—Soldier Settlement Act, 1919, Section 48—Warrant of possession—When may be obtained.

Held, where the Crown had entered into an agreement with *P.*, a returned soldier, for the sale of land to him, under the provisions of the Soldier

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Settlement Act, 1919, it was not open to the Crown, upon *P's.* failure to perform his part of the said agreement, which had been cancelled as provided for by the said Act, to obtain the warrant of possession referred to in Section 48 thereof; because that section limits the issue of a warrant to cases where the Crown has acquired land by contract or purchased it compulsorily, and resistance or opposition is made by some person, preventing the Crown from entering upon and taking possession of the same.

APPLICATION by the Attorney General for Canada for the issue of a warrant of possession under Section 48 of the Soldier Settlement Act, 1919.

February 2nd, 1924.

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

E. Miall for the Attorney General.

George F. Henderson, K.C. for the respondent.

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

AUDETTE J., now (February 4, 1924), delivered judgment.

This is an application, on behalf of the Attorney General of Canada, for the issue of a warrant under the provisions of Sec. 48 of The Soldier Settlement Act, 1919, directing the sheriff to place the board, or some person acting for it, in possession of the West Half of Sec. 2, Township 38, Range 12, West of the second Meridian, in the province of Saskatchewan.

The Crown, having acquired the lands in question, entered into an agreement for the sale of the same to the respondent—a returned soldier—under the terms and conditions mentioned in the deed filed herein and executed under the provisions of the Act.

The respondent having failed to perform his part of the contract, the contract or agreement for sale was duly cancelled and rescinded as provided by the Act.

The Crown following up the rescission or cancellation of this agreement of sale, asked for possession of the lands in question and upon the respondent's refusal to comply therewith, now applies for the warrant of possession provided by Section 48.

This Section 48 of The Soldier Settlement Act was borrowed almost word for word, *mutatis mutandis,* from Sec.

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21 of The Expropriation Act (R.S.C. 1906, ch. 143) to perform obviously the same function as Section 21, since Section 48 forming part of Part III of The Soldier Settlement Act, deals specifically with identical matters, i.e., with the expropriation of lands by the Crown for the purposes of the Act.

All of these sections of Part III of the Act, from Sec. 35 to Sec. 48 deal exclusively with the expropriation of lands, and it is in the light of such a purpose that one must approach here the consideration of the meaning of Section 48.

Moreover the words of Sec. 48 distinctly declare under what circumstances a warrant may issue. It is when the Crown or the board is meeting with resistance or opposition upon entering or taking possession of land,—that is when it is expropriating, taking land compulsorily, that the provision applies. This appears more clearly upon reading further on when it enacts that the judge will direct the issue of such warrant upon

> proof of the execution of the conveyance of such land to the board, or agreement therefor—or the gazetting of a notice in Form D.

Indeed, all of these circumstances have relation to the time the Crown acquires land for the purpose of the Act and not otherwise.

It therefore appears beyond all doubt that the issue of such a warrant is not authorized by the Act when the respondent, in breach of his contract or agreement withholds possession of the land. The position of the parties in the present controversy is that of a contractual relation flowing from the agreement of sale above referred to, and which is filed with the said petition.

Therefore I find that Section 48 does not provide for the issue of a warrant of possession upon the circumstances of the present case; but is limited in its scope to lands expropriated or compulsorily taken. The application is dismissed with costs.

Judgment accordingly.

1924
Feb. 5.

QUEBEC ADMIRALTY DISTRICT

THE CORPORATION OF THE TOWN OF WESTON ..... PLAINTIFF;

VS.

THE STEAMER *RIVERTON*..... DEFENDANT.

Shipping—Bill of Lading—"Weight unknown"—Carriage—Evidence of delivery—Burden of proof—Recovery against ship for shortage—Customs Duty paid thereon.

W. sued for an alleged shortage in the delivery of a cargo of coal received by the *R.* for delivery at Montreal. The *R.* contended that by reason of the words "weight unknown" in the bill of lading *W.* was obliged to prove not only that they had received less than the amount stated in the bill of lading, but also that the ship had received the full quantity, and should have examined the weighers who put the cargo on board.

Held: That whatever effect should otherwise be given to the words "weight unknown" in a bill of lading for coal, where the Master of the ship stated in evidence that the said bill of lading showed the actual weight taken on board, and the consignee proved that the quantity delivered to him was less than was stated in the bill of lading, the onus was upon the ship-owner to establish that the weight in the bill was wrong; this he may do by showing mistakes by the tally-men from whose tallies the bill of lading was made out, or by indirect evidence sufficient to satisfy the Court, beyond reasonable doubt that he delivered all he received.

2. That in such a case, where the ship-owner has failed to prove that the quantity mentioned in the bill of lading was not in fact put on board, the ship was bound to deliver the full quantity stated in the bill of lading; and that the Consignee having paid the shipper for the full quantity, was entitled to recover against the ship the proportion of the purchase price represented by such shortage.

3. That although the Consignee might be entitled to claim a refund of the amount erroneously paid for Custom duty on such shortage from the Custom's authorities, it cannot be claimed as an element of damage against the ship; and that likewise amounts overpaid for handling and discharging cargo should be claimed against those employed to do the work, and not against the ship.

ACTION for alleged shortage in delivery of cargo of coal received by steamer defendant for delivery at Montreal.

November 26, 27, 1923, and January 28, 1924.

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

A. R. Holden K.C., P. P. Hutchison and *J. Howard Gray* for plaintiff.

A. W. Atwater K.C. and *L. Beauregard* for defendant.

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

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TOWN OF WESTON v. *Riverton.*

Maclennan L.J.A.

MACLENNAN, L.J.A. this 5th day of February, 1924, delivered judgment.

The plaintiff's action is for alleged shortage in the delivery of a cargo of coal received by the steamer *Riverton* at Cardiff, Wales, for carriage and delivery at Montreal under a bill of lading issued on behalf of the master to the Bank of Montreal or assigns and assigned to the plaintiff. The quantity stated in the bill of lading is 4,187 tons 13 cwts., and plaintiff claims that there was a shortage in delivery at Montreal of 447 tons 17 cwts and 32 lbs. The plaintiff paid the shipper for the bill of lading quantity and paid duty, storage, wharfage and handling charges thereon at Montreal.

The defence is that the bill of lading contained a qualification

weight unknown

and further

freight for the same prepaid as per Charter-party dated 15th August, 1922, all the terms and exceptions contained in which charter are hereby incorporated.

The Charter-party was between the owners of the steamer and the agents for the charterers, in which it was agreed that the steamer *Riverton* should proceed to Cardiff and there load a full and complete cargo of nominated coal not exceeding 4,400 tons nor less than 4,000 tons, and being so loaded should proceed to Montreal and there deliver her cargo on being paid freight at the rate of 13 shillings and 6 pence per ton of 20 cwts. or on bill of lading quantity, and contained the further provision:—

The bills of lading shall be prepared in accordance with the dock or railway weight in form endorsed on this charter and shall be signed by the master, agent or owner, weight unknown, freight and all condition as per this charter. Such bills of lading to be signed at the charterers' or shippers' office, within 24 hours after the steamer is loaded.

The defendant further alleges that the *Riverton* proceeded to Cardiff and took on a full cargo of coal, bills of lading were signed for the master by Sir R. Ropner & Company, Limited, as agent, weight unknown, and that the statement contained in the bill of lading that 4,187 tons 13 cwts were shipped was the statement by the shipper, who was the charterer, for the purpose of freight only (which was paid in advance) and was not an acknowledgement by the ship defendant that the weight was correct; that the steamer

proceeded to Montreal and there delivered all the cargo which had been put on board her at Cardiff; that none of the cargo was jettisoned, lost or consumed for the steamship's purposes and all the cargo received was delivered.

The evidence at the trial establishes that there was a shortage of 447 tons 17 cwts. and 32 lbs., the total quantity delivered being 3,739 tons 15 cwts. and 80 lbs. Before the trial the defendant examined the master and chief engineer of the *Riverton*. According to the bill of lading, in addition to the cargo, the ship received at Cardiff 858 tons 17 cwts. of bunker coal for the ship's use independent of the cargo. The cargo and bunker coal were both of the same kind. Both were brought alongside the ship by the Great Western Railway. The coal was weighed alongside the ship by the railway weighers and went directly from the weighing machines into the ship. An official representing the owners was present throughout the loading and weighing. The master produced a statement (Exhibit D-9) of the cargo and quantities as weighed when the ship was loaded which was given to him by the railway weighers and which the master says was subject to check afterwards. This statement shows the cargo consisted of 4,177 tons 13 cwts. The checking was done after the ship sailed and before the bill of lading was issued. In the cross-examination of the master there is the following evidence:—

Q. All the coal that was weighed went into the ship?

A. Yes.

Q. Did you get any other statement of the weights apart from this exhibit D-9?

A. Yes, I got it on the bill of lading when I got out here. The bill of lading shows the same practically. It was sent out to me to meet me here.

Q. The weights put into the bill of lading you had also obtained from the railway weighers?

A. From the head of the railway office.

Q. That the bill of lading would be made out after the checking had been done, that you refer to?

A. Yes.

Q. Am I right that the bill of lading shows the actual final weight taken just as the coal was loaded into the ship?

A. Yes.

Q. You or some of your officers or crew are present at the time that the coal is weighed and loaded into the ship?

A. Yes.

Q. Were you present yourself this time?

A. I was aboard the ship all the time. I did not see it weighed.

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TOWN OF WESTON v. *Riverton.*

Maclennan L.J.A.

Q. If you did not somebody did on your behalf?
A. There are proper officials for that purpose. There is a superintendent at the ship all the time.
Q. A superintendent on behalf of the owners?
A. A superintendent engineer.
Q. What is his name?
A. Mr. Dyack, or something like that.
Q. Employed by the owners of the ship?
A. Owners' representative, yes.

The master also testified that this representative of the owners would have a record of the weights, but he was not called as a witness, and his record of the weights was not offered in evidence.

Statutory declarations by the master, 2nd officer and chief engineer of the *Riverton* were filed at the trial in each of which it is stated:—

(2) That the said steamship (*Riverton*) was chartered by Charter-party on the fifteenth day of August, nineteen hundred and twenty-two (1922) for a voyage from Cardiff or Barry to Montreal for a full and complete cargo of coal not exceeding 4,400 tons nor less than 4,000 tons, freight to be paid in advance;

(3) That the said steamship took on board at Cardiff a full cargo of coal and sailed from Cardiff on the sixteenth day of September, 1922, at 1 a.m. and arrived in Montreal on the fifth day of October, 1922, at 7.15 a.m. and there delivered the said cargo alongside the Dominion Coal Company's wharf;

(4) That the said freight was paid in advance, and upon quantities shipped and weighed before being put on board, and bills of lading issued and freight paid upon the quantities so established;

(5) That none of the said cargo of coal was jettisoned, lost, or consumed for the steamship's purposes, and all of the cargo received on board has been delivered upon the wharf aforesaid in Montreal.

The Charter-party provided that the owner shall furnish, if required, a statutory declaration by the master and other officers that all the cargo received on board has been delivered. These statutory declarations of the master, 2nd officer and chief engineer go far beyond the requirements of the Charter-party in that respect and in very formal terms state, that the ship was chartered to carry a full and complete cargo of coal not exceeding 4,400 tons nor less than 4,000 tons; that she took on board a full cargo of coal (which must mean a cargo between 4,000 and 4,400 tons and the bill of lading quantity was within these limits); that freight was paid upon the

quantities shipped and weighed before being put on board

and bills of lading issued upon the

quantities so established.

The freight paid as appears by the receipt on the face of the bill of lading was at the rate stated in the Charter Party and upon the bill of lading quantity which these statutory declarations state was

shipped and weighed before being put on board.

This is a very formal admission of the master and his two officers, that the bill of lading quantity was actually put on board.

The chief engineer of the *Riverton* filed two statements purporting to show the quantity of coal consumed by the steamer on the voyage from Cardiff to Montreal and on the return voyage from Montreal to Marseilles. When the steamer arrived at Cardiff she had 44·5 tons of bunker coal; she took on board there 858 tons 17 cwts. of bunker coal, and on arrival at Marseilles, on November 13, 1922, she still had 197 tons 17 cwts. bunker coal. The quantity used by the ship, according to the chief engineer and the master, from the ship's arrival at Cardiff until her arrival at Marseilles, was 705 tons. If the ship used more than that quantity for bunker purposes, some of the cargo must have been used.

After the trial the plaintiff applied to the court to reopen the case for the purpose of examining expert witnesses on the question of the quantity of coal which would be necessary for the operation of the ship from the time she arrived at Cardiff until her arrival in Marseilles. A witness, holding a first-class marine engineer's certificate and who had been seventeen years at sea during two of which he had been chief engineer, testified that after examination of the consumption of coal statements filed by the *Riverton's* chief engineer and examination of the engine room log book and the chief officer's log book for the *Riverton's* voyage out to Montreal and back, in his opinion, after giving the ship benefit of all possible doubt, she would have used 931 tons bunker coal instead of 705 tons, and possibly she might have used as much as 1,091 tons. His testimony is corroborated by that of a master mariner who has had over thirty years experience and who testified that, in his opinion, the quantity of bunker coal claimed to have been used on the *Riverton* during these two voyages is very much underestimated and that, if he were master of a ship

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and an engineer brought him these consumption sheets, he would say they were not true. The defendant examined a marine engineer and a master mariner to support the contentions of the defendant as to the quantity of coal used by the steamer, but the evidence of the two experts called on behalf of the plaintiff is entitled, in my opinion, to greater weight than that of defendant's experts.

At the trial counsel for defendant submitted that the quantity of cargo stated in the bill of lading was merely the statement of the shipper and was put into the bill of lading for the purpose of calculating the freight and that, having regard to the words

weight unknown

in the bill of lading, there was no presumption against the owners that the quantity stated in the bill of lading had actually been received and put on board, and in support of this proposition counsel cited among other cases: *New Chinese Antimony Company Limited* v. *Ocean Steamship Co., Ltd.* (1).

It appears to me that the evidence of the master and the statements contained in the statutory declarations filed by him and two of his officers destroy whatever effect should otherwise be given to the words

weight unknown,

and the authorities cited on behalf of defendant are not in point. Before the bill of lading was issued the weight of the cargo had been ascertained, the railway weights had been checked by an officer who superintended the loading on behalf of the owners, and the master testified that the bill of lading shows the actual final weight taken just as the coal was loaded into the ship. The owners' representative who superintended the loading is proved to have been in possession of a record of the weight. He was not called as a witness. No attempt was made to show that any mistake was made by the men who were doing the weighing of the coal as it was delivered into the ship. The experts examined on behalf of plaintiff, if their evidence is to be accepted, and I can see no reason why it should not, establish that more bunker coal was used for the ship's purposes than the officers of the ship admit. The cargo

(1) [1917] L.R. 2 K.B. 664; 86 L.J.K.B. 1417.

coal was the same kind of coal as the bunker coal and it was not a difficult matter for the engine room staff of the steamer to get at the cargo and appropriate a portion of it for the steamer's purposes. Having regard to the whole of the evidence, I am not satisfied that the defendant has established beyond reasonable doubt that no portion of the cargo was used for the purpose of the ship on the voyage from Cardiff to Montreal, and therefore it is not sufficient for the ship's officers to say in general terms, without showing any mistake by the weighers, that they delivered in Montreal all the cargo which they received at Cardiff. The admissions of the master placed the burden of proof on the defendant to establish that the quantity mentioned in the bill of lading was wrong, but there is no evidence in the case to suggest any mistake in the quantity admitted by the bill of lading and by the master.

In *Sanday* v. *Strath Steamship Company* (1), Greer J., said:—

> All these cases of short delivery turn on inferences of fact and not on rules of law. The rules of law are quite clear. They are as follows: (1) A plaintiff claiming damages for short delivery must, like any other claimant, prove his case. (2) It is sufficient to entitle the plaintiff to succeed if he proves the delivery of a less number or weight or measure of goods than that which is admitted in the bill of lading. This proof puts the onus on the ship-owner to establish that the number, weight or measure admitted by the bill of lading is wrong. (3) He may do so by direct evidence showing that a mistake was made by the tallymen, from whose tallies the bill of lading was made out. (4) He may do so by indirect evidence, sufficient to satisfy the tribunal of fact beyond reasonable doubt, that none of the goods were lost or stolen after receipt, and that he delivered all that he received.

This decision was affirmed on appeal by Bankes L.J., Warrington L.J., and Scrutton L.J.

As the defendant has failed to prove that there was in point of fact a short shipment and that the bill of lading quantity was not in fact put on board, the ship was bound to deliver in Montreal the full quantity stated in the bill of lading: *McLean* v. *Fleming* (2), and *Smith* v. *Bedouin Steam Navigation Co.* (3).

The plaintiff paid the shipper for the bill of lading quantity and is entitled to recover the proportion of the pur-

(1) [1921] 90 L.J.K.B. 1349 at p. 1351.
(2) [1871] L.R. 2 H.L. Sc. 128; 25 L.T. 317.
(3) [1896] A.C. 70; 65 L.J.P.C. 8.

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chase price represented by the shortage of 447 tons 17 cwts. and 32 lbs., which amounts to one thousand and seven pounds thirteen shillings and ten pence, equivalent at the proved rate of exchange to $4,454.01.

The plaintiff includes in its action claims for duty, wharfage and handling charges on the shortage. Duty was paid to the Canadian Customs on the bill of lading quantity before the cargo was discharged and before the shortage in delivery was discovered. As soon, however, as the shortage was known it appears to me that the plaintiff was entitled to claim a refund of the duty paid on the shortage. That claim would be against the Customs authorities and cannot be maintained against the ship. The same observations apply to any overcharge made to plaintiff for handling and discharging the cargo. If plaintiff paid more than it should have paid, its claim for reimbursement should have been made against the persons who were employed to discharge the cargo and not against the ship. The item in the action for freight on the shortage was abandoned at the trial.

There will therefore be judgment against the ship and her bail for $4,454.01, with interest and costs.

Judgment accordingly.

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

Solicitors for defendant: *Atwater, Bond & Beauregard.*

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Feb. 8.

QUEBEC ADMIRALTY DISTRICT

KNOX BROS., LIMITED.....PLAINTIFF;

AGAINST

THE STEAMER *HEATHFIELD* AND OWNERS..... } DEFENDANTS.

Shipping—Charter-party—Discharging of cargo—"Default"—Delay fixed or ascertainable—Lay days—Demurrage—"Running days."

1. That the provision in a charter-party that the discharge of a cargo would be "at the rate of * * * feet per day," becomes, once the cargo is ascertained, an undertaking to complete the discharge within a fixed period of time, such period to be computed by days calculated at the rate fixed in the charter-party, and not by hours, and that where a fraction of a day was required for the completion of the discharge, the charterer is entitled to the whole of that day.
2. That where there is an undertaking to discharge the ship in a fixed period, such a provision is an absolute and unconditional undertaking by the charterer that the ship will be released at the expiration of the lay days, regardless of the difficulties and obstacles which might be met in the course of such discharge, and that the words "default of charterer" in the charter-party meant not merely default to receive the cargo, but generally an omission or neglect to perform the contract.
3. That "days" and "running days" in computing demurrage mean the same thing, in absence of some particular custom, and refer to calendar days, without excepting Sundays and holidays, and not any period of 24 hours; and in this case "lay days" being completed at midnight on the 13th June, 1923, and the unloading completed on the 18th at 11 p.m., the ship was entitled to five days demurrage.

ACTION for damage to cargo of lumber on voyage from Vancouver, B.C., and Portland, Ore., to Montreal, and counter-claim by defendant against plaintiff for $1,977.84 demurrage for detention of steamer beyond the lay days allowed under the charter-party.

Plaintiff's action was abandoned at trial and action proceeded only on the counter-claim.

8th, 9th, 10th January, 1924.

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

C. A. Hale, K.C. for plaintiff.

A. R. Holden, K.C. and *R. Clement Holden* for defendants.

The facts are stated in the reasons for judgment.

MACLENNAN, L.J.A. now, February 8, 1924, delivered judgment.

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The plaintiff's action is for alleged damage to a cargo of lumber carried from Vancouver, B.C., and Portland, Ore., to Montreal, under the terms of a charter-party entered into at Montreal on 6th February, 1923, between plaintiff and the agents for the steamer *Heathfield* and her owners. The defendants in their defence deny responsibility for the alleged damage to the cargo and counter claim against plaintiff for $1,977.84, as demurrage for the detention of the steamer at the port of Montreal five days and two hours beyond the lay days allowed by the charter-party for the discharge of the cargo.

The steamer arrived in the port of Montreal at 9 a.m. on May 31, 1923, and the master immediately by letter notified plaintiff of the arrival and that the lay days for discharging the cargo would commence at 9 a.m. June 1. The discharge began at 1 p.m. on June 1 and was completed at 11 p.m. 18th June. By the terms of the charter-party the cargo was to be delivered by the vessel at the port of discharge at the vessel's rail, any custom to the the contrary notwithstanding, and in the order most convenient to the vessel. The charter-party contains the following provisions relative to loading, discharging and liability for demurrage:—

F. The party of the second part (charterers) shall be allowed for loading and discharging said vessel at the respective ports aforesaid, lay days as follows: Cargo to be supplied to vessel at loading place or places at the rate of two hundred and fifty thousand feet, board measure, each working lay day (Sundays and legal holidays excepted, unless otherwise agreed by mutual consent) .....
discharge to be given at the rate of four hundred thousand feet per day, at such safe wharf, dock or place as charterers or their agents shall designate.

For each and every day's detention by default of said party of the second part or their agents or receivers of cargo, demurrage shall be paid at the rate of sixpence (6d.) per net register ton per running day, day by day (before bills of lading are signed if at loading port, and before completion of delivery of cargo if at port of discharge) by said party of the second part or agents or receivers of cargo to said party of the first part or agents.

The plaintiff's answer to the claim for demurrage is, that the ship failed to discharge at the rate of 400,000 ft. per day as required by the charter-party and is alone responsible for any delay that may have occurred, and plaintiff was not liable for any demurrage charges whatsoever.

At the trial the plaintiff abandoned its action for damage which was accordingly dismissed. The defendants then put in their evidence on the counter claim and plaintiff examined its witnesses in support of its answer. The cargo was in part round logs and square timber and the balance material varying in thickness from one-half to three inches. The discharge was a joint operation, as the ship was obliged to deliver the cargo at the rail where the plaintiff, charterer, was obliged to receive it. The same firm of stevedores acted on behalf of the ship and plaintiff under a separate contract with each. The cargo was delivered over the rail into the water and not on the dock. Rafts were formed of the timber and lumber as delivery proceeded. The evidence shows that the mechanical appliances on board the ship were in good order and sufficient for the purposes of delivering the cargo and that the stevedores' workmen were competent and efficient. The discharge began at 1 p.m. on June 1. No work was done on June 3, 10 or 17 which were Sundays. June 4 was a legal holiday, the King's birthday, but the men worked the whole day. No agreement was made between the charterer and the master, or the ship's agents, that the King's birthday, although the men worked, should be counted as a lay day. There was some interruption of the work on June 8 on account of rain, the men working only a part of the forenoon. There was also interruption on account of rain on June 14, but on that day the defendants claim the lay days had expired and the ship was on demurrage. Work was suspended during the forenoon of 18th June on the order of the master. The ship had a lien on the cargo for demurrage and the discharging was suspended pending the receipt of a personal undertaking from the plaintiff for the ship's claim for demurrage. As soon as that undertaking was obtained the discharge was resumed and was completed at 11 p.m.

An important question in this case is, what was the nature and extent of plaintiff's engagement under the charter-party for detention of the ship beyond the time allowed for discharging the cargo? The claim for demurrage is in respect of the discharge and has nothing what-

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ever to do with the loading of the cargo. The discharge was to be at the rate of 400,000 feet per day, the bill of lading quantity was 3,805,260 ft. and, at the stipulated rate, should be discharged in 9·51 days, if a fraction of the last day is to be counted, but if not, 10 days. That was the delay stipulated for the discharge and the release of the ship.

In *Randall* v. *Lynch* (1), Lord Ellenborough said at page 355:—

> I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time, he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent them from doing so.

In *Barret* v. *Dutton* (2), *Gibbs* C.J., said, at p. 334:—

> There was an absolute undertaking by the freighter of this ship to load and discharge her in 30 days and whether it was or was not possible for him to do so from the state of the weather, is quite immaterial.

In *Thiis* v. *Byers* (3), Lush J., said:—

> We took time to look into the authorities, and are of opinion that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part, that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay days. This is the doctrine laid down by Lord Ellenborough in *Randall* v. *Lynch*, which was upheld by this court; and it has been accepted as the guiding principle ever since.

In the House of Lords, in 1880, in the case of *Postlethwaite* v. *Freeland* (4), Lord Selborne L.C., said:—

> There is no doubt that the duty of providing, and making proper use of, sufficient means for discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charter-party, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated.

In the House of Lords, in 1919, in the case of *Alexander* v. *Aktieselskabet Dampskibet Hansa* (5), Viscount Finlay cited with approval the language used by Scrutton L.J., in

(1) [1809] 2 Campbell's Rep. 352.
(2) [1815] 4 Campbell's Rep. 333.
(3) [1876] L.R. 1 Q.B.D. 244 at p. 249.
(4) [1880] 5 A.C. 599 at p. 608.
(5) [1919] 88 L.J. P.C. 182.

his work upon charter-parties and bills of lading, Article 131 reading as follows:—

If by the terms of the charter the charterer has agreed to load or unload within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever be the nature of the impediments which prevent him from performing it, unless such impediments are covered by exceptions in the charter, or arise from the fault of the ship-owner or those for whom he is responsible.

The charter-party now under consideration provides for discharge at a rate per day which becomes, once the cargo is ascertained, an undertaking to complete the discharge in a fixed period of time regardless of the difficulties and obstacles which might be met during the course of the discharge. It is an absolute undertaking on the part of the plaintiff, as charterer, that the ship would be released and returned to her owners at the expiration of the lay days, subject to the obligation of paying demurrage for each and every day's detention at the rate of six pence per net registered ton per running day, day by day. The defendants claim demurrage from 13th June at 9 p.m. for five days and two hours at the rate specified in the charter-party. The net registered tonnage of the *Heathfield* is 3,198 tons and, at six pence per ton, would entitle the ship to claim 79 pounds 19 shillings per day, or, as the charter-party says, *per running day, day by day.* Lord Abinger, C.B., in *Brown* v. *Johnson* (1), said:—

I think the word *days* and *running days* means the same thing, viz: consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation, they must be expressed.

Lord Esher, M.R., in *Nielsen* v. *Wait* (2), after referring to the above observations of Lord Abinger, said:—

Running days comprehend every day including Sundays and holidays, and *running days* and *days* are the same.

Substantially the same language is to be found in MacLachlan's Law of Merchant Shipping, 6th edition, page 420, where it is stated that

in reckoning time under a stipulation for demurrage *days* and *running days* mean the same thing in the absence of any peculiar custom to the contrary, i.e., calendar days from midnight to midnight running consecutively, therefore without excepting holidays.

Carver's Carriage by Sea, 6th edition, page 740, says:—

The word *day* usually means day according to the calendar beginning and ending at midnight,

(1) [1842] 10 M. & W. 331 at p. 333.

(2) [1885] L.R. 16 Q.B.D. 67 at p. 73.

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and the author refers to *The Katy* (1), where the Court of Appeal held (affirming the President)

that *running days* meant calendar days and not any period of 24 hours.

Although the discharge of the cargo began at 1 p.m. on June 1, *The Katy* is authority for counting that day as one of the lay days. June 4th, the King's birthday, was a legal holiday excepted by the charter-party and, although the men worked, in the absence of any agreement or mutual consent to treat it as a lay day, it is not to be counted as such on the authority of the House of Lords in the case of *Nelson & Sons, Limited* v. *Nelson Line* (2). In *Houlder* v. *Weir* (3), Channell J. held that, where a fraction of a day is required to complete the time allowed for discharging, the charterer is entitled to a whole day, unless there are words in the charter-party indicating a different intention, and, on the principle laid down in that case, the plaintiff would be entitled to 10 days for the discharge of the cargo of the *Heathfield,* as there is nothing in the charter-party that fractions or parts of days are to enter into the computation of the time specified for loading or discharging the cargo. Excluding June 3 and 10, which were Sundays, and June 4, the King's birthday, the plaintiff would be entitled until midnight June 13 to complete the discharge, the ship would go on demurrage on the morning of June 14 and, as the discharge was complete at 11 p.m. on 18th June, the claim for demurrage would be for 5 days at the rate stipulated in the charter-party. There was no default on the part of the ship, her equipment was in good order and sufficient, her stevedores were the best that could be obtained and could have discharged the cargo within the delay fixed between the parties, which was exceeded on account of the time it took the plaintiff's stevedores to build the rafts and remove the cargo after it reached the vessel's rail, where the ship's responsibility ended.

The plaintiff submitted that it would only be liable in the event of

detention by default of said party of the second part,

that is, by some default on the part of plaintiff to receive

(1) [1894] 71 L.T. 709.
(2) [1908] A.C. 108; 77 L.J.K.B. 456.
(3) [1905] 2 K.B. 267.

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the cargo. In the case of *Burrill* v. *Crossman* (1), it was held by the Circuit Court of Appeals that,

where the charter-party provides that demurrage should be payable for each day of detention by default of the charterers or their agents, the word *default* means an omission or neglect to perform the contract.

See also Stephens Law relating to Demurrage, page 70.

The plaintiff undertook to release the ship within a definite fixed delay. It did not do so, it omitted or neglected to perform its contract and therefore the detention of the ship beyond the stipulated time was by reason of the plaintiff's default within the meaning of that expression in the charter-party.

The stipulated rate of demurrage amounts to 79 pounds 19 shillings per day, and for five days amounts to 399 pounds and 15 shillings, equivalent in Canadian currency at the rate of exchange on 18th June, 1923, to the sum of $1,889.81.

There will therefore be judgment on the counter-claim in favour of defendants against plaintiff for $1,889.81, with interest and costs.

Solicitors for plaintiff: *Messrs. Laverty, Hale & Dixon.*

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

1923

Oct. 29.

IN THE MATTER OF THE PETITION OF RIGHT OF THE SISTERS OF CHARITY OF ROCKINGHAM ..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Expropriation—Compensation—Market value—Measure of Compensation —Value to owner—Injurious affection to remaining lands—Railway yard.

Suppliant's property, a young ladies' academy established in 1872, was a very valuable one. It consisted of lands situated on the east and west side of a public road existing from time immemorial, and a railway. By the expropriation all suppliant's lands to the east, in and on the margin of a public harbour, were taken, consisting of two small

NOTE: The appeal which was taken to the Supreme Court of Canada from this judgment has been abandoned.

(1) [1895] 69 Fed. Rep. 747.

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promontories upon which had been built a bathing-house and wharf used in connection with the academy; and upon an area wholly to the east of the railway and comprising these promontories, the Crown made a large shunting railway yard. By a judgment of this court, affirmed by the Supreme Court, suppliant was compensated for lands taken, but nothing was allowed for injury to its property on the west. On appeal to the Judicial Committee of the Privy Council it was held that the suppliant was entitled to compensation for injurious affection to its remaining property on the west by reason of the apprehended legal user to be made of said promontories, and referred the case back to this court to assess the compensation to be paid therefor. Respondent contended that it was impossible to segregate the noise from operations in the yard as a whole, or any part thereof, from that originating on the said promontories.

Held, that while it may be impossible to divide the noise in the yard with mathematical accuracy, yet, as it appears from actual fact, and from the conformation and distribution of the yard, that one part is more used than another, and as noises from the operations concentrated on the said promontories can be ear-marked and segregated, the court may appreciate and deal with the injurious affection to suppliant's lands on the west due to the noise arising from the user of said promontories, as distinct from that due to noise from the use of the yard as a whole, and may fix the compensation due therefor.

Semble: Where it is impossible to ascertain the actual market value of a property by the usual tests which presuppose a willing buyer, the value of the property to the owner is the real value to be ascertained in fixing the compensation.

PETITION OF RIGHT to have certain properties expropriated by the Crown in 1913, and the damage caused to suppliant thereby, assessed by the court. This court, on the 7th of March, 1919, (1) assessed the compensation to be paid for the property taken, but refused to allow anything for injurious affection to that part of the property not taken. This judgment was affirmed on appeal to the Supreme Court of Canada, but on appeal to the Judicial Committee of the Privy Council, both judgments were reversed and the case was remitted to this court to have assessed the damage to which the suppliant was entitled for injurious affection to its remaining property, arising from the apprehended legal user of said two promontories taken by the Crown and used as part of a railway yard (2).

September 12, 1923.

Action now heard on the above reference before the Honourable Mr. Justice Audette, at Halifax.

(1) [1919] 18 Ex. C.R. 385. (2) [1922] 2 A.C. 315.

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Audette J.

I. F. Tobin K.C. and *L. A. Lovett K.C.* for suppliant.

J. L. Ralston K.C., J. E. Rutledge and C. J. Milligan for respondent.

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

AUDETTE J. now (this 29th of October, 1923) delivered judgment.

This is an action in expropriation which has already been adjudicated upon by this court, the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council. The question of injurious affection involved in the same has now been referred back to this court by the judgment of the Judicial Committee of His Majesty's Privy Council, bearing date the 29th June, 1922.

The scope of the question now under consideration for determination is to be found in the judgment of reference which is in the following language, to wit:—

that the matter ought to be remitted to the said Exchequer Court in order that it may be ascertained to what damages the appellants (suppliants) are entitled for injurious affection of their remaining property which has not been expropriated limited to such injurious affection as arises from the apprehended legal user of the two promontories part of the subject matter of these proceedings as part of a railway shunting yard.

Before entering into the consideration of the subject matter of this reference, leave was granted to both parties, upon application, to adduce further evidence in respect of the same, and in accordance therewith additional evidence was adduced on behalf of both parties and all of the old record was tendered and made available on the hearing of the question submitted by the reference.

The two promontories, or knolls, above referred to are known and described upon the plan as areas "A" and "B." Area "A" contains 13,730 square feet and area "B" 1,220 square feet. The total area of the yard is 1,128,810 square feet; which area compared with areas "A" and "B" represents a proportion of about $^{1}\%_{55}$ or $1/75\frac{1}{2}$.

As disclosed by witness O'Dwyer, on parcel "B" there is now one track and no room to place a portion of another. On parcel "A" there is room for 5 tracks, more or less.

The capacity of the whole yard is about 1,600 cars.

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According to witness Emerson, on parcel " A " there is

	Running length of feet	No of cars allowing for fouling points
On track No. 1.....	432	5
On track No. 2.....	340	4½
On track No. 3.....	330	6
On track No. 4.....	155	1½
On track No. 5.....	90	None

On parcel " B " there is a running length of feet to allow the placement of 5 cars thereon.

The distance between the nearest point of parcel " A " to the south-western corner of Mount St. Vincent is about 294 to 295 feet; and from parcel " B " to the south-east corner of the Chapel, 260 feet.

The elevation of the mount over the tracks is from 15 to 18 feet.

The yard, as a whole, is more or less of a fan-shape; that is while there are (see plan No. 14) twenty-two tracks on the north there are much less on the south. The yard is called by witness MacDonald a " receiving and classification yard."

The yardmaster testified that ladder-track " A " is the main artery of yard " A."

The actual value of Mount St. Vincent is difficult to ascertain in a satisfactory manner. We are told that about $505,000 were spent upon the property since 1872. One witness states that it would cost, in 1914, between $900,000 to $1,000,000 to put up similar buildings and plant. Witness Clark, a person of repute and of great experience in valuing property placed a value of $500,000 upon the property in 1913; however, he adds that this valuation is really a guess, he might say $1,000,000; but that he cannot say what that property is worth on the market.

The market value of this property must be deduced from its intrinsic value, that is, its value to the owners for their special purpose.

The property has been held and improved in such a manner as would serve its destination, its useful purposes to the owners, and if they were desiring to sell they would be un-

able to obtain a price like its real value. It is impossible, in a case like the present one, to ascertain the actual market value of such a property by the usual tests which presuppose a willing buyer; the conditions upon which such values are based are not present. In a case of this character, market value is not the measure of compensation. Therefore some other measure must be sought. In the absence of market value, the intrinsic value or value to the owners is the real value to ascertain for measuring the compensation.

It is common ground that Mount St. Vincent is in good shape, well kept and is a very fine property. The damages to such a property, used for educational purposes, are larger than would be for an ordinary dwelling house. To an industrial property the neighbourhood of the railway would be beneficial.

The damages to the property resulting from the whole yard is reckoned by some of the witnesses at from 25 per cent, 50 per cent to 75 per cent of its value. Some say that it is impossible to carry on the work of the institution as successfully as it should be; that the expropriation has spoiled the institution and that the work has been carried on at great inconvenience.

The Reverend Superior General of the School testified that they had come to the necessity of putting up a new building at a cost of $450,000 as per plans which are being prepared, this new building to be erected somewhere behind the present buildings which would act somewhat as a muffler to the back land. There is no intention of abandoning the present buildings, which however, might be remodelled.

Most of the evidence has been adduced with respect to the damages resulting from the whole yard. With that we are not concerned. The question to determine is the damage resulting from the use of the two promontories, as set forth in the judgment of the Judicial Committee of the Privy Council. Upon that branch of the case, we have, however, the evidence of the Reverend Sister Agnes Gertrude and Reverend Sister Maria Gratia. They prepared a statement, filed as exhibit No. 15, showing the result of their observation respecting the operation over the two

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promontories. Sister Gertrude testified that one time she noise was continuous on that piece of land for one hour and twenty minutes.

I have had the advantage, accompanied by counsel for both parties, of viewing the premises in question and of amply visualizing the lay of the land and its surroundings, and while there I had occasion to witness the best display and operation of a freight train on the promontories in question that could have been desired by the suppliants, although it occurred quite casually, but it made one fully appreciate the truth of the statement prepared by Sister Gertrude.

I found without hesitation, as stated by witness Lovett, the yardmaster at Rockingham, that ladder-track "A" is the main artery of yard "A." Indeed while we were all standing by, that freight train loomed up and came to the head of ladder-track "A" and began shunting back and forward right on the two promontories, for upward of twenty minutes they were there without any let up and they were still at it when we left. We there witnessed with our own eyes the full operation of the train and heard with our own ears the wracking and deafening noise resulting from the shunting; the rumbling of the wheels, whistling, letting off steam, the crushing heavy noise from the sudden concussion of cars bumping together, the rattling of iron, etc. This deafening noise was resulting for the most part from the use of the two promontories fed and served by the yard as a whole.

It was contended at bar that it is impossible to segregate the noise resulting from the operation of the yard as a whole or any part thereof, from the noise originating on the two promontories. This is plausible and partly true, but it is not a whole truth, in that it is quite possible, and the facts seem to confirm it, that the tracks close to the main line—the western tracks of the yard—are a great deal more used than the eastern one. That while it is impossible to divide the noise with mathematical accuracy, it is quite easy to realize that one part of the yard is more in use than another, both from actual fact and from the very conformation and distribution of the yard. Moreover, when the noise actually arises on the promontories, as witnessed

when viewing the premises, that noise can certainly be earmarked and segregated from the noise coming from the other parts of the yard.

If the concentration of the shunting—if a great deal more of the shunting—is done on the two promontories, then shunting on these areas "A" and "B" is much more detrimental to the institution than if the shunting were far away from such places.

However, the noise arising from the user of these two promontories with such concentration at close proximity to the institution, as compared to the noise which arises from the yard as a whole, might be the last straw that breaks the camel's back—might be the final volume of sound that would suffice to make it impossible to carry on the institution with efficiency and so constitute an injurious affection of a substantive character to be appreciated and dealt with separately from the injurious affection arising from the general noise from the balance of the yard.

Unassisted by direct evidence of any kind naming any figure of the damages resulting from this self-evident injurious affection, I have, thus unaided, to ascertain and determine to the best of my ability, what is the measure of such damages. I am unable to satisfactorily measure these damages and to arrive at any figure, aided by any mathematical reasoning; but answering, as best I can, the scope of the enquiry, as above set forth, and recited in full, I have come to the conclusion that a compensation of $10,000 will meet the merits of the case, so far as it can be ascertained, to cover all damages, resulting in the injurious affection to the property as arises from the apprehended user of the two promontories, as part of a large railway shunting yard but fed and served thereby.

Therefore, there will be judgment ordering and adjudging that the suppliants are entitled to recover from the respondent the sum of $10,000 with interest thereon from the date of the expropriation to the date hereof, and with costs.

Judgment accordingly.

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Feb. 28.

BRITISH COLUMBIA ADMIRALTY DISTRICT

OSTRUM ..... PLAINTIFF;

AGAINST

THE SHIP *MIYAKO*

Shipping and seamen—Wages of engineer—Loss thereof by desertion—Jurisdiction.

On the 4th of July, 1923, O. shipped as engineer for the fishing season, lasting four months, at $150 a month. On October 4 there was a balance of $134 due him, and on the 25th October he deserted the ship without lawful justification or excuse. He then sued for $286.64, balance of wages due up to October 20. It was contended by defendant, that all wages earned from October 4 to time of desertion had been forfeited, and further, that the balance being for a sum under $200, the court had no jurisdiction.

Held, that in this case the wages must be deemed to have been forfeited from the time of the last monthly payment which the contract contemplated, and that, as by deducting these from the claim, the sum due plaintiff was under $200, viz., $134, this court had no jurisdiction, and the action must be dismissed for want thereof.

Plaintiff took action against the defendant's ship, alleging a contract with her to serve as engineer at a wage of $5 per day together with board and provisions, and stating that he served from the 4th of July, 1923, to the 20th October, 1923, and claimed a balance due him of $286.64.

The defendant claimed that the plaintiff was engaged by the master of the ship *Miyako* as engineer, on a contract of service from month to month at a wage of $150 per month together with board to be furnished on the said ship *Miyako.*

The defendant also alleged that on or about the 17th of October, 1923, the plaintiff deserted the ship at Steveston, B.C., and subsequently refused and neglected to return on board when ordered to do so by the master and thereby forfeited his wages for the current month. They also allege that at the time of action the plaintiff had coming to him as wages only $130 and that accordingly the court had no jurisdiction to entertain the action by virtue of the provisions of the Canada Shipping Act, R.S.C. (1908), chapter 113.

February 5, 1924.

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

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OSTRUM v. THE SS. *Miyako.*

Martin L.J.A.

Roy B. Ginn for plaintiff.

Sidney Smith for defendant.

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

MARTIN L.J.A. now, this 28th February, 1924, delivered judgment.

This is a question of seaman's wages, and I find upon the facts adduced that the contract was that the plaintiff should be paid the sum of $150 a month during the fishing season, which was understood to last for a period of four months beginning on the 4th July, the date of the hiring.

It is admitted that there was a balance of $134 due the plaintiff on the 4th October, but the difficulty arises from the fact that on the early morning of the 25th October, as I am constrained to find, the plaintiff deliberately deserted his ship without any lawful justification or excuse. In such circumstance it was submitted that whatever might be said of the amount due on the 4th October, it was clear he had forfeited his wages from that day up to the time of desertion. I experienced some reluctance bearing in mind the favourable inclination this court as a matter of history has always had towards the interests of mariners, to give effect to this strict construction, seeing that he had so nearly completed his contract, *i.e.*, at the end of the third day of the next month, and therefore requested counsel to furnish me with further authorities upon the point.

After carefully considering them I find that there is no legal escape from the result that, upon the facts, the wages here must be deemed to be forfeited from the time of the last monthly payment which the contract contemplated. The authorities in general are to be found chiefly collected in MacLachlan On Shipping (1923) 178; Macdonell on Master and Servant (1908) 619 (*e*) 20 Hals., 85; 26 Hals., 49, and I refer particularly to *Taylor* v. *Laird* (1); *Button* v. *Thompson* (2); *Saunders* v. *Whittle* (3); *Roberts* v. *The Tartar* (4), and *Selig* v. *Arenburg* (5).

Seeing then that at best the plaintiff can only recover $134, objection is taken that the action must be dismissed

(1) [1856] 1 H. & N. 266.
(2) [1869] L.R. 4 C.P. 330.
(3) [1876] 33 L.T. 816.
(4) [1908] 13 B.C. 474.
(5) [1917] 51 N.S.R. 198.

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for want of jurisdiction, the wages recovered being " under the sum of $200," as required by section 191 of the Canada Shipping Act, R.S.C., cap. 113, and the decision of this court in *Cowan* v. *The St. Alice* (1), followed in *Kouame* v. *The Maplecourt* (2), is relied upon, and as the objection is precisely sustained by that decision, the only order that can be made is that the action be dismissed, with costs to follow the event, according to the general rule (132) in that behalf, there being no circumstances, I think, which would justify me in departing from said general rule, and seeing that the law on the jurisdiction point has been settled for over eight years.

This result may seem a hardship, but the longer I sit upon this Bench the more I am convinced that the only real justice is strict justice for all concerned, and here, for example the plaintiff was hired not by the defendant owner but by one who chartered the vessel from the owner and has not paid the charter money, so for that reason, I am informed by counsel, the owner resists the plaintiff's claim so as to reduce his own loss as much as possible.

Judgment accordingly.

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Feb. 27.

THE ROYAL TRUST COMPANY.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Practice—Function of particulars—In what instances ordered—Object of examination for discovery.

Held: That the function of particulars is to limit the generality of allegations in a pleading, and define the issues to be tried; as distinguished from that of the examination for discovery, which is to get at the knowledge of the adverse party;

2. That particulars will not be ordered of facts within the knowledge of the party applying, nor particulars of the character of the act which produced the damage and the circumstances under which it was done.

3. That while no precise rule can be laid down as to the degree of particularity required in any given case, in this case, the court, in the exercise of its discretion, having regard to the circumstances and nature of the facts alleged, ordered that particulars should be furnished of a lump sum claimed as damages, by allocating a certain amount to each item of damage.

(1) [1915] 21 B.C.R. 540; 17 Ex. C.R. 207.

(2) [1921] 21 Ex. C.R. 226.

APPLICATION by respondent for an order for particulars of certain allegations of Petition of Right.

February 27, 1924.

Application heard by the Honourable Mr. Justice Audette in Chambers.

Geo. F. Macdonell for the suppliant.

W. Stuart Edwards for the respondent.

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

AUDETTE J. this 27th February, 1924, delivered judgment.

The function of particulars is to limit the generality of the allegations of the pleadings and thus define the issues which have to be tried and as to which discovery can be had (22 Hals. 453) and before an order is made to that effect, it must be shown to the satisfaction of the judge, that the respondent might be embarrassed in his defence or at trial without such particulars and that justice requires their delivery (Audette's Practice, 440).

Now, in the present case the application for particulars comes long after the issues have been joined,—the statement of defence was filed on the 15th October, 1923 without such particulars. Therefore the particulars are not needed for the preparation of the defence and it does not appear that an examination for discovery was resorted to.

After all, as said by the learned Chancellor in *Smith* v. *Boyd* (1):

> Particulars are ordered with reference to pleadings and are distinguished from examination for discovery, which is to get at the knowledge of the adverse litigant.

The application is now made, about 9 days before the trial and an order for delivery of long detailed particulars would be burdensome at this stage.

There is no precise rule as to the degree of particularity required in any given case, however, regard must be had to the circumstances and nature of the acts or facts alleged. In the present case the petition of right sets out fully the material grounds or facts upon which relief is sought and shows the ground upon which damage is claimed. The

(1) 17 P.R. 467.

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petition discloses clearly what case the respondent has to meet and in the present instance these facts must be within the knowledge of the party applying, since the suppliant contends the damage is the result of their act or the act of those for whom they are answerable.

Particulars cannot be asked of the character of the act which produced the damage and the circumstances under which it was done. No party is bound to disclose his evidence before trial.

However, while the necessity of this application admits of doubt, I see no reason why the suppliant should not be ordered to give particulars showing how the sum of $7,500 is made up (22 Hals. 454) that is the suppliant is hereby ordered to allocate a certain amount to each count or item of damages, mentioned in the petition of right which will ultimately show how that $7,500 is made up. Such particulars to be supplied and served upon the respondent not later than the 4th March next.

Costs to be costs in the cause.

Ordered accordingly.

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Feb. 28.

BRITISH COLUMBIA ADMIRALTY DISTRICT

WINSLOW MARINE RY. & SHIP-BUILDING CO. ..... PLAINTIFF;

AGAINST

THE SHIP *PACIFICO*

Shipping—Admiralty law—Claim for work and material supplied—Interest on claim ex contractu—Time from which to be allowed.

In an action against a ship to recover an amount due for work and labour done, and material supplied to the ship, with interest, it was *held*, that the plaintiff was entitled to recover interests upon the amount of his bill from the date of the formal demand of payment thereof, after due completion of the work under the contract. (The Northumbria, 1869, L.R. 3 Adm. & Ecc. 6, followed).

ACTION by plaintiff to recover the amount of an account against the ship for work and labour done and material supplied.

January 3, 4 and 10, 1924.

Action now tried before the Honourable Mr. Justice Martin at Victoria.

E. C. Mayers for plaintiff.

N. D. Hossie for defendant.

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

MARTIN L.J.A. now, this 28th February, 1924, delivered judgment.

At the close of the hearing I said that subject to the objection to my jurisdiction and the question of interest, I was prepared to give judgment for the plaintiff's claim in full.

As to the objection to the jurisdiction, my impression at the time was that it was not supported by the authorities cited and I remain of that opinion.

As to the interest: the plaintiff claims it from the time it rendered its bill on the 27th of March last for the work and labour done and materials supplied. It is beyond serious question that the ancient practice of the Admiralty Court in allowing interest upon claims arising *ex delicto* still prevails, *e.g.*, in collision cases from the time when the injury occurred, a practice which is based upon the civil law and which Lord Esher, M.R. commended in *The Gertrude* (1), as

more just than the common law rule,

and as not being in any way disapproved of by Lord Selborne L.C., in the House of Lords in *The Khedive; Stoomvaart Maatschappy Nederland* v. *Peninsular & Oriental St. Nav. Co.* (2), in the following language:

It does not appear to have been the general course of the court that those decrees should contain any directions as to interest; and I think it more probable that the principle on which interest was computed under them is that mentioned by Mr. Sedgwick in his book on Damages (chapter 15, pp. 373 and 385-7), where he treats of the power of a jury to allow interest, as in the nature of damages, for the detention of money or property improperly withheld, or to punish negligent, tortious, or fraudulent conduct; the destruction of or injury to property involving the loss of any profit which might have been made by its use or employment.

And in *The Gertrude, supra,* the rule as to interest was applied to a case which before the Judicature Act could

(1) [1888] 13 P. 105 at p. 108. (2) [1882] 7 A.C. 795 at p. 803.

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not have been tried in Admiralty, but only in one of the Common Law Courts; that case was one of damage to cargo by stranding; and the *Baron Aberdare* (1) in the same report was one of negligence by a dock company in mooring. It is instructive to note that in *Smith* v. *Kirby* (2), the King's Bench Division, affirming Lush J., followed the Admiralty rule and allowed interest from the date of collision. In *The Khedive, supra,* Lord Bramwell, p. 823, agreed that the matter must be decided by the Admiralty practice, saying:

> It is not a question of principle; it is not a question of reason; it is a question of what was the law of the Court of Admiralty; because undoubtedly what was the law formerly is the law still, for the Judicature Act has not changed the law in that respect.

No authority has been cited to show that with respect to interest any change has been affected by the Judicature Act; the earlier case of the *Jones Brothers* (3), is only a decision as to the date upon which interest upon judgments and costs taxed should begin to run and does not touch the question at bar. Moreover, the *Jones* case was one of salvage which claim arises neither *ex contractu* nor *ex delicto* and therefore it never was the practice in Admiralty to allow interest upon salvage awards.

The question, then, is narrowed down to the right to interest upon a claim *ex contractu.* Reliance is placed by the plaintiff upon the following observations of Sir Robert Phillimore in *The Northumbria* (4), a case arising out of a collision, at p. 10:—

> But it appears to me quite a sufficient answer to these authorities to say, that the Admiralty, in the exercise of an equitable jurisdiction, has proceeded upon another and different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, *ex mora* of the obligor; and that, whether the obligation arose *ex contractu* or *ex delicto.* The American common law has been made more liberal than the English; Mr. Sedgwick, in his work on damages (4th ed.), p. 443, remarks: "There is considerable conflict and contradiction between the English and American cases on this subject. But as a general thing, it may be said that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the courts of the United States, on the other hand, have shewn themselves more liberally disposed, making the allowance of interest more

(1) [1888] 13 P. 105.
(2) [1875] 1 Q.B.D. 131.
(3) [1877] 37 L.T. 164.
(4) [1869] L.R. 3 Adm. & Ecc. 6.

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nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim."

And he points out, p. 11, that the Chancery Courts followed the Admiralty rule as to interest, citing Vice-Chancellor Wood in *Straker* v. *Hartland* (1), wherein he said:

It was quite clear that justice required that a debt which was due but the payment of which was delayed, should carry interest.

In view of the positive statement of so learned a judge in Admiralty law as Sir Robert Phillimore that his court had adopted the just principle of the civil law

that interest was always due to the obligee when payment was not made *ex mora* of the obligor, and that, whether the obligation arose *ex contractu* or *ex delicto*

I do not feel at liberty to refuse the claim of the plaintiff herein to interest after it made a formal demand for payment by presenting its bill after due completion of the work under the contract. To say that interest could not be awarded in such circumstances by other courts is only another illustration of the more equitable rules that are established in this court in several respects: Lord Chancellor Herschell in *London Chatham Dover Ry.* v. *South Eastern Ry.* (2), said at p. 440, that claims for interest in the Common Law Courts were kept within limits which were

too narrow for the purposes of justice.

In the ascertainment of the exact date from which interest is to run herein, I direct counsel's attention to the final words in the letter of defendant's attorney, dated 21st February, 1923, (Ex. 9), with leave to speak to the point, if necessary.

The plaintiff is entitled to judgment for the full amount of its claim and costs.

Judgment accordingly.

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Nov. 27.

BRITISH COLUMBIA ADMIRALTY DISTRICT

EVANS, COLEMAN & EVANS, LTD.....PLAINTIFF;

AGAINST

THE SS. *ROMAN PRINCE*

Shipping—Negligence—Unavoidable accident—Forces of nature.

At about 1 o'clock on October 27, 1922, the *R.P.*, a steamer of some 10,000 tons net register, was attempting to dock on the east side of

(1) [1865] 34 L.J. Ch. 122. (2) [1893] A.C. 429.

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Johnson Wharf on the south shore of Vancouver Harbour, which lies west of a wharf operated and owned by plaintiff, and at a distance of 300 feet. The ship was not under her own power, but had employed two tugs to bring her up to the wharf; tide was high-slack, weather clear with a breeze of considerable force from the west. The bow of the *R.P.* had entered the fairway between the wharves, when the pilot stopped the tug ahead, and ordered the other, which was lashed to the port quarter of the ship, to go astern and take the way off the ship, then proceeding at about one mile an hour. In so doing the tug carried away her headline and thereupon, the pilot dropped both anchors, bringing the vessel to a standstill. The vessel drifted upon the northwest corner of plaintiff's pier causing damage. The defence to plaintiff's action was one of unavoidable accident.

Held, that while no fault, in the abstract, could be found with the defendant ship's owners in employing the two tugs as they were employed, yet, on the above facts and considering the force and direction of the wind and its effect upon the ship, due care was not taken to approach the wharf in a proper and seaman-like manner. There was no good reason why necessary allowance for the forces of nature, to offset the leeway, should not have been made in approaching its berth under the restricted condition of a narrow slip, and that defendant was liable in the circumstances.

ACTION by plaintiff to recover damages suffered by reason of a collision with a wharf owned and operated by them.

June 28 and 29, and July 10 and 14, 1923.

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

E. P. Davis K.C. and *D. N. Hossie* for plaintiff.

Martin Griffin and *Sidney Smith* for defendant.

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

MARTIN L.J.A. now, this 27th November, 1923, delivered judgment.

In my note of 27th November last, directing judgment to be entered for the plaintiff herein, I said that my reasons would be handed down later (1), but pressure of work, and other causes, have delayed me till now in carrying out my intention.

Briefly, my view of the case is that while no fault in the abstract can be found with the defendant ship's owners in employing the two tugs in the way they were employed to move the ship to pier H and dock her on the east side

(1) NOTE: Reasons were handed down on Feb. 29, 1924.

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thereof, yet having regard to the circumstances, in particular the considerable force and direction of the wind and its affect upon a ship of her size, and the situation of the piers between which the ship was entering, due care was not taken to approach them in a proper and seamanlike manner, though the defendants were in control of the situation in their attempt to moor the ship to an immovable object in the face of clearly apparent difficulties, and there was no good reason why the necessary allowance for the forces of nature, so as to offset the leeway was not made in approaching her intended berth under the restricted conditions of a narrow slip.

The defence of inevitable accident was not supported by the evidence and therefore fails.

As to the defences denying the plaintiff's title and that the dock was an unauthorized obstruction to navigation, and other objections taken, suffice it to say that, in my opinion, they were not established.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT

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March 26.

L. FUGERE ET AL.....PLAINTIFFS;

AGAINST

THE STEAMER *DUCHESS OF YORK.*

Shipping and seamen—Wages of master and engineer—Lien on ship—Charterers—Engagement of master by charterers—No power to bind owner—Costs.

Held, that the court has jurisdiction over claims by Master and seamen for wages earned by them on board ship, which may be exercised *in rem,* and that the lien for wages of the master and crew attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship. *The Castlegate,* (1893) A.C. 52 referred to.

2. That where the master has not been engaged by the owners but by the charterers, he has no authority to pledge the credit of the owners for anything.

3. That in such a case the master has no right of action against the ship for money expended by him for board.

4. Master and engineer sued separately for wages and the actions were subsequently consolidated. *Held,* that as one action only should have been brought plaintiffs were entitled to costs of one action only.

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ACTIONS brought by master and engineer of the steamer *Duchess of York* to recover wages due them and disbursements for board. The actions were consolidated and heard together.

March 24 and 26, 1924.

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

Adolphe Gadoury for plaintiffs;

C. A. L. Hibbard for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A. now this 26th March, 1924, delivered judgment.

These consolidated actions were instituted separately on claims for wages and disbursements. The defendant, after having appeared, moved for their consolidation. This application was granted and the cases were consolidated into one action, costs to be allowed of one action only, as the plaintiffs should have brought one action together instead of suing separately; Rule 33; Mayers 226:—*The Strathgarry* (1); *The Marechal Suchet* (2), and *The Marlborough Hill* (3).

Pleadings having been ordered, it is alleged in the statement of claim that plaintiff Lucien Fugère, on 21st February, 1923, was appointed engineer of the steamer at wages of $150 per month by J. O. Normand and North Land Navigation Company, Limited, lessees of the steamer and representatives of the owners; that he acted as engineer from 8th May, 1923, until 6th December, 1923, and that there is now due him for wages from 15th August, 1923, to 6th December, 1923, the sum of $545; that the plaintiff Joseph Jean, on 21st February, 1923, was appointed master of the steamer at wages of $100 per month by J. O. Normand and North Land Navigation Company, Limited, lessees of the steamer and representatives of the owners; that he acted as master from 8th May, 1923, until 8th October, 1923, and there is now due him a balance of $225 for wages from 1st August, 1923, to 8th October, 1923, and that as master of the steamer he expended $39.99 for board

(1) [1895] P. 264. (2) [1896] 65 L.J. Adm. 94.
(3) [1920] 90 L.J. P.C. 87 and 96.

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and room from 12th April, 1923, to 8th May, 1923, and plaintiffs claim a decree pronouncing the said sums to be due to them, with costs;

By the defence it is denied that Normand or the North Land Navigation Company, Limited, ever were the representatives or agents of the owners of the steamer; that under a lease in authentic form executed before Henri Morin, Notary Public, Normand was in possession of the steamer from 22nd May, 1919, to 28th November, 1923, and had full control thereof, but neither Normand nor the North Land Navigation Company, Limited, or any one appointed by them, had the right in any way to pledge the credit of the owners or to enter into any agreements or contracts on their behalf; that the owners did not appoint the engineer or master and are not liable for plaintiffs' claims, the said Normand having by said lease undertaken to hold the steamer free from all claims, liens and incumbrances whatever, and the defendant prays for the dismissal of the action and that the steamer be freed from arrest, with costs;

By the Admiralty Court Act, 1861, section 10, the court is given jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship and over any claim by the master of any ship for wages earned by him on board the ship, which jurisdiction may be exercised by proceedings *in rem* (section 35) and the lien for wages of master and crew attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship; *The Castlegate* (1). This rule constitutes an exception from the general principles applicable to claims for necessaries, that there cannot be a remedy *in rem* against a ship unless the owner is liable as debtor. The consequence therefore is that, although the steamer was in possession of a charterer who engaged the master and engineer and was personally liable for their wages, the plaintiffs are entitled to exercise their lien for their claims. Fugère, the engineer, was engaged on 21st February, 1923, by Normand for the season of 1923 at the rate of $150 per

(1) [1893] A.C. 38 at p. 52.

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month commencing from 1st March to the end of the season. It is alleged in the statement of claim that he acted as engineer of the steamer from 8th May to 6th December, 1923, and he claims a balance of $545. He testified that his wages for the season amounted to $1,325, on account of which he was paid $780, leaving the balance sued for. By his written engagement his wages were to start from 1st March, 1923. If he is to be paid only from 8th May to 5th December, when it is proved he quit work, his total pay would amount to $1,035, and deducting the $780 which he received on account, his balance would be $255. It is proved, however, that he began to work as engineer before the 8th of May, and he must have, otherwise his season's pay would not amount to $1,325. At the trial counsel for plaintiff moved to amend paragraph 2 of the statement of claim by substituting "1st March, 1923" in place of "8th May, 1923." It appears to be well established that the balance due to Fugère is $545 and his application to amend the statement of claim is within the discretion of the court under Rule 67. The application to amend will therefore be granted upon payment of costs of a motion to amend.

Regarding the claim of Captain Jean for wages and disbursements, the record and evidence show that Normand, on 7th April, 1923, transferred his rights in the lease or charter from the owners to the North Land Navigation Company, Limited. Normand was the President and Captain Jean the Vice-president of that company and the latter subscribed for one share of $100 in the capital stock of the company, but never paid for it. The steamer was operated in the name of the company during the season of 1923, and Captain Jean admits he was an employee of the company both in his evidence and in the statement of claim. He left the steamer in October on account of illness when he claims a balance of $225 was due him as wages. The defendant has submitted that $100 of his claim for wages must be declared compensated for what he owed the company on his share of the capital stock. The position seems to be that he owed his employer $100 for the share and the employer owed him $225 for wages; that would reduce his claim against the steamer to $125. With regard

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to his claim for $39 alleged disbursements, it is sufficient to say that, as he was not appointed master by the owners but by the charterer, he had no authority to pledge the credit of the owners for anything. What he claims is not a disbursement; he was living at home in his own house for between three and four weeks before he took command of the steamer on 8th May and he is attempting to charge $1.50 per day for his board and lodging while he was living at home. He had no authority to pledge the owners' credit for these so-called disbursements. He may have a claim against the North Land Navigation Company, Limited, but not against the steamer; *The Barge David Wallace* (1); *The Orienta* (2); *Baumwoll* v. *Furness* (3); *The Castlegate* (4).

The result is that there will be judgment for plaintiff Fugère for $545, and for the plaintiff Joseph Jean for $125, with costs.

Judgment accordingly.

1924
Feb. 20.

IN THE MATTER OF THE TREATY OF PEACE (GERMANY) ORDER 1920

BETWEEN

THE SECRETARY OF STATE OF CANADA, AS CUSTODIAN UNDER THE SAID TREATY ..... PLAINTIFF;

AND

ERNEST LAFONTAINE ..... DEFENDANT;

AND

G. A. LAFONTAINE ..... OPPOSANT;

AND

SAID PLAINTIFF CONTESTING.

Opposition—Affidavit in support—Function thereof—Quebec practice—Burden of proof.

Semble: That the sole function of the affidavit made at the end of and in support of an opposition and *afin d'annuler* pursuant to article 646 of the Code of Civil Procedure (Quebec) amending the old Article 584, is to authorize the sheriff or seizing officer to suspend proceedings without any order for stay of execution (sursis), and that being so,

(1) 8 Ex. C.R. 205, at 236.
(2) [1895] P. 49.
(3) [1893] A. C. 8.
(4) [1893] A.C. 38.

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where no evidence is adduced at trial on behalf of either party, the burden of proof being upon the opposant his opposition will be dismissed for want of proof.

OPPOSITION to set aside seizure of certain goods and chattels seized under execution.

February 16, 1924.

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

Joseph A. Mercier K.C. for plaintiff.

W. M. Mazur for opposant and defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. this 20th February, 1924, delivered judgment.

This is an opposition *afin d'annuler* filed by G. A. Lafontaine claiming the ownership of the goods and chattels seized at the business place or office of the defendant, Ernest Lafontaine, and advertised for sale. This place of business appears, under the bailiff's notice, to have been changed from Number 97 to Number 205 St. James Street, Montreal.

No evidence was adduced at trial on behalf of either party, both parties relying and resting respectively on the opposition and the contestation thereof as filed.

It was stated at bar that the present opposant is the defendant's father, and that the present opposition is in respect of the goods and chattels seized in the defendant's office as distinguished from those seized at his residence or domicile.

The defendant and opposant were duly served with the order fixing the trial and their counsel admitted service had been duly made.

The general rule by which the burden of proof rests on the opposant, as plaintiff, admits of no exception in the present case. Indeed, the burden of proving facts at issue lies on the party holding the substantial affirmative, and the substance of the issues raised by the pleadings must be satisfactorily proved.

Now, the only evidence on record supporting the allegations of the opposition in respect of the ownership of the goods and chattels seized is the affidavit by the defendant —(not the opposant). The well known rule of law that the best evidence must be adduced is more especially enacted in article 1204 of the Civil Code of the province of

Quebec, which states that the proof produced must be the best of which the case in its nature is susceptible. Secondary or inferior proof cannot be received unless it is first shown that the best or primary proof cannot be produced.

In the present case the affidavit at the end of the opposition, asserting ownership, is not even made by the opposant himself, but is made by the defendant, who on a previous occasion in the same case had stopped a sale under the same seizure by an opposition in his own name in which he contended that the very same goods and chattels should be released from the seizure *in his* favour, and the present opposition is only supported by the affidavit of the same defendant to the effect that the goods belong to the opposant. This affidavit on the defendant's opposition (which has already been dismissed) and that upon the present opposition, made by the same party, are therefore in direct conflict.

Moreover, the affidavit at the end of the present opposition is made pursuant to article 647 of the Code of Civil Procedure, which, according to the Report of the Commissioners in charge of the revision of the Code, enacts that an affidavit or sworn deposition be now always required to accompany oppositions, thereby abrogating article 584, C.P.C., which formerly allowed to replace this deposition by an order for stay (sursis).

Therefore it would seem that the sole function of the affidavit at the end of the opposition is to authorize the sheriff or seizing officer to suspend proceedings without any order for stay of execution (sursis). If that be the function of that affidavit the opposition remains unsupported by any evidence whatsoever on the merit.

Counsel at bar on behalf of the Crown even suggested that the opposant was not aware of this opposition, and that is one of the allegations of his contestation, but however possible or probable that may be, there is no evidence on the record in support of that view.

The opposition is frivolous, vexatious, embarrassing and, notwithstanding the affidavit to the contrary, I must find that it was made solely to delay the sale, and is therefore dismissed with costs for want of being supported by evidence.

Opposition dismissed.

1924
April 8.

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT

THE STEAMER *HAMONIC* AND OWNERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE SHIP *ROBERT L. FRYER* (DEFENDANT) ..... } RESPONDENT.

Shipping—Collision—Harbour—Narrow channels—Negligence—Regulations.

The *H.* was in dock on the west bank of the K. river intending later to proceed down river to Port Arthur, when the *F.* entered the K. river from Port Arthur intending to lay at the same dock, which instructions were changed. The channel is 450 feet average in width from this dock to the point of collision, a distance of about 2,000 feet. The McK. river joins the K. on its easterly bank, nearly 1,900 feet below the dock, which river is 820 feet at its mouth, gradually narrowing up to the railway bridge over the same, 850 feet up stream, constituting the McK. basin, which under the harbour regulations was a turning basin, turning in channel for such ships being forbidden. The *H.* proceeded down stream stern foremost to the basin, assisted by a tug, lashed to her port bow, there to turn and go down stream whilst the *F.* was coming up on her starboard side of channel at 3 miles an hour. When about 2,800 feet away the *F.* saw the *H.* leaving her dock. A westerly wind was blowing, and the *F.* straightened up from time to time to keep steerage way. When the *H.* had put her stern into the M. river, and lay across the *K.* close to the lower bank of the M., about to turn, but without indication of whether to port or starboard, both ships were close together, and a collision was imminent. The *H.* then gave a danger signal and when 75 feet away gave a two-blast signal, for the tug. The *F's* engines were put astern, and the *H.* influenced by wind and tide was not well under command, and the ships collided.

Held (varying the judgment appealed from), that the *H.* going astern in such manner as to occupy considerable space of the stream, with better knowledge than the other ship of the probable degree of success with which her turning movement was being executed, and knowing the degree of command under which she was, and with knowledge of the up-going ship, should have used the danger signal in ample time and with such frequency as the situation and prudence would indicate and not wait until the collision was imminent or inevitable, and that she was not navigated with proper regard to the other ship; but that the *F.* was also navigated in an unseamanlike manner and without regard to the *H.*, that she should have held the starboard side of the river, should not have been so near the *H.* at her turn, and both ships were to blame.

2. That regulations are not merely made for the purpose of preventing collisions, but also to prevent a risk of collision.

3. That the *F.* was not entitled to any consideration by reason of the structural peculiarities she possessed, rendering it difficult to exercise due and prompt command over her. Her captain knowing her peculiarities should have used corresponding care. That one ship should not be expected to know the navigating disabilities of another and base her own conduct thereon.

Judicial observation. The absence of specific regulations in the way of signals applicable to turning ships in narrow channels, which exist elsewhere, noticed and commented upon.

APPEAL from the judgment of the Local Judge in Admiralty of the Toronto Admiralty District (1) which dismissed the action of the appellants herein.

January 31, 1924.

Appeal now heard before the Honourable the President.

R. I. Towers, K.C. for appellants;

The owner of the Robert L. Fryer in person.

The facts are stated in the reasons for judgment.

THE PRESIDENT, this 8th day of April, 1924, delivered judgment.

This is an appeal from a decision of Honourable Mr. Justice Hodgins, Local Judge in Admiralty for the Toronto Admiralty District, rendered in an action for damages by collision brought by the steamship *Hamonic* and owners, against the steamship *Robert L. Fryer,* the collision occurring in the Kaministiquia river, a part of the harbour of Fort William. The steamship *Hamonic* was found wholly to blame by the trial judge and the action brought by that ship and her owners was accordingly dismissed.

The appeal was heard by me with two nautical assessors, Capt. L. A. Demers, Wrecks Commissioner, and Capt. L. G. Dixon, Marine Superintendent of the Department of Marine and Fisheries.

On the day of the collision, September 9, 1922, the *Hamonic,* a passenger and freight steamer of over 5,000 tons and 350 feet in length, was taking on cargo at the Ogilvie Milling Company dock on the west bank of the Kaministiquia river, with the intention of proceeding down the river, after loading, to Port Arthur. The *Fryer* entered the Kaministiquia river from Port Arthur with the intention of proceeding up the river and lying at the same dock, but her instructions being subsequently changed, she was directed to another dock in the river.

The Kaministiquia river is a narrow channel of about 450 feet in average width, from the Ogilvie Milling Company dock down the river to the point of collision, its gen-

(1) [1923] Ex. C.R. 155.

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The President.

eral direction being north and south. The distance in length between these two points would roughly be about 2,000 feet.

The McKellar river joins the Kaministiquia river on the easterly bank of the latter river, and down the river from the Ogilvie Milling Company dock about or nearly 1,900 feet, that is to the centre line of the McKellar river. The width of the McKellar at its junction with the Kaministiquia is about 820 feet and it gradually narrows from its mouth upwards, to a railway bridge crossing the same, the distance from this bridge to the confluence of both rivers being about 850 feet. The water area between the mouth of the McKellar river and this railway bridge constitutes what is known as the McKellar Basin. The width of the Kaministiquia river immediately below its junction with the McKellar is about 480 feet.

On the occasion in question the *Hamonic* lay at her dock with bow upstream and on her departure down the river was of course obliged soon to turn. Regulations applicable to the harbour of Fort William prohibit ships exceeding 200 tons gross from turning in the channel of the Kaministiquia except at designated turning basins provided for that purpose. The natural turning basin for the *Hamonic* on this occasion was the McKellar Basin, at least that was the one selected. The *Hamonic* accordingly proceeded down stream, with the assistance of a tug boat made fast to her port bow, stern foremost, to the McKellar turning basin with the view of there turning and proceeding on her voyage down the river.

As the *Hamonic* was going down stream, the *Fryer* was proceeding up stream, on her starboard side of the channel, being the westerly side of the river, at the rate of three miles an hour according to her captain, whether over the ground or through the water does not appear from the evidence. So far as one can gather from the evidence, it was at a distance of about 2,800 feet, the *Fryer* first saw the *Hamonic* leave the lower end of the Ogilvie dock. A westerly wind was forcing the *Fryer* towards the easterly bank, below the turning basin, and she continued to straighten up from time to time to keep steerage way. The stage was soon reached when the *Hamonic* had put her

stern into the McKellar a short distance, and lay across the Kaministiquia river, and close to the lower bank of the McKellar, about to make her turn complete but without any indication whether to port or starboard. Both ships were then close together, and each slightly under way, and a collision was imminent. The *Hamonic* gave a danger signal, and a further signal of two blasts was also given when within 75 feet of the *Fryer,* intended for the tugboat to reverse her engines in order to stop the way of the *Hamonic.* The *Fryer's* engine was put astern but very probably did not quickly gather sternway, and the *Hamonic,* influenced by wind and tide, was not apparently well under command, and a collision occurred.

The trial judge found that the *Hamonic* failed to give the signal required by number 27 of the Rules of the Road for the Great Lakes, and the *Fryer* as well, but that as each steamer was aware of the presence of the other when at a considerable distance apart, this rule became of little importance. He was of the opinion that the *Hamonic* might have stopped her downward course earlier and backed up or gone further into the basin, and that she came down too close to the lower bank of the turning basin, without completing her turn or getting her bow down stream; or that she should have forged ahead and made a quicker turn so as to avoid the *Fryer,* a course the wisdom of which might well be doubted. He also adopted the view of witnesses deprecating any effort on the part of the *Fryer* to cross on her starboard side the bow of the *Hamonic,* and found that the *Hamonic* was alone to blame for the collision.

The case being one of collision in a narrow river or channel presents as is usual, many difficulties. The case is further rendered difficult by reason of the fact that the *Hamonic* was obliged to turn in the river, at or in a turning basin designated for such purposes, and the turning operations of a large ship in such circumstances cannot always be controlled to a nicety by the turning ship nor predicated with exactness by an approaching ship. Unfortunately, the rules of the road for the Great Lakes do not prescribe specific regulations in the way of signals applicable to turning ships in narrow channels, as prevail

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in many places elsewhere in similar waters, rendering it difficult to determine which of existing rules are applicable in the circumstances, or the degree, if any, in which any of them may be applied. I think the whole issue involved relates to the conduct of a turning ship in a narrow channel and an approaching ship.

I agree with the finding of the trial judge to the extent that the *Hamonic* was at least in fault and contributed to the collision, and his judgment in this respect should stand. This also is the opinion of my assessors. I do not think that the navigation of the *Hamonic* from the time of leaving her dock until the moment of the collision was carried out with due regard to the rights of the up-coming ship, the *Fryer*.

The *Hamonic* was bound in the circumstances to proceed astern down the river to the prescribed turning basin. I think the evidence supports the view that in her course to the turning basin she was more or less athwart the stream, and probably causing the *Fryer* to conclude at an early stage that it was inadvisable to contemplate the idea of continuing her course up the river on her starboard side, whilst the *Hamonic* was proceeding in this fashion towards the basin. My assessors advise me that it would have been wrong for the *Fryer* to have attempted this, and in that I concur. This was also the view of the trial judge.

The presence of the *Fryer* was known to the *Hamonic*, and the latter must have been cognizant of the fact that she was occupying a considerable space of the river channel. A ship proceeding down a narrow channel obliquely to or athwart the stream, as in this case, must produce a situation of embarrassment for an approaching ship awaiting the turning event, and as well a situation involving a possible risk of collision.

I am of the opinion that a ship such as the *Hamonic* in this case, going astern about two thousand feet, and in such a manner as to occupy a considerable space of the stream, with better knowledge than the other ship of the probable degree of success and precision with which her turning movement was being executed, or likely to be consummated, and knowing the degree of command which she was under, and with the knowledge that the up-going ship was

awaiting the turning event, should use the danger signal in ample time, and with such frequency as the situation and prudence would dictate, and not postpone the same until the collision is imminent or inevitable. Regulations are not merely made for the purpose of preventing a collision, but also to prevent the risk of a collision. They apply at a time when there is a probability of collision or when risk of collision can be avoided. The use of the danger signal long before it was used by the *Hamonic* was I think imperative.

Further as the trial judge concluded, the *Hamonic,* a powerful boat with the aid of a tug, was allowed to come down too close to the lower side of the basin before getting her bow in a down stream direction, and in not earlier stopping her downward movement and going further into the basin, was in fault, and no satisfactory explanation of her failure to do so has been made. The turning manœuvre of the *Hamonic* was not in my judgment properly executed or with proper regard of the rights of the *Fryer,* and this is also the opinion of my assessors.

The question of the liability of the *Fryer* is not quite so easy of determination, but my assessors are of the opinion that the *Fryer* contributed to the collision and is also blamable and in that view I concur. The trial judge himself evidently entertained some doubt in respect of his finding as to the liability of the *Fryer,* and I am respectfully obliged to differ from his conclusion thereon.

While it is true that a ship intending to turn in a narrow channel should approach her turning basin and execute her turn with reasonable care and with regard to other traffic passing up and down the river, still she is entitled to turn, and traffic up and down the channel must exercise reasonable care with regard to her, because such traffic has to deal with a turning ship in a narrow channel. They must act with proper regard for the safety of each other. I do not think that the *Hamonic* was handled with due regard to the safety of the *Fryer* and I am also of the opinion that the *Fryer* is blamable for the same reason.

I think the starboard side of the river was the proper one for the *Fryer* to hold, both under the regulations and in the exercise of prudent seamanship. Until a situation de-

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veloped justifying a departure from the starboard side of the river, the *Fryer* should have held to her starboard side of the channel. Had the *Fryer* kept such a position she would have been able to await with safety the turning of the *Hamonic,* and later might have pursued her starboard course, or if events required it, proceeded to port. Further, she would have been under better control in that she would have been less exposed to the influence of the wind which prevailed on this occasion. The *Fryer* was on the starboard side of the river when she first sighted the *Hamonic* but afterwards went to the port side of mid-channel or close to it, evidently with the intention of passing under the stern of the *Hamonic* when she made her turn. She permitted herself to get too far to port to properly manoeuvre in the crisis of the situation that developed.

My assessors are of the view, and in that view I agree, that the *Fryer* should have much earlier gone astern when she saw that the *Hamonic* was not backing further into the basin and was athwart the river just prior to turning. It was close to the crucial moment of the turning of the *Hamonic* that the *Fryer* was found too close to the former ship. What the *Fryer* should have done prior to the turning is one thing; what she should have done just when the *Hamonic* was about to complete her turn is another thing. The *Fryer* then knew that the *Hamonic* was not a ship intending to return, but a ship just about to turn or actually turning which is quite a different thing. She should not have been in such close proximity to the *Hamonic* at her turn and should much earlier have gone astern. This I think she could have done. I am of the opinion that the *Hamonic* and *Fryer* are both to blame for the collision.

I do not think the *Fryer* is entitled to any consideration by reason of the fact that she possesses structural peculiarities or other seagoing qualities, which rendered it difficult to exercise due and prompt command over her in her navigation, as suggested by the trial judge. The captain of the *Fryer* knew her peculiarities better than any one else, and, because of this knowledge, corresponding care was required on his part. I do not think that one ship should be expected to know the navigating disabilities of another ship and thereon base her own conduct, and, even if she did,

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the ultimate welfare of each will best be conserved by the observance of the regulations and practices which experience and good seamanship have established for the guidance of each.

Therefore I very respectfully am of the opinion that both ships are to blame. The appellant should have his costs of the appeal and there should be no costs to either party on trial.

The case will be remitted to the court of first instance to be there dealt with as the rights of the parties under this judgment may appear to the said court.

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT

1924

April 8.

THE SHIP *ROBERT L. FRYER* (DEFENDANT) ..... } APPELLANT;

AND

THE STEAMER *WESTMOUNT* AND OWNERS (PLAINTIFFS) ..... } RESPONDENTS.

Shipping—Collision—Harbour—Narrow channels—Negligence.

On the 17th November, a little after 5.40 p.m. a collision occurred between the *W.* and the *F.* in Port Arthur harbour, at the entrance to a slip, 1,100 feet long and 175 feet wide, which is narrowed on the south side of the entrance by 20 feet, due to a wreck. In the south wall of the slip there are two recesses, and in one was the said wreck and in the other the *J.* Another steamer, 48 feet beam, lay at the north wall (Government dock) 450 feet from its end. Directly outward, 2,400 feet, is a breakwater forming the harbour between it and the shore. From the harbour proper is a slip channel leading into the slip. The *W.* a steel steamer, 550 feet long and 58 feet beam lay on the south side of the slip, and when the *F.* a wooden steamer 280 feet long, was not more than 300 feet from the end of the north wall, to which she was destined, the *W.* began to back out, swinging stern first across the slip, with considerable speed, intending to work along the north wall. The *F.*, unable to make her berth, signalled she was going to port, and in so attempting, the collision occurred. The visibility was low and the *W's* stern lights were out; she knew of the *F's* approach and gave no signal that she was to leave her dock.

Held, (reversing the judgment appealed from) that no fault should be attributed to the *F.* for not pursuing her efforts to make her dock; nor because she had got in too far into the slip channel to make a passage to port; that the *W.* by failing to signal her intention to leave dock, by her speed in swinging across channel and her general manœuvring was guilty of negligence, which was the proximate cause of the collision, and the *W.* was wholly to blame.

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APPEAL by steamer *Robert L. Fryer* from a judgment of the Local Judge in Admiralty of the Toronto Admiralty District (1) declaring that both ships were equally to blame for the collision in question.

February 1, 1924.

Appeal now heard before the Honourable The President.

The owner of the Robert L. Fryer in person.

R. I. Towers, K.C. for the respondent.

The facts are stated in the reasons of judgment.

THE PRESIDENT, this 8th day of April, 1924, delivered judgment.

This is an appeal asserted by the steamer *Robert L. Fryer* and owners from a judgment of Honourable Mr. Justice Hodgins, Local Judge in Admiralty, for the Toronto Admiralty District, given in an action for damages for collision brought against the steamer *Robert L. Fryer,* the appellant, by the steamer *Westmount* and owners, wherein it was pronounced that both ships were equally to blame for the collision. The appellant asks that it be declared that the steamer *Westmount* was alone to blame.

The appeal was heard by me with two nautical assessors, Capt. L. A. Demers, Wrecks Commissioner, and Capt. L. G. Dixon, Marine Superintendent of the Department of Marine and Fisheries.

The slip so-called, or basin, wherein the collision occurred is located in the harbour of Port Arthur. With slight variations the slip is rectangular in shape. The southern side of the slip is known as the Davidson & Smith elevator dock, and is about 1,100 feet in length. The northern side or wall of the slip is known as the Government elevator dock, and is of the same length as the south side of the slip. The width of the slip is 175 feet, narrowed at one point near the entrance on the south side, by reason of the wrecked steamer *Ritchie* projecting into the slip about 20 feet, thus narrowing the slip at this point to about 155 feet, and near which the collision occurred. The steamer *Jedd* lay also on the south side of the slip, but further in, than the *Ritchie,* but apparently was not projected into the slip proper. The south wall of the slip is not straight through-

(1) [1923] Ex. C.R. 161.

out, there being two recessions southerly, and towards the outer end, and it was in either of these recessions the *Jedd* and *Ritchie* lay. At the time of the collision the steamer *F. B. Squires,* of 48 feet of beam lay at the Government dock, and about 450 feet from its end.

Directly outward from the slip 2,400 feet, is a lengthy breakwater running north and south, and about at right angles to the slip, forming a harbour between it and the shore line. The harbour extends very much north and south of the north and south lines of the slip if projected outwards to the harbour and breakwater. In the breakwater almost in line with the slip, is a gap through which ships enter the harbour, and from there the slip in question. The further statement should be made, however, that there is a channel leading into the slip from the shore limits of the harbour, this channel being of the same width as the slip. This point may perhaps be more clearly and accurately expressed by saying, that if the southern and northern sides of the slip were projected outwards 1,000 feet and 200 feet respectively, they would mark the channel from the navigable harbour proper into the mouth of the slip, and this may be designated as the slip channel. It would not be incorrect to describe the slip and the slip channel, as a narrow channel navigable for ships drawing a certain depth of water.

On the day in question, November 17, 1922, the *Westmount,* a steel freight steamer of 7,932 tons, and being 550 feet in length and 58 feet width of beam, was loading grain at the Davidson and Smith elevator on the south side of the slip. At 5.40 p.m. of that day the *Westmount* finished loading and proceeded to back out from her dock in the slip with a view to proceeding to another place for additional cargo, and about the same time the *Fryer,* a wooden steamship of 1,157 tons and 280 feet in length, was entering or approaching the slip.

I have restated chiefly the facts disclosed at the trial which are descriptive of the locus where the collision occurred, because, in my opinion the issue involved in the appeal relates entirely to the manner in which an incoming and an outgoing ship, to and from a common slip, which is connected with a harbour by a narrow navigable channel,

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The President.

were respectively navigated. All other relevant facts are fully stated in the judgment appealed from.

I have considered this appeal with my assessors with great care and at considerable length. They were very strongly of the opinion that the *Westmount* was alone to blame and I am of that view.

I think the evidence clearly and abundantly indicates that the *Fryer* had proceeded up the channel leading from the harbour into the slip, on her starboard side, to a point not more than 300 feet from the end of the Government dock, to which dock she was destined, before the *Westmount* commenced to move from her dock, and the trial judge so finds. That is to say, the *Fryer* had approached within a little more than her own length of the dock at which she was to lay, before she had any notice of the intention of the *Westmount* to move from her dock. That the *Fryer* was approaching the slip was known to the *Westmount*. The visibility was low, in fact it must have been after sundown before the *Westmount* commenced to move and her stern lights were not lighted. The mate of the *Westmount* states that he first observed the *Fryer* 300 feet out from the Government dock, and that it was then dusk, and so much so, that he did not recognize the approaching steamer as the *Fryer*, although she must have been well known to him owing to certain peculiarities of her superstructure. The *Fryer* was shewing her lights. The appellant urged on her own behalf but casually, the absence of lights on the *Westmount*, at the trial and on the appeal, and consequently I shall not allow this apparent neglect to enter into my consideration of the appeal, although my assessors were very strongly of the opinion that in this respect the *Westmount* was negligent. I think, however, that the *Westmount* did not show proper consideration of the fact that the visibility was low, and further, I am of the opinion that the lack of lights on the *Westmount* might very naturally lead the *Fryer* to conclude that the *Westmount* was not likely to soon move from her dock, and this view was urged at the trial.

Thus with the *Fryer* only her own length and a little more, from the end of the dock at which she intended to lay, the *Westmount* without the prescribed signal, with

the knowledge that the *Fryer* was approaching the slip, commenced to move from her dock in the manner described by the trial judge, swung stern first across the slip with very considerable speed, as the trial judge finds, towards the side of the slip directly opposite from where she was moored, and soon her stern was close to the Government dock, intending to work out along the Government dock wall, and indeed the witnesses of the *Westmount* say that at a certain stage of this movement she had lines fast to the Government dock. This is denied by the *Fryer,* but at all event it establishes the manœuvre contemplated by the *Westmount.* The *Fryer* finding it impossible to make this dock, signalled she was to go to port, the *Westmount's* position making it unsafe or impossible to attempt to go further ahead and on her starboard along towards the Government dock, at least the *Fryer* deemed it inadvisable to attempt to do so. In attempting to go to port a collision occurred as narrated in the judgment appealed from, the *Fryer* striking the port quarter of the *Westmount* a glancing blow.

Upon this set of facts it appears to me that the *Westmount* is wholly to blame. Her failure to give the signal that she was to depart from her dock, the speed with which she swung across the channel, and generally her method of manœuvring to get out of the slip, to the apparent exclusion or danger of other ships seeking entry to the slip, were each acts of negligence, the proximate causes of the collision.

The trial judge found the *Fryer* at fault for not pursuing her efforts to make the Government dock, and making fast there. My assessors advise me that nothing would have justified such an attempt, and that it would in the circumstances be challenging disaster. The counsel for the *Westmount* on the appeal admitted that such a movement would not be justified on the part of the *Fryer.* I am clearly of that opinion and cannot reach the conclusion that in this respect the *Fryer* was to blame.

The *Fryer* was held also to blame in that she allowed herself to get in too far in the ship channel to safely make a passage to port. It is true in fact that the *Fryer* was unable to make a safe entry to port and a slight collision

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The President.

occurred. Nothing remained for the *Fryer* to do but attempt the passage to port, or go astern. I do not think it reasonable to say that the *Fryer* should earlier have anticipated the actual movement of the *Westmount* in swinging across the slip. Even after first observing the *Westmount* in this movement, the *Fryer* might well have expected the *Westmount,* when her stern was in mid-channel, to straighten herself up by various ahead and astern revolutions of her propellor so that she might go astern if necessary in the centre of the slip. She not only did not do this, but had even failed in any way to indicate her intention of leaving her dock. With very little action at the proper time on the part of the *Westmount,* by going ahead, the collision could have been avoided. I do not think that the *Fryer* was to blame for being too far in to make a safe voyage to port. I adopt the appellant's contention, and my assessors concur, that it was dangerous, if at all possible, for the *Fryer* to go astern with a view of reaching the navigable waters on the north side of the slip channel, owing to the fact that this movement would throw the stern of the *Fryer* into the bank on the south side of the channel. In fact had she gone astern her bow would probably have swung to starboard, and struck the stern of the *Westmount,* with probably more serious consequences than followed from the collision which did occur. It appears to me she adopted the only course open to her and just barely failed to accomplish successfully her movement to port.

The trial judge finds that the *Fryer,* like the *Westmount,* failed to give the signal required by Rule 27 applicable to the Great Lakes, and there remains to be considered the question, if this constitutes contributory negligence on the part of the *Fryer.* Regardless of this rule, I think that the *Westmount,* in view of her contemplated and executed manoeuvre, and in view of all the circumstances, was negligent in not giving earlier a danger signal, and this is the opinion of my assessors. A greater burden in this respect rested upon the *Westmount.* She was aware before moving of the close approach of the *Fryer.* The *Westmount* at her dock was visible to the *Fryer,* but her intention to move was not indicated, until the *Fryer* was well up the slip channel and quite close to her destined dock. I do not

think this failure constitutes contributory negligence on the part of the *Fryer*.

It seems to me that the reasoning of Viscount Birkenhead in his elaborate and comprehensive exposition upon the law of contributory negligence in *Admiralty Commissioners* v. *SS. Volute* (1), excludes the inference that this and other matters complained of on the part of the *Fryer*, were such acts of default or commission, contemporaneous, or subsequent and several, which constitute contributory negligence on the part of the *Fryer*. The facts suggest rather the case where the prior negligence of the *Westmount* could not by any appropriate measures be successfully avoided, or where even if mistaken measures were adopted by the *Fryer* she is not blameable for the consequences.

Therefore with great respect I allow the appeal with costs, together with the costs of trial.

Judgment accordingly.

(1) [1922] 1 A.C. 129.

QUEBEC ADMIRALTY DISTRICT

1924
April 12.

KEYSTONE TRANSPORTS LIMITED....PLAINTIFF;

AGAINST

THE BARGE *BERNON L.*

Shipping—Collision—Practice of seamen—Canal navigation—Negligence—Tug and tow.

A collision occurred on the Welland Canal, just below the Airline Bridge between the barge *B.L.* in tow of the tug *B.* coming down the current and the *K.* going up. The bridge swings on a pier in the centre of the canal, leaving a gap on the east and west sides for boats to pass, being respectively 45 feet 6 inches and 43 feet 6 inches wide. When a considerable distance above the bridge the tug gave a one-blast signal which was answered by the *K.* with a similar signal. The *K.* was a steel vessel, 42 feet 6 inches beam and 250 feet long, and the barge was 40 feet wide, being loaded with grain. When between 625 and 650 feet from the bridge, the *K.* put her bow against the west bank, her engines just turning to hold her, her stern being 10 or 15 feet out, intending to let tug and tow pass and then go through the east gap. The tug and tow came through the east gap slowly, and then, as happens to all vessels at this place, she took a sheer to port. All possible manœuvres were taken to minimize and counteract the effects

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of the sheer, and she was on her side of mid-channel at time of collision. There was a west wind of 22 miles an hour blowing, and the *K.* being light and drawing forward only 2 feet and being 34 feet above water, was exposed to the influence of wind, and her bow was forced away from the bank towards the centre, causing her to drift and the collision occurred. The *B.L.* had right of way.

Held, on the facts, that the collision was caused by the *K's* sheer to port due to want of care and seamenship on her part in selecting a place too near the bridge, and in attempting to keep stationary with her bow against the bank. That she should have either stopped further down to enable the tug to recover from an inevitable sheer, or placed her bow in the west gap until the tow had passed, and that in consequence the *K.* was wholly to blame for the collision.

Held further, that a tug with barge in tow has not the same facility of movement as if she were unencumbered, and that a vessel meeting them should make allowance therefor, and take additional care.

ACTION *in rem* and counter-claim for damage resulting from collision.

March 31, 1924.

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

A. R. Holden K.C. for plaintiff.

Errol Languedoc K.C. for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN, L.J.A., now this 12th day of April, 1924, delivered judgment.

This is an action *in rem* and counter-claim for damages resulting from a collision between plaintiff's steel steamer *Keynor* and the Wooden barge *Bernon L.* which occurred in the Welland Canal on the 30th June, 1923.

[His Lordship here gives a summary of the plaintiff's and defendant's case as set out by them in their pleadings and preliminary acts, and proceeds.]

The *Keynor* was a steel vessel of 1,806 gross tonnage, 250 feet long and 42 feet 6 inches wide, drawing at the time of the accident two feet forward and 12 feet 6 inches aft. The wooden barge *Bernon L.* of 982 gross tonnage, 196 feet long by 40 feet wide, drawing 14 feet 2 inches and carrying 41,000 bushels of wheat, was in tow of the tug *Brant,* a vessel 58 feet long and 16 or 17 feet wide. The tug and tow were going down the canal with the current of about

two miles an hour and had the right of way. The *Keynor* was going up. The Airline Bridge crossing the canal has a pier in the centre of the canal and a draw or gap on either side, the east draw being 45 feet 6 inches wide and the west draw 43 feet 6 inches. When the tug and tow were some distance above the bridge a one-blast signal was given by the tug, to which the *Keynor* responded by a similar signal. The tug and tow reduced their speed to dead slow, headed for the starboard or east draw of the bridge and passed through with very little speed. The *Keynor* had been going at half speed and after the passing signals were given reduced to dead slow, continued up the canal and was brought over to her starboard side with her bow up to the bank and her stern ten or fifteen feet out in the canal. She was seen hugging the bank by the master of the tug when the tug was above the bridge. When the tug and tow came through the draw, the barge, as happens to all vessels coming down there, took a sheer to port. The master of the tow put her wheel over to counteract the sheer, and the master of the tug ported his helm and went full speed ahead in order to keep the bow of the tow from going too far to port.

The evidence of what happened after the tug and tow had come through the bridge up to the time of the collision is most contradictory. According to the master and mate of the *Keynor,* that vessel had her bow against the west bank, her stern out ten or fifteen feet, with her engines just turning and holding her against the current for from four to five minutes at a point said to be 625 or 650 feet below the bridge, when the tow sheared to port and the vessels collided. The bluff of the barge's port bow, about three feet abaft the stem, came into contact with the bluff of the *Keynor's* port bow fifteen or eighteen feet from her stem. That was the story told by the master and mate of the *Keynor.* One of the bridge men on the Airline Bridge has testified that, just before the collision, the *Keynor* was not lying against the canal bank but was thirty feet out parallel to the bank and that the barge sheered into her when in that position; while the evidence of all the witnesses who were on board the tug and tow is, that the tow never passed the centre line of the canal and that the *Keynor*

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took a sheer to port out into the canal until she came into collision with the tow. The accident happened about 2.30 p.m. June 30, 1923, about sixteen miles west of Buffalo, N.Y., where the official record of the Weather Bureau of the U.S. Department of Agriculture shows that at 2 p.m. on that day the wind was blowing from the west at the rate of 22 miles per hour. There is evidence that the wind would be about the same where the accident happened as at Buffalo, and the master of the tug has testified that the wind was a fresh breeze on his port quarter and as the canal, there, runs practically north and south, the wind would be on the starboard bow or side of the *Keynor*. As she was light and drawing only two feet forward, she would have about 34 feet above the water line, and was quite exposed to the influence of the wind. The *Keynor's* intention was, after the tug and tow had passed down, to go through the east draw of the bridge, as it was a little wider than the west draw and would afford easier passage, and, in order to allow the tug and tow to pass down, the master of the *Keynor* brought her within about 650 feet of the bridge intending to remain there until the tug and tow had passed.

Among the questions which I asked my assessors, with their answers, are the following:—

(1) Was it in accordance with the ordinary practice of seamen and good navigation to attempt to keep the *Keynor* stationary with her bow against the bank and her stern out ten or fifteen feet while the tug and tow were approaching, having regard to current and wind conditions?

Ans. No. It was not good policy or good navigation to attempt this. From such position any tendency to sheer on the part of the *Keynor* would be—with the wind on the starboard bow and the current on the port-quarter—to send her bow out towards the centre of the canal, and this sheer would be difficult to overcome.

(2) Was the place which the master of the *Keynor* selected to meet the downbound tug and tow too close to the Airline Bridge?

Ans. Yes. It would appear that he was in such position as to lay himself open to damage, because of the known sheer all vessels take when coming down through the Airline Bridge. He could have remained below or, as an alternative, placed the bow of the *Keynor* in the west draw and waited until the tow had passed clear.

(3) Was the *Keynor* brought too soon to the starboard bank of the canal?

Ans. Yes. It is a better and safer practice to keep the centre of the canal until about a ship's length, or less, then to take his right side of the canal.

It will be seen that the gentlemen who advised me are of opinion that the place where the master of the *Keynor* selected to meet the tug and tow was dangerous and was too close to the bridge and that the master of the *Keynor* should either have stopped further down the canal at a greater distance from the bridge, which would have enabled the tug and tow to recover from the sheer which all vessels take after passing through the draw, or he might have proceeded up to the bridge and placed the bow of the *Keynor* in the west draw and waited there until the tug and tow had passed, and then by going astern a short distance could have safely passed through the east draw, if he considered the west draw too narrow for his vessel. The master of the tug expected the *Keynor* would have adopted the latter course, but instead of doing so the master of the *Keynor*, contrary to the ordinary practice of seamen and good navigation, in the opinion of my assessors, and contrary to the usual practice in the canal, according to the evidence of some of the witnesses, attempted to keep his vessel against the west bank stationary for several minutes while the tug and tow were coming through the bridge, hoping to remain in that position until they had passed. If it had not been for the wind, it is possible that the *Keynor* could have been kept in that position until the tug and tow had passed, but placed as she was, she had the current against her port-quarter and the wind on her starboard bow, which apparently forced her bow away from the bank towards the centre of the canal just as the tug and tow were passing, with the result that she drifted over and the collision took place. If the *Keynor* had waited further down, the tug and tow would have had time and opportunity to recover from the inevitable sheer after passing the bridge, and the *Keynor* when a ship length or less from the tug, could have gone to starboard and safely passed. This is the advice of my assessors. In my opinion, it was bad seamanship on the part of the master of the *Keynor* not to have remained further down the canal, say half a mile below the bridge, and there met the tug and tow, or equally bad seamanship,—and he had ample time so to do,—not to have taken his vessel up to the bridge and placed her bow in the west draw until the tug and tow had

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passed down. Instead of taking either one of these alternatives, he chose a dangerous and unseamanlike manœuvre in attempting to keep his vessel stationary, with her bow against the bank and her stern out about ten or fifteen feet for several minutes while exposed to a wind strong enough to carry his vessel away from the bank until she came into collision with the tow. The tug and tow had the right of way and it was the duty of the *Keynor* to keep clear and give them a safe passage. A tug with a barge in tow has not the same facility of movement as if she were unencumbered, and the *Keynor* should have made allowance for this and taken additional care in meeting them. On the evidence I find that the collision did not take place in the manner described by the master and mate of the *Keynor;* that the sheer of the tow was inevitable; that it was known to all the navigators of the canal that every vessel coming down through the east draw of the bridge would sheer more or less to port; that those on board the tug and tow did everything possible to minimize and counteract the effect of the tow's sheer and that the tow did not pass mid-channel of the canal at the time of the collision, which was caused by the *Keynor's* sheer to port until the bluffs of the bows came in contact in a glancing blow which did some damage to both the *Keynor* and the *Bernon L.*

I find that the collision was caused by the failure of the *Keynor* to keep to the starboard side of the canal, and that her sheer to port until she collided with the *Bernon L.* was due to want of care and seamanship on the part of her officers in charge of her navigation. I also find that there is no blame imputable to those in charge of the *Bernon L.* or the tug *Brant.*

There will therefore be judgment dismissing the action against the *Bernon L.* with costs, and the counter-claim of the defendant for damages caused to the *Bernon L.* is maintained with costs, with a reference to the Deputy District Registrar, with the assistance of merchants, to assess such damages.

Judgment accordingly.

ROYAL TRUST COMPANY.....SUPPLIANT; 1924 April 26.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Landlord and tenant—Lease—Covenant to repair—"Wear and tear"—Interpretation.

Held, that where a lease contains a covenant "to repair, reasonable wear and tear, and damage by fire, lightning and tempest only excepted . . . and that the lessee shall leave the premises in good repair, reasonable wear and tear, etc., only excepted," such a covenant must be construed with moderation and not with severity, so that nothing will be exacted at the expiration of the lease in the nature of repairs, except such as are necessary to make the premises reasonably fit for occupation by tenants of the class likely to occupy it. Repair and not perfection is the test, and the tenant will be deemed to have discharged his liability to repair if he has kept the building in repair according to its age, nature and the condition in which it was when he took possession.

2. That "wear and tear" must be considered in the light of the purpose for which the building was leased and the nature of the use to which it might be put.

3. That the suppliant's claim for damages for breach of the covenant to repair was not extinguished by a sale by him of the demised premises, before the institution of the action. This right is in the nature of a chose in action existing separately from the property itself.

PETITION OF RIGHT seeking to recover $10,000 damages for breach of covenant to repair under a lease of premises from suppliant to respondent.

April the 2nd, 3rd, 4th and 5th, 1924.

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

R. T. Harding, K.C. and *C. B. Clark* for suppliant;

H. H. Dewart, K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 26th April, 1924, delivered judgment.

The suppliant, by its Petition of Right, seeks to recover the sum of $10,000 damages arising out of an alleged breach of a covenant in a lease or agreement entered into between the parties, in that at the expiration of the least the property has been yielded up to the suppliant

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greatly injured, wasted, damaged and destroyed, and that the defendant failed to keep the premises in repair during the term of the lease.

On the 23rd February, 1921, the parties hereto entered into a lease whereby the suppliant rented to the respondent on College Street, in the city of Toronto, a large property which hitherto had been used as a dwelling or residential property and for a time as the residence of the Lieutenant Governor of Ontario. The lease specially sets out that the property is taken or leased

to provide facilities for the care and training, in the city of Toronto, of sub-normal ex-members of the Military and Naval Forces who are eligible for such care and training under the regulations of the Department of Soldiers' Civil Re-establishment with a view to the re-establishment of such persons in civil life . . . .

the lessor specifically agreeing

to lease unto the lessee for such purposes.

The house was rented and used to open and operate "vetcraft" workshops, providing manual employment,—such as the making of toys, baskets and brass-work, etc., involving technical, mechanical and artisan training with machinery and equipment, for sub-normal handicapped men who required consideration, as alleged in paragraph 2 of the statement in defence. The building

which is a good old house

was used, as stated by one of the witnesses, for copper work, wooden work, wicker work and light carpentering.

The claim is made against the respondent for breach of covenants for repair contained in the lease, reading as follows:

And to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted . . . . And that the lessee shall leave the premises in good repair, reasonable wear and tear, etc., only excepted.

Both of these clauses to be read within the amplified meaning defined in R.S.O. (1914) c. 116, Schedule B., pp. 1239 (4) and 1240 (9), as per annexed copy to the lease filed as exhibit No. 1.

The particulars of the claim are as follows, viz:—

1. Repairs to roofing..	$ 250 00
2. Necessary plastering..	100 00
3. Repairs and replacements of plumbing and steamfitting	400 00
4. Repairs to lighting, wiring and lighting fixtures..	1,500 00
5. Necessary carpenter work, about..	250 00
6. Repairs to and installation of floors and floor coverings, about..	1,400 00

7. Repairs to tile work in bathrooms and lavatories, and marble work in main lavatory, as well as replacement of fireplace linings, about..	350 00
8. Painting and decorating interior work, about..	1,800 00
9. Replacing broken glass and painting conservatory inside..	250 00
10. Exterior painting, two coats of paint on the outside of the house—estimate..	1,100 00
11. Repairs to stables, greenhouses and outbuildings, for cleaning up and painting, estimate..	200 00
	$7,600 00

It must primarily be observed that notwithstanding the allegation of paragraph 8 of the petition of right that this sum of $7,600 " was required " to put the demised premises in a final state of repair, that the allegation would have been clearer and unambiguous had it said " would be required," as no amount was expended and that this sum of $7,600 is merely an estimate of the cost of the contemplated repairs. *Klees* v. *Dominion Coat and Apron Co.* (1).

The standard of repairs under the circumstances of the case is the difficult question left for determination.

That question, it seems, cannot be properly decided without taking all the circumstances of the case into consideration. The evidence discloses that the demised premises were old; the property was built in 1858 or 1859 and when bought in 1904 by Mr. Beardmore it was remodelled and repaired at great expense.

It is further established under the evidence that these premises in the process of trade and commercial change and development in Toronto, had gone out of the dwelling and residential class and district into another class and district. That it was now to be used either as a public library or an institution, etc.

Does not the fact that the owners leased to the respondent for the avowed purposes mentioned in the lease, show that they realized that the residential character of the property had departed. Does not this fact, coupled with the evidence that the property had gone out of the residential district, lead to the conclusion that the state of repair in which the property was to be left at the conclu-

(1) [1905] 6 Ont. W.R. 200.

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sion of the tenancy was to be such as would make it reasonably fit for the occupation of a tenant of the class likely to take it. That it seems to me is the true construction to be placed upon the covenants to repair. *Proudfoot* v. *Hart* (1); *Calthorpe* v. *McOscar* (2).

Now it is one thing to lay down the rule that the covenants of the lease must be fairly construed, but quite another thing to establish the proper application of the rule to a particular case.

The claim made is an estimate and it must be borne in mind that the evidence adduced in support of the same has been by so-called experts or men in the trade, master-plumbers, etc., who were sent upon the premises for the very purpose of finding fault. Indeed, at all times and under all conditions, if an expert in plumbing, heating, or any other trade, is let into a house for the very purpose of fault finding, he will always find manifold defects that will be magnified and increased to suit the purposes of the case. Therefore in an earnest endeavour to do justice between parties one must guard against exaggerations one way or the other.

A lessee cannot commit waste in the nature of a breach of a covenant of his contract, even technically, if he is doing that which he is entitled to do by such contract,—that is he cannot commit waste in the nature of a breach, if the lessor has entered into a special contract with him that enables him to do what he has done. *Meux* v. *Cobley* (3).

When an old building is demised and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed state at the end of the term, or that it should be of greater value than it was at the beginning of the term. *Gutteridge* v. *Munyard* (4). Some of the witnesses were testifying to expenditures in repairs upon the basis of turning out some portion of the house as good as new, in first-class condition, when it is clearly established that the house was only in fair condition at the time possession was taken.

(1) [1890] 25 Q.B.D. 42.
(2) [1923] 2 K.B. 573 at p. 579.
(3) [1892] L.R. 2 Ch. D. 253 at p. 263.
(4) [1834] 1 Moody & Rob. 334, at p. 336.

Far from being maltreated or badly abused, the house—having regard to the use for which it had been leased—(Woodfall's Law of Landlord and Tenant 20th ed. 818) has been relinquished in a better condition than might have reasonably been expected,—saving always, *inter alia,* the injury which obviously must have resulted from the user of the large benches for the purposes of the copper workshop in the dining room—but all of this is due to the careful supervision of those in charge at the time of the taking possession, occupation and at the end of lease.

The covenant to repair, as set out in the lease, is to

well and sufficiently repair, etc.,

words that have been very ably commented and passed upon in the leading case of *Calthorpe* (ubi supra) and wherein it is said that they must be construed with moderation and not with severity. Repair and not perfection is the test. The covenant must not be strained, but reasonably construed, so as to keep the premises in substantial repair as opposed to trivial matters. 18 Hals. 508.

The learned judge in the *Calthorpe* case, sums up his judgment and concludes in the following manner, viz:—

> In concluding this judgment I desire to point out that *Proudfoot* v. *Hart* (ubi supra) supplies, I think, a useful working rule for the normal covenants to repair, however variously they may be worded. Some standard must be taken. What is it to be? The notion of the actual owner may be generous or severe. The notion of the actual tenant may be narrow or indulgent. It is well to adopt a practical and general working standard and thus to meet the difficulty arising when landlords and tenants have opposite views with respect to houses which vary greatly in age, description, locality and purpose. Such a standard is provided by *Proudfoot* v. *Hart.* After all, a building is made for occupation. It is for use as a business or residential structure and not as a museum of reparational achievement. If the actual landlord with varying notions is excluded, and the actual tenant with varying notions is also excluded, then a hypothetical person can be taken as supplying the test. That person is well indicated in *Proudfoot* v. *Hart.* He is known as the reasonable person. He is assumed to be the intended occupant. He is reasonably minded. He must not ask too much or accept too little. The notional existence of this person guards equally the interests of landlord and tenant. Exclude him and confusion exists; adopt him and a working rule is provided.

The tenant discharges his liability when he keeps the building in repair according to its age, nature and the condition in which it was when he took possession. He is not expected to return a new house, but a house in a substantial state of repairs, with due allowance for wear and tear.

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The covenant to repair does not imply the necessity to rebuild when not contemplated by the lease. *Lister* v. *Lane* (1).

I have had the advantage, accompanied by counsel for both parties, of viewing during the trial, the premises in question,—a visit which has enabled me greatly to properly appreciate the testimony of the witnesses and to understand the manifold details of the claim.

The house has been empty from the 1st February, 1923. It was heated from that day to the spring of 1923, but not to the same degree of temperature as before.

Possession of the property was taken on 1st February, 1920, and it was vacated on 31st January, 1923.

Now the property when entered upon by the tenant was not, as put by witness Northgrave, in first-class repair, and the defects in wiring, plumbing and heating were not, however, such as would interfere with the use it was intended to be made of the premises. Great precautions were taken at the outset by the tenant to protect the house, repairs were made from time to time and even at the expiration of the lease, when carpenters were sent to make such repairs as would appear to be required. Witness Northgrave went over the property, at the time possession was taken and exhibit G prepared by him shows the state and condition of the premises when possession was taken on about 1st February, 1920.

Taking the several items of the particulars above recited the full estimate will be allowed in respect of the floor in the dining room and a reasonable amount to retouch and fix the other floors on the ground and first floors which might have been affected by the washing with water, or otherwise. There was no damage to the third floor as stated by one of the witnesses heard on behalf of the suppliant. A reasonable allowance will also be made with respect to the tile work, together with the decorations in the interior; that is to clean, touch with paint, but not repaint the two flats. If all the painting and decorating asked were allowed,

(1) [1911] 31 Can. L.T. 927; [1893] 2 Q.B.D. 212.

the house could be placed in a very much better condition than when the tenant took possession. *Scales* v. *Lawrence* (1); *Crawford* v. *Newton* (2).

Nothing should be allowed in respect of the conservatory the evidence establishing clearly that it was "not in good shape" on the 1st February, 1920. There were panes of glass broken, it leaked and could not be used at the time. The paint was gone and the ribs of the dome showed dry rot. *Lister* v. *Lane* (3). The 10th item respecting painting of the outside of the house has been abandoned at trial and very little could be allowed, if any, in respect of the stables, which were especially well protected by a wooden floor plank laid with joints over the cement when used by the tenant.

A small amount will be allowed in respect of all items, excepting items 1, 9, 10 and 11. The plumbing and heating except "some small details" have been maintained in fair state of repairs and the claim in that respect was grossly exaggerated by some of the witnesses, such as the sum claimed in respect of the laundry tubs (which were not used by the tenant), the copper sink, the smoke stacks of the furnaces, etc. A moderate and small amount is allowed with respect to the item of wiring, lighting and bells, a claim marked with the most arrant extravagance, as shewn by the evidence.

The system of telephones between the different apartments of the house was not in perfect condition, not in working condition, when possession was taken. It was not used. However, it is true there was some slight damage at a couple of places and an allowance is made for such damage. All wirings in the building are obsolete and under the rules and regulations of underwriters could not be installed to-day. Brass sockets were removed from cellar and replaced by porcelain.

Going over these particulars, I may say that in making an estimate of what should be allowed it is impossible to arrive at a compensation with mathematical accuracy, and I have come to the conclusion that the sum of $1,016 will

(1) [1860] 2 F.F. 289. (2) [1886] 36 W.R. 54.
(3) [1893] 2 Q.B.D. 212.

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meet the merits of the case, so far as it can be ascertained, to cover all real and actual damages.

Besides the item of the particulars amounting to $7,600, as more fully amplified in exhibit 7, there is also a claim of $2,500 set out in paragraph 9 of the information for the use of the premises, by the landlord, to make the repairs in question, thereby depriving him of rent in the meantime.

The repairs alleged in the petition of right were not made and there is no evidence on the record going to show the lessor has lost any tenant on that account. Moreover, the property was relinquished on the 31st January, 1923. The bursar and secretary of the University of Toronto testified that the property has been bought by them, under deed bearing date the 17th May, 1923. That negotiations for such sale had been submitted in writing by the lessor on the 5th March, 1923, and furthermore that " some verbal negotiations had started before that date " and he said he should judge " a month or so before,"—which would take us back to the 5th of February, 1923, five days after the expiration of the lease.

The claim for this sum of $2,500 has not been proven and is disallowed.

There remains the further question raised by the amendment of the statement in defence to the effect that the claim made by the petition which is dated the 22nd June, 1923, at a time when the suppliant had sold the property and had thus parted with and disposed of all its interest whatsoever in the demised premises, as more fully stated in the pleadings, and that therefore the suppliant's right of action was at that time extinguished and that he has no claim for any damages against the respondent.

The right of action for damages arose on the 31st January, 1923, and remained extant and in existence as long as unsatisfied. It is a right in the nature of a chose in action existing separately from the property itself and which did not depend upon what the lessor was doing with his property at the expiration of the lease,—either selling or demolishing. This right of action must not be confused with an alleged right of action for damages arising after the property has been sold by the lessor.

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Where, indeed, premises have been pulled down by the lessor at the expiration of a lease, his rights under the covenant to repair are not thereby diminished or altered. *Inderwick* v. *Leech* (1); *Joyner* v. *Weeks* (2) 18 Hals. 513; *Rawlings* v. *Morgan* (3); *Calthorpe* v. *McOscar* (4).

I should not close without saying I have not overlooked the question stressed in the course of the trial with respect to exhibit No. 3, required when submitting premises for rental to the Crown and the letter, exhibit No. 4, written by witness Northgrave. The writer of that letter had no authority to bind the Crown and even had he such authority the signing of the lease after that date is a clear and distinct waiver of the several conditions mentioned in exhibit No. 3 which is entirely superseded by the lease itself which has become the law between the parties thereto.

Therefore, there will be judgment adjudging that the suppliant is entitled to recover and be paid by the respondent the said sum of $1,016 and with costs.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

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May 14.

EVANS, COLEMAN & EVANS, LTD., ET AL ..... } PLAINTIFF;

AGAINST

THE *ROMAN PRINCE*

Practice—Costs—Discretion of judge—Amendment.

Held, that it is impossible to formulate any general rule which could adequately cover or anticipate those ever varying circumstances which should determine the application of a milder or stricter order for costs, and that in exercising a proper discretion as to costs, each case must be carefully considered in the light of its special circumstances.

2. Where it was found, during the trial, that the proper person was not in the suit as plaintiff, and where by amendment he was added, the costs of such a motion, under such circumstances, should be paid by the plaintiff to the defendant in any event.

(1) [1884-5] 1 T.L.R. 485.
(2) [1891] L.R. 2 Q.B.D. 31.
(3) [1865] 18 C.B. (N.S.) 776.
(4) [1923] 2 K.B. 573 at p. 579.

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Two days of the trial were taken up with the hearing of expert evidence, on behalf of plaintiff and defendant, on the question of whether the ship should have used two or three tugs in berthing. The court declined to accept plaintiffs theory of responsibility, but held the ship responsible on other grounds. On application of defendant for the costs of these two days in any event.

Held, that costs of the trial should follow the event, in accordance with rule 132 and the Court did not deem it fit to make any other order.

MOTION to settle certain questions of costs reserved under the judgment rendered herein on the 27th November last (1).

Vancouver, May 14, 1924, after argument before the Honourable Mr. Justice Martin, judgment was rendered the same day.

E. P. Davis for motion.

Griffin & Co. contra.

The facts and points discussed are stated in the reasons for judgment.

MARTIN L.J.A. now this 14th day of May, 1924, delivered judgment.

This is a motion to settle certain questions of costs reserved under the judgment for the plaintiffs herein of the 27th November last.

First, as to the amendment granted on the 13th of July during the hearing, adding The Evans Coleman Wharf Co., Ltd., as plaintiff, I have carefully considered this question in the light of the special circumstances of the case which must always govern the exercise of a proper discretion since it is impossible to formulate any general rule which could adequately cover or anticipate those ever varying circumstances which should determine the application of a milder or stricter order for costs. Many cases have been cited by counsel and referred to by me, and the matter was recently considered by my brothers and myself in the Court of Appeal in *Farquharson* v. *Can. Pac. Ry.* (2), wherein the decision of the learned trial judge was set aside because a wrong principle had been applied and we noted also that even if there had been no such error the imposition of

(1) [1924] Ex. C.R. 93.

(2) [1922] 3 W.W.R. 537; 31 B.C.R. 338 at p. 341.

milder terms was open to his discretion as in *E. M. Bowdens Patents Syndicate Ltd.* v. *Herbert Smith & Co.* (1), and I note that in *Performing Right Soc.* v. *London Theatre of Varieties* (2), leave was given to add the publishers as necessary co-plaintiffs to maintain a copyright action even after the case had been appealed and argued, upon the terms as to costs that

> all the defendants' costs of action thrown away by the fact that up to the moment of amendment the action was not maintainable, should be the defendants in any event,

pp. 460-1. In *Long* v. *Crossley* (3) similar amendment was allowed at the trial "the plaintiffs paying the consequent costs" of it and of the adjournment of the trial which became necessary. A striking case in Admiralty is the *Duke of Buccleuch* (4), wherein leave was given to add a necessary plaintiff, even after an an appeal to the House of Lords, in order to correct a mistake and enable a claim for damages to be assessed upon payment of the costs of the application. That is an informative case also, upon the trial, judgment and assessment of damages in Admiralty, and the following instructive observations below occur on p. 209-10:—

> The practice in the Admiralty Court goes far to shew that a decree at the hearing was never considered final in the sense that a person could not be introduced afterwards as a party to the suit for the purpose of getting assessed and receiving damages. In the case of *The Ilos* (5), where an action was brought, not by the registered owner, but a person having a bill of sale (whether taken after or before the collision does not appear), Dr. Lushington, when the matter was before the registrar and merchants, refused to dismiss the defendant on the ground of want of title in the plaintiff, ordered the reference to proceed, and added, that if there was any doubt who was entitled to receive the amount of compensation, after it had been assessed, he should direct the amount to be paid into the registry, and throw upon the party claiming it the onus of establishing his ownership.
>
> In *The Minna* (6), Sir Robert Phillimore approved and followed the case of *The Ilos ubi supra.*
>
> It is said by Mr. Barnes, that in both these cases the plaintiffs on the record had, or might have had, beneficial rights; but that does not appear to me to meet the point that the Court of Admiralty considered the decree of the judge as leaving still open the question of the title of the plaintiffs as owners of ship or cargo.

(1) [1904] 2 Ch. D. 86 at pp. 92 & 122; 73 L.J. Ch. 522 at p. 776.
(2) [1922] 2 K.B. 433.
(3) [1879] 13 Ch. D. 388 at 391.
(4) [1892] P. 201 at pp. 210-212.
(5) [1856] 1 Swabey 100.
(6) [1868] L.R. 2 A. & E. 97.

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And see Lord Esher's remarks on p. 211. It is to be noted that the new plaintiff was added, pp. 210, 212, not substituted as erroneously stated in the head-note.

I am of opinion that in the circumstances of this case the proper order to make is that the costs of and consequent upon the amendment should be paid by the plaintiff to the defendant in any event, being set off against those due by the defendant.

Second, as to the costs of the trial, I have come to the conclusion that they should follow the event, as in general accordance with Rule 132, and do not deem it "fit" to make any other order. I have given full and careful consideration to Mr. Griffin's submission that the dispute as to the propriety of employing only two tugs instead of three should be regarded as a separate issue of which the defendant should get the costs and he relied particularly upon *The Ophelia* (1). But in that case there were two quite distinct issues, the first being a question of faulty navigation, and the second, compulsory pilotage, which if established would have exonerated the defendant ship from liability even if negligent as pointed out by Lord Parker at p. 51. But in the case at bar the issue was faulty navigation only (apart from title) in the continuous execution of one manoeuvre, and in the determination of that question, in the circumstances herein, the proper employment of one or more tugs was really no more a separate issue than, *e.g.,* the proper employment of a hawser, of an anchor, or of the steering gear to make allowance for wind or tide. This view is consistent with the principle of the decision of the British Columbia Court of Appeal in *Seattle Construction & Dry Dock Co.* v. *Grant Smith and Co.* (2), wherein the observations I made, on p. 786, are in point and cover the present question upon lines identical in principle with the *Ophelia* case.

As to the remaining questions of admissions, and costs of the two plaintiffs, I see no good reason, in the circumstances, for excluding them from the general rule; the names of the two plaintiffs are, in pursuance of my judgment yesterday, upon the record and should have been

(1) [1914] P. 46.

(2) [1919] 1 W.W.R. 783 at p. 786.

upon it when the formal judgment was entered, and I think that no sound reason has been advanced for the removal of either of them from said record, even if this were the proper occasion to do so and in the absence of a substantive motion to that effect, and in view of the appeal which has been taken from said judgment. The costs of this motion will be in the cause.

Judgment accordingly.

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BRITISH COLUMBIA ADMIRALTY DISTRICT

EVANS, COLEMAN & EVANS, LTD., ET AL ..... PLAINTIFF;

1924
May 13.

AND

THE *ROMAN PRINCE*

Practice—Amendment of judgment after entered—Error—Formal judgment not representing judge's judgment.

In the course of the trial herein, leave was granted to plaintiff to add the E.C.W. Co. as co-plaintiff, with its consent. When judgment was handed down, the brief note of the judge only gave a short style of cause, as is usual, and in settling the formal decree the name of the added party was omitted. Plaintiff now moves to rectify this slip and error, by amending the judgment accordingly, which was opposed, it being contended that by failing to formally amend and by taking out and entering the formal judgment, and proceeding to assess the damages, plaintiff had abandoned the benefit of this order.

Held, that abandonment being a question of intention, in view of all circumstances of this case the court would not be justified in concluding that plaintiff had elected to abandon the order obtained and accepted after strong opposition; that, moreover, as the judgment now stands, it is not the judgment intended to be delivered, the style of cause in the judgment should be amended to show its true state.

MOTION to amend a formal judgment after it had been entered by the Registrar.

May 13, 1924.

Motion heard before the Honourable Mr. Justice Martin at Vancouver.

E. P. Davis & Co. for motion.

Griffin, Montgomery & Smith contra.

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

MARTIN L.J.A., May 13, 1924, delivered judgment.

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EVANS, COLEMAN & EVANS, LTD. v. THE *Roman Prince.*

L.J.A. Martin

This is a motion to amend the judgment herein after it has been duly entered by adding the name of the Evans Coleman Wharf Company, Limited to the style of cause as a party plaintiff. The fact is that during the course of the trial a motion was made by plaintiff to amend the proceedings by adding the wharf company as a plaintiff with its consent, and after a lengthy argument the amendment was allowed on the 13th July last, as clearly appears by my notes and by the registrar's record. No terms were imposed upon the plaintiff other than it was to pay such costs as I might decide in my discretion would be just in the circumstances, as to which many authorities were cited; the plaintiff accepted this position and I reserved judgment after argument thereupon and the case proceeded and was decided by me upon the proper assumption that the wharf company was a party plaintiff. In the brief note of my judgment which I handed down on the 27th November, 1923, in advance of my reasons for judgment, I used, as ordinarily and informally in such case, an abbreviated style of cause omitting the added plaintiff, and later when the formal order was drawn up by some strange oversight or misapprehension of the said amending order of the 13th of July last, the name of the added plaintiff was omitted. It is now sought to rectify this slip and error by amending the judgment so that it shall contain the names of both plaintiffs. In opposition to the motion it is objected that by failing to formally amend the proceedings pursuant to the order which it is conceded was made, and by taking out and entering the formal judgment, with only the original plaintiff named therein, and by proceeding thereunder to assess the damages before the registrar the plaintiff has evidenced its election to abandon the said amending order and therefore the present motion should not be granted. In answer to this objection, the plaintiff's counsel says that he had no intention whatever of abandoning the order which he accepted at the trial and that the error he fell into was occasioned by an erroneous note in his brief made at the trial that the whole question of amendment was reserved and not only the costs thereof; that he was confirmed in his error by misapprehending my said advance note of judgment; and that the proceedings before the registrar

were simply to ascertain the amount of the damages and had no reference to the liability of any party therefor, which was a question for the court and could not be referred, and hence no prejudice to the defendant has been occasioned by the said slip or error.

In all the unusual circumstances I would not be justified, I think, in coming to the conclusion that there has been an election by plaintiff to abandon the order it obtained and accepted after strong opposition; abandonment is always a question of intention and after the reasonable explanation given by counsel for the omission of the name in the judgment and the prior failure to actually make the amendment ordered at the trial, I see no good reason for refusing to amend the style of cause in the judgment to show its true state, because as it now stands it does not represent the judgment I intended to deliver in that one of the parties to it has been excluded from the proceedings after I ordered that it should be included, hence in a very important particular, viz., as to the parties before it, the judgment of the court is misrepresented upon its own records. Such being the position of the matter there can be no question about my jurisdiction to make the judgment conform to the true position of affairs in which it was pronounced, which I consequently order to be done, and leave is also given, as prayed, to make such other amendments in the prior proceedings as may be necessary.

The costs of and occasioned by this motion shall be costs to the defendant and set off against those due to the plaintiffs.

In connection with my observations during the argument as to the wide and absolute nature of the powers given by our Admiralty Rules 29-32 over the interests of "parties," I deem it desirable to refer to my judgment of the 8th inst., in this court, in *Wrangell* v. *The Steel Scientist*, wherein the decision of the Privy Council in *Dominion Trust Co.* v. *New York Life Insce. Co.* (1), is considered, and it fortifies me in the view I have taken of the effect of the sweeping language employed in the rules under which I made the amendment.

Judgment accordingly.

(1) [1918] 3 W.W.R. 850; [1919] A.C. 254.

1924
May 7.

BRITISH COLUMBIA ADMIRALTY DISTRICT

WRANGELL ..... PLAINTIFF;

AGAINST

THE *STEEL SCIENTIST*

Shipping and seaman—Seaman's wages—Plaintiff resident out of jurisdiction—Security for costs—Delay in making application—Practice—Rule 134, Interpretation.

The defendant ship was arrested on December 3, 1923, the pleadings were closed in February, 1924, and it had been agreed between the parties that the case be tried on the 19th of May, 1924, though a date for trial had not been applied for. On May 6 an application for security for costs was made on the ground of plaintiff being resident out of the jurisdiction, etc.

Held, that, though in this case there had been delay which was not accounted for, and could only be conjectured, yet in the absence of any prejudice thereby occasioned to the other side, the court did not feel justified in refusing an application for security for costs.

2. That Admiralty rule 134, providing for the giving of bail for costs by a non-resident plaintiff or counter-claimant is not intended to be a declaration of the former practice of the court at the time it was passed, but as a definition of the powers conferred *ad hoc* by the new General Rules and Orders of 1892.

APPLICATION by defendant for an order that plaintiff furnish security for costs, being out of the jurisdiction.

Tuesday, May the 6th, 1924.

Application heard before the Honourable Mr. Justice Martin in Chambers, at Victoria.

Arthur Crease for the motion.

Harold Robertson, K.C., contra.

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

MARTIN L.J.A., now this 7th of May, 1924, delivered judgment.

This is an application by the defendant for security for costs on the ground that the plaintiff company is resident out of the jurisdiction and its ship, the *Angvald*, is a foreign one of Norwegian registry. Objection is taken that the application is made too late, the defendant ship having been arrested on the 3rd December last, the pleadings closed early in February, and (though a date for trial has not yet been applied for), an agreement reached prior to the demand for security, that the case should be tried on

the 19th instant, if that date was convenient to the court. Admiralty Rule 134, promulgated in 1892, provides that:—

> If any plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision), or any defendant making a counter-claim, is not resident in the district in which the action is instituted, the judge may, on the application of the adverse party, order him to give bail for costs.

In the Quebec District of this court, in *Morton Down & Co.* v. *The Lake Simcoe* (1), my esteemed brother Routhier, made an order for security after the defendant had, as here, taken several steps in the action, but gave no reasons for so doing, which is unfortunate because the argument of both counsel proceeded upon the erroneous assumption that Rule 228 governed the matter, thus:—

> 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.

But this rule is excluded by its own terms from any application to this case because it can only be invoked in

cases not provided for by these Rules,

and the "case" is, in fact, entirely provided for by said rule 134 above recited.

While it would not be right for me to assume that my brother Routhier was unaware of rule 134, even though both counsel overlooked it, yet I am left in doubt as to whether or not he did, in fact, consider it in giving his judgment as thus noted in the report:—

> *Per Curiam:* The plaintiffs will give security for costs within thirty days from the date hereof to the amount of $5,000; costs of motion to follow the event.

I have therefore deemed it proper to consider carefully that rule, the subject being of importance and counsel having argued it very fully.

It is beyond dispute that, upon the face of it, the rule is very wide in its terms and if not subject to restriction in its application by the practice of this court it would justify me in ordering security now because the sole condition for the exercise of my unfettered judicial discretion is that the plaintiff

is not resident in the district in which the action is instituted,

which condition admittedly exists herein. No decision upon the scope of the rule has been cited, and it is proper to

(1) [1905] 9 Ex. C.R. 361.

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determine at the outset how it is to be regarded, and as I do so, it is not intended to be a declaration of the former practice of the court at the time (1892) as set out in the reports, or otherwise, but as a definition of the powers conferred, *ad hoc*, by the new "General Rules and Orders" of 1892, to be in force in Canada, after approval by the Governor General in Council and by Her Majesty in Council (*Vide* Rule 229) under the Colonial Courts of Admiralty Act, 1890, and the Admiralty Act, 1891 (Canada). I am confirmed in this opinion by the recent decision of their Lordships of the Privy Council in *Dominion Trust Co.* v. *New York Life Insurance Co.* (1), wherein it was held that our Supreme Court consolidation rule 656, reading as follows:—

> Causes, matters, or appeals may be consolidated by order of the court or judge, in such manner as to the court or judge may seem meet.

is an *absolute* one, and

> leaves the matter so far as *ultra vires* is concerned entirely in the hands of the judge,

and therefore though the consolidating order might have been perhaps *ill judged,* nevertheless it should not be interfered with because there was

> proper material before the court upon which a judgment on the facts could be given.

Their Lordships pointed out that the corresponding English rule differs essentially from our rule because it added the words:—

> to be exercised in the manner in use before the commencement of the principal Act.

thereby introducing a reference to the course of previous decisions.

This indication is important because the Court of Appeal below (2)—was equally divided on the construction of our rule, my brother McPhillips and myself taking the view that it was controlled by the former practice which we thought, erroneously as it turned out, had not been affected by the change in language—*cf.* pp. 372-4. In the absence of any like indication in rule 134 that it is to be restricted by the former practice I do not feel justified in regarding it as any less "absolute" than the said consolidating rule 656, and I am fortified in this opinion by the fact that our excellent Admiralty rules are, as a whole, of a character

(1) [1918] 3 W.W.R. 850; [1919] A.C. 254.

(2) [1916] 23 B.C.R. 344.

which is at once simple, comprehensive, and elastic, so as to meet the conditions of a court which in dealing with maritime affairs wisely does so in a broad way having regard to quickly varying circumstances which are often not so subject to control as are affairs upon the land, and hence is not prone to lay down intractable rules of practice, which might result in injustice in the future in circumstances which could not be foreseen: that at least is the practice I have followed in this court for over a quarter of a century, and, if I may say so, it has been justified by experience.

In deference to the careful argument of plaintiff's counsel, I have closely considered the decision of Dr. Lushington in *The Volant* (1). That was a case of an action and cross-action wherein security for costs was ordered after the act on petition, under the old practice, had been concluded and signed by the respective proctors, and both of them had been assigned to bring their proofs into court, the proceeding being, therefore, at a stage very similar to these before me. Objection was taken that the application should have been made earlier and the court said:—

> According to the practice of other courts, it is, I apprehend, the usual course that applications of this kind should be made in the earliest stage of the proceedings, and, in ordinary cases, I should be disposed to enforce the observance of the same rule in the proceedings in this court. There is, however, this peculiarity in the present case, that the owner of the *Beatitude* is resident abroad, and the original action was entered by another person in his name and without his privity or concurrence. If I had been aware of this circumstance at the time, I should have directed security for the costs to be given in the first instance; and as I am now informed that the bail which has been given will not be liable for the costs for which this application is made, I shall direct security to be given for the same, before I allow the suit to proceed,—the amount of that security I fix at £80.

It is to be observed, first, that the learned judge did not go so far as to recognize such a rule of practice as was contended for, but only that he "should be disposed to enforce" one; second, that he was dealing with a case, obviously of the two British ships (not a foreign one with foreign owner as here) and therefore they would presumably be within the jurisdiction to answer their presumably British owners' liabilities; and third, that the controlling circumstance of his decision must have been that the owner was resident abroad, because he could not, obviously, upon

(1) [1842] 1 W. Rob. 383.

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any principle of justice be dealt with *in poenam* because some other person had " without his privity or occurrence " wrongfully made use of his name to institute proceedings. The report does not suggest that the defendant (*The Volant*) did not know *ab initio* that the owner of the *Beatitude* was resident abroad, nevertheless the belated order for security was made despite that knowledge. I do not find the report a satisfactory one, apart from a decided difference in the facts; in some aspects it is opposed to both the parties before me, and at most it is an expression of an opinion that applications of the kind should be made " in the earliest stage of the proceedings," with which I agree as a general rule, but I do not regard it as a decision (even apart from the said special effect of our rule 134) that would prevent me from exercising my discretion in this case at least. A situation is conceivable wherein a defendant might reasonably not wish to apply for security under circumstances existing at the beginning of the action, but an alteration in them would lead to an application being advisable. Though in this case there has been delay which is not accounted for, and can only be conjectured, yet in the absence of any prejudice thereby occasioned to the other side I do not feel justified in refusing the application, and so an order will issue for security to be given for $1,200 within a time to be spoken to, if counsel cannot agree thereupon.

I need only add that in view of the opinion I formed of the matter it is not necessary for me to discuss the other cases cited to me of decisions in other courts, though they have received my attention, particularly *Re Smith: Bain* v. *Bain* (1); *Wood* v. *The Queen* (2), and *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal* (3).

As to costs: ordinarily, the application being successful, after the refusal of the demand, I should have given them to the defendant in any event, but because of the delay I think the proper order is to make them in the cause, as was done in the case of the *Lake Simcoe.*

Judgment accordingly.

(1) [1896] 75 L.T. 46. (2) [1876] 7 S.C.R. 631.
(3) [1901] 7 Ex. C.R. 47.

1924
May 23.

W. E. DANNER .....PLAINTIFF;

AND

THE UNITED DRUG COMPANY.....DEFENDANT.

Patents—Retroactive effect—13-14 Geo. V, c. 23.

The Patent Act 13-14 Geo. V, c. 23, was assented to on the 13th of June, 1923, and came into force on the 1st September, 1923. Under the provisions of section 17 a patent may not be granted for certain products therein mentioned, but only for the process.

D's patent was granted under the old Act on the 3rd July, 1923, upon an application made in 1921. Motion was made to dismiss the action on the ground that the patent, having been granted after the new Act was assented to, notwithstanding that it was before the Act came into force under proclamation, was invalid.

Held, that as the provisions of section 17 of the Patent Act, 1923, only came into force on the 1st September, 1923, and have no retroactive effect, the patent was properly issued and the motion should be dismissed.

MOTION to dismiss on the ground that the patent sued on was invalid.

May 7th, 1924.

Motion heard before the honourable Mr. Justice Audette at Ottawa.

C. C. Robinson, K.C. for the motion.

R. S. Smart contra.

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

AUDETTE J., now (May 23rd, 1924), delivered judgment.

This is an action in infringement of a Canadian Patent, which comes on by way of motion, on behalf of the defendant, for the dismissal of the action on the ground that the Letters Patent sued upon are invalid as being in contravention of section 17 of The Patent Act (1923) 13-14 Geo. V, ch. 23.

Under the provisions of such section a patent may not be granted for certain products therein mentioned but only for the process. The patent in question in the case, which was granted under the old Act is for the product and is now attacked and the question for determination is whether or not that patent issued under the old Act has become invalid as being in contravention of section 17 of the new Act.

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The application for the patent was made on the 9th December, 1921. The patent was granted and bears date the 3rd July, 1923. Under the English law a patent bears the date of the application for the same and not the date of issue, as under our Canadian Act. Frost, Patent Law, 2nd ed. 166 and 331.

The Patent Act, 1923, was assented to on the 13th June, 1923, but, under the provisions of section 70 thereof, only came into force on the 1st September, 1923, under proclamation published in the *Canada Gazette,* and the present action was instituted on the 2nd October, 1923.

It must first be borne in mind that the application for the patent, which is valid under the old Act, was made as far back as the 9th December, 1921, and came within the class of patents allowable under the Act in force at the time, when there was no notion, imparted to the public, of any change to be made in the law in respect of the same. When the patent was issued and granted it was so issued and granted under the only provisions of law existing and in force at the time.

The Commissioner of Patents could do nothing else but issue the patent as applied for and did so. While the Patent Act of 1923 had passed both houses and had been assented to, it had not come into force and might have been kept in abeyance for months and perhaps for years, as was done before respecting the Copyright Act.

While the new Patent Act attaches a new disability in respect to the issue of certain patents, it does not enact that this new provision is retrospective. *Manufacturers' Life Ins. Co.* v. *Hanson* (1). As said by Lindley L.J. in *Lauri* v. *Renad* (2):

> It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.

See also Craies, On Statute Law, 3rd ed. 321 to 325. A statute is not to operate retrospectively, except when there is to the contrary a clear indication either from the subject-matter or from the wording of the statute. The words of

(1) [1924] 2 D.L.R. 692. (2) [1892] 3 Ch. 402 at 421.

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the statute must be read in their natural and grammatical sense.

Not much help will be found upon the subject from the Interpretation Act, except perhaps that subsection (*c*) of subsection (*e*) of section 19 enacts that the procedure, established by substituted provision shall be followed as far as it can be adapted.

The right of action in the present case accrued under the plaintiff's title of the 3rd July, 1923, his patent, which is good and valid for the whole life of the same.

Great privileges may be given by early Crown grant, such as exclusive right of fishing given to Seigniors in certain part of Canada, which could not be given to-day and which are contrary to laws subsequent to the granting of the same; but these privileges, notwithstanding subsequent legislation to the contrary, remain no less valid, extant and enforceable by law.

The plaintiff's patent is only subject to empeachment under the provision of the Patent Act which has provided legal proceedings in that respect.

The provisions of section 17 of the Patent Act, 1923, only came into force on the 1st September, 1923, and have no retroactive effect.

Moreover sec. 68 of that Act provides, in clear and unambiguous language, that

> nothing in this Act contained shall be construed . . . to avoid any patent that was valid at such time.

That is any patent issued under the old Act.

The defendant's motion is dismissed with costs.

Judgment accordingly.

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May 23.

PHILANDER HOWARD .....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Public work—Lachine Canal bridge—Damages—Section 20, Exchequer Court Act—Pecuniary loss for child of seven—Funeral expenses—Upkeep and education.

In July, 1923, H's son, aged 7, while crossing the Lachine Canal, over a bridge the property of the Crown, climbed the railing, 2 feet 9 inches high, to see a boat pass, and in letting himself down slipped through an opening of 8⅝ inches, between the end of the floor planking and

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the said railing and was drowned. The care and maintenance of the bridge were upon the superintendent of the Lachine Canal. This flooring had been renewed in 1922, leaving the opening in question.

Held, that such a hole constituted a dangerous place, amounting almost to a trap, at night, and that the officer in charge, in allowing it to remain, was guilty of negligence for which the Crown was responsible.

2. That in such an action it is not sufficient for suppliant to prove he has lost a speculative possibility of pecuniary benefit by the death of his son, but he must show he has lost a reasonable probability of pecuniary advantage.

3. That any amount expended in the upkeep, instruction, etc., of the child is not recoverable; nor is there any right of action in the father for recovery of expenses of burial.

4. That damages claimed for loss of time and for the expenses of a doctor in attending the child's mother, are too remote and not recoverable.

PETITION OF RIGHT to recover $2,450 for damages it is alleged suppliant suffered by the loss of his son by drowning, having fallen through a bridge over the Lachine Canal, a public work of Canada.

May 14th, 1924.

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

A. I. Popliger for suppliant.

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

The facts are stated in the reasons for judgment.

AUDETTE J., now this 23rd May, 1924, delivered judgment.

This is a Petition of Right whereby it is sought to recover damages amounting to the sum of $2,450 as the result of the drowning, in the Lachine Canal, of the suppliant's son, a boy of seven years of age.

The accident happened under the following circumstances. In the course of the afternoon, on the 11th July, 1923, in company with two small boys, the suppliant's son, while crossing the Government bridge at St. Patrick Street, near Côte St. Paul, in the city of Montreal, having his attention attracted by the noise of a motor boat on the canal, and desirous of seeing the same, got on top of the railing of the bridge, which is two feet nine inches from the flooring. When he came to come down, he slipped in an opening of $8\frac{5}{8}$ inches, between the end of the planking of the bridge and the truss or railing of the same, fell in the canal and was drowned. Hench the present action by the father.

The bridge in question is the property of the Crown and its care and maintenance are upon the Superintendent or Acting Superintendent of the Lachine Canal, as established by the evidence. The bridge's construction is composed of three large trusses; one on each side and one in the centre dividing the bridge into two separate sections, one of which is assigned to the railway, and the other of 18 feet 2 inches, to the public for use by vehicles and pedestrians. These large steel trusses have flanges above and below and one of these trusses acts as a railing, two feet nine inches above the flooring of the bridge, on the side where the boy fell.

Between the end of the flooring and the truss in question, at the place where the accident happened, there is an open space of $8\frac{5}{8}$ inches,—and the flange at the top,—2 feet 9 inches in height, from the floor, extends inside, to $1\frac{1}{2}$ inch of the edge of the flooring, leaving, however, under that flange the space in question of $8\frac{5}{8}$ inches through which the child slipped into the canal.

When the Acting Superintendent took charge in June, 1922, he says the flooring of the bridge had just been renewed leaving the opening in question which had been maintained up to date. It is customary, he says, to leave a small space between the edge of the flooring and the truss, for the purpose of letting surface water fall in the canal and for throwing the sweepings in the same manner; but at no other bridge was such opening so large; two or three inches would have been sufficient.

The edge of the planking had been unevenly cut and there was such an opening of $8\frac{5}{8}$ inches only for a width of about 8 to 10 inches and the average opening all through the bridge is of about 5 to 6 inches.

I must therefore find, under the circumstances, that the case comes within the provision of section 20 of the Exchequer Court Act. There is a public work, the property of the Crown; an officer of the Crown whose want of proper care of the paving, in allowing it to remain in such a state as found when he took possession, amounts to negligence, while acting within the scope of his duties or employment and that the accident resulted therefrom.

This hole in the bridge constituted a dangerous place, almost amounting to a trap at night, and the officer in

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charge owed to the public the duty of protecting those who use the bridge from an accident of this kind; and he failed to discharge such duty. If the mind of a child is immature and incapable of weighing danger like an adult, therefore an adult owes a greater degree of care to an infant than to another adult. That is applicable when the adult, as in the present case, owes the child, as one of the public, some duty, and the child is in a place where he has a lawful right to be and where danger is either known or apparent.

Now coming to the consideration of the intricate question of damages, under the circumstances of the case, I find the damages must be limited to the loss of a life of substantial or pecuniary benefit to the relatives to entitle them to recover. The evidence is conspicuous for the want of establishing any pecuniary loss to the father by reason of the child of seven years of age having been killed. *Damnum absque injuria.* There is not a tittle of evidence upon which damages could be found for the obvious reason that there is none.

In such an action it is not sufficient for the suppliant to allege or even prove that he has lost by the death of the deceased a speculative possibility of pecuniary benefit; to succeed it is necessary to show he has lost a reasonable probability of pecuniary advantage. In the case of *Barnett* v. *Cohen* (1), damages were refused for the death of a four years old son, following the well established jurisprudence upon that branch of the law. See also *Runciman* v. *Star Steamship Line* (2) and the long catena of cases cited in support of that view in Messrs. Macmurchy and Denison, Railway Law, 3rd ed. 454.

The suppliant is not entitled to recover any amount he would have expended in the upkeep, instruction, etc., of the child, *Beaudet* v. *Grace Co.* (3). Furthermore, there is no right of action in the father for the recovery of the expenses incurred for burying his child for the elaborate reasons given in the case of *Clark* v. *London General Omnibus Co. Ltd.* (4); *Toronto Railway Co.* v. *Mulvaney* (5); *Filiatrault* v. *C.P.R.* (6); 2 Beauchamp, General Digest 1827.

(1) [1921] 2 K.B. 461.
(2) [1900] 35 N.B.R. 123.
(3) [1904] 7 R.P.Q. 82.
(4) [1906] 2 K.B. 648.
(5) [1906] 38 S.C.R. 327.
(6) [1900] R.J.Q. 18 S.C. 491.

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The damages claimed for loss of time and for the expenses of a doctor for attendance on the child's mother are too remote and are not recoverable.

Upon all grounds the action fails and there will be judgment adjudging that the suppliant is not entitled to any portion of the relief sought by his petition of right. I trust the respondent will be generous enough to forego any claim for costs.

Judgment accordingly.

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LAMONT, CORLISS & COMPANY.....PETITIONERS;

AND

THE STAR CONFECTIONERY COMPANY ..... } RESPONDENT.

Trade-Marks—"Chocolate Croquettes"—"Person aggrieved"—Interest —Distinctiveness.

Held, that the words "Croquettes" or "Chocolate Croquettes" being essentially words of the French and English languages, and having direct reference to the character of the goods, cannot be regarded as distinguishing the goods of one trader from another, and therefore cannot be made the subject-matter of a trade-mark.

Semble. That the words "person aggrieved" in section 42 of the Trade-Marks and Designs Act, are synonymous with the word "interested" which relates to a person having the necessary interest to sustain an action.

PETITION to expunge trade-mark "Chocolate Croquettes" and to register the word "Croquettes" as a specific trade-mark.

May 2nd, 1924.

Action now tried before the Honourable Mr. Justice Audette at Montreal.

R. C. H. Cassels, K.C. for petitioners;

M. Solomon and *T. M. Tansey* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 23rd May, 1924, delivered judgment.

This is an application, by the petitioners, to expunge from the Canadian Register of Trade-Marks, the respondent's Specific Trade-Mark

to be applied to the sale of chocolates and the like and which consists of the words "Chocolate Croquettes" enclosed in three circles,

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and to register as the petitioners' specific trade-mark, the word "Croquettes."

In the view I take of the case, it will be unnecessary to decide whether or not the user made by the petitioners, both in the United States and in Canada, prior to the respondent, of their own mark in the manner mentioned in the evidence—so mixed up with other more prominent words, features and letters and also associated and coupled with these words in large print,—could amount to a substantial user. The only two questions in this case which postulate and call for determination are:—

First: Whether the petitioners are *persons aggrieved* within the meaning of section 42 of the Trade-Marks Act, and secondly and principally: Whether the word "Croquettes" by itself or the words "Chocolate Croquettes" are susceptible of registration as a trade-mark.

Dealing with the first question, it would seem,—in view of the very wide and large definition which has been given these words *persons aggrieved* to be found in section 42—that they could be treated as being of the same meaning and synonymous with the word *interested,* that is to be understood as the fundamental rule which requires that no person can bring an action at law unless he has an interest therein, which interest, unless otherwise provided, may only be eventual. Does the word "aggrieved" here mean anything more than "interested"? C.P.C. Art. 77; Trade-Mark *Zonophone* (1); Sebastian, 5th ed. 631; In re *Apollinaris* (2); *Re Billings et al* v. *Canadian Billings Co.* (3). As put by Davies J. in re *Vulcan Trade-Mark* (4):

> The words 'any person aggrieved' embrace anyone who may possibly be injured by the continuance of the mark on the register and to the extent it is so registerd.

This view has been adopted in Canada in the case of *Auto Sales Gum and Chocolate Co.* (5) and in other well known cases, as well as in England in *Re Powell* v. *Birmingham Vinegar Brewery Co.* (6) and in the numerous cases therein cited, under a similar statute using the same words. Sebastian 5th ed. 367, 372 and 386. Reading together secs. 35, 12 and 9 of the english Act, it must be found that the court

(1) [1903] 20 R.P.C. 450.
(2) [1891] 2 Ch. 186.
(3) [1921] 20 Ex. C.R. 405.
(4) [1915] 51 S.C.R. 411.
(5) [1913] 14 Ex. C.R. 302.
(6) [1894] A.C. 8.

will always expunge when the mark offends against sections 9 and 11 of this Act, that is when the mark is wanting in subject-matter, or does not possess the essential requirements to constitute a trade-mark.

In the present case the petitioners are persons interested, having a potential interest that may ripen into a practical and real subject of grievance upon an extension of their business along a certain line (C.P.C. art. 77). They are persons aggrieved. Indeed, if the respondent's trade-mark were to remain on the register, when it should not be, through the monopoly of the word "Croquettes" or "Chocolate Croquettes" being apparently vested in them, the petitioners would be deprived from using the words, and were they making use of the same, the respondent would be at liberty to prosecute them for infringement.

I therefore find the proceedings were rightly instituted by the petitioners.

Coming now to the second question as to whether the word "croquettes" by itself, or the words "chocolate croquettes" are susceptible of registration as a trade-mark, it will be well to first inquire into the meaning and character of these words.

The word "croquette" is one which essentially belongs to the French language and which has found its way into the English language. By reference to Larousse (Nouveau Larousse) dictionary, we will find that "Croquette" is a

boulette de pâte ou de hachis saupoudrée de chapelure de pain, trempée dans les oeufs et frite:—Croquette de riz, de pommes de terre, de cervelle,

and it also means:

Tablette de chocolat très petite et très mince.

That is the word "Croquette" by itself means a chocolate croquette. In the New English Dictionary—Murray—we find the following definition of the word croquette:

(C. f. *croquer* to crackle under the teeth, to crunch)—A ball or mass of rice, potato or finely minced meat or fish, seasoned and fried crisp.

No one can monopolize the French or the English languages,—the two official languages in Canada,—nor can any one have a monopoly in the name of anything.

A word having direct reference to the character of the goods cannot be the subject of a trade-mark.

Distinctiveness is the cardinal requirement for a trade-mark to be good and valid, and distinctiveness means that

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the word, symbol or device shall be used or adapted to distinguish the goods of the proprietor of the trade-mark from those of other persons, owners of similar or other goods.

I may repeat here some observations I had occasion to make in the *Aspirin* case (1):

> Our Canadian Trade-Mark Act provides, by section 5, what shall be deemed to be a trade-mark, and section 9 provides for its registration, which does not confer any new right but merely gives a *locus standi* in the courts to enforce its rights. Then by subsection (*e*) of section 11, it is provided that the minister may refuse to register any trade-mark "if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking."

—which essentials are not defined in the Act. *The Standard Ideal Co.* v. *The Standard Sanitary Mfg. Co.* (2).

Having found that the words "croquettes" or "chocolate croquettes" are both English and French words having direct reference to the character of the goods,—without any distinctiveness—and applying the judgment of the *Standard Ideal* case (*ubi supra*), it must be found, without attempting to define "the essentials necessary to constitute a trade-mark properly speaking," that these words form part of the English and French languages and cannot be apt or appropriate for distinguishing the goods of one trader from those of another. They have no distinctiveness to identify the product of any particular trader.

The trade-mark already on the register and the trade-mark sought herein to be registered do not, either of them, contain

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

—a valid trade-mark.

The trade-mark on the Register must be expunged and the registration of the word "Croquettes" as a trade-mark is refused.

This finding is in accordance with the decision of the Supreme Court of Canada in *Parlo* v. *Todd* (3).

Now there remains the question of costs. The petitioners succeed in expunging the respondent's trade-mark; but they fail in their application to register their own. I take it to be a sound and sensible principle that parties ought not, even if found to be substantially right in the actions instituted by them, to add to the expenses of a case by

(1) [1923] Ex. C.R. 65, at p. 74. (2) [1911] A.C. 78 at 84.
(3) [1888] 17 S.C.R. 196.

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fighting issues in which they are in the wrong. It may be, however, reasonable as regards their own interest, and may perhaps help them in the conduct of the action, that they should raise issues in which in the end they are defeated; but the party who does so does it in his own interest, and I think he ought to do it at his own expense. *Badische Anilin und Soda Fabrik* v. *Levinstein* (1); *Treo Co.* v. *Dominion Corset Co.* (2).

Under all the circumstances of the case on the question of costs, I think justice will be done by allowing the petitioners only half costs—that is to say half of the total amount of the bill of costs as taxed according to the practice of the court.

I have therefore come to the conclusion, for the reasons above set forth to adjudge and order that the specific trade-mark No. 131, Folio 30050, registered on the 15th December, 1921, consisting of the words "chocolate croquettes" as applied to the sale of chocolate be expunged from the Register of the Canadian Trade-Marks, and that registration of the word "croquettes," as sought by the petitioners, be refused. The whole with costs as above mentioned.

Judgment accordingly.

IN THE MATTER OF AN APPEAL UNDER THE INCOME WAR TAX ACT, 1917, AND AMENDMENTS *IN RE* JUDGES' SALARIES

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Income War Tax Act, 1917—Judges' Salaries—Exemptions—Local Judges in Admiralty—Judges' Act, as amended by 10-11 Geo. V, c. 56.

Where a judge has accepted the increase in salary provided for by 10-11 Geo. V, c. 56, being an amendment to the Judges Act, he loses the benefit of the exemption previously enjoyed under section 27 of the Act, and such salary thereupon becomes liable to taxation under The Income War Tax Act, 1917 and Amendments.

2. While the office of Local Judge in Admiralty may be held by a judge of another court, it is nevertheless a separate and distinct office; and the salary of a Local Judge in Admiralty not having been increased by the provisions of the Act aforesaid is not liable to taxation under The Income War Tax Act, 1917, and Amendments, being still exempted by section 27 of the Judges' Act.

(1) [1884] 29 Ch. D. 336 at 419. (2) [1918] 18 Ex. C.R. 115 at 131 *et seq.*

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IN RE TAXATION OF JUDGES' SALARIES.

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APPEAL from decision of the Commissioner of Taxation. Heard by the Honourable Mr. Justice Audette at Ottawa, May 6, 1924.

Christopher Robinson, K.C. for appellant.

C. P. Plaxton for the Crown.

The facts are stated in the reasons for judgment.

AUDETTE J., this 23rd May, 1924, delivered judgment (1).

This is an appeal, under the provisions of sections 15 *et seq* of The Income War Tax Act, 1917, and amendments thereto, from the assessment, for the year ending 31st December, 1920, of that part of the appellant's income dealing with both his salary as Local Judge in Admiralty of the Exchequer Court of Canada and also his salary as Judge of a provincial Superior Court.

At the opening of the argument I called attention of the parties to the fact that while I was not actually interested in the present case, I would however, be affected by the determination of the question submitted and I offered to recuse myself and to ask for a judge *pro hac vice* to be appointed to hear the case, who would not be interested in the determination of the question. Both parties refused and insisted that I should proceed with the hearing of the case and exercise my jurisdiction, and I did so.

I may also say as a prelude that I am not satisfied with the manner in which the case comes before me. I have not before me the concrete decision from which this appeal is made. The matter has been determined by the Commissioner of Taxation and not the Minister. This objection has been answered by counsel for the Crown, calling my attention to section 22 of the Act, as amended by 9-10 Geo. V, ch. 55, sec. 9, which reads as follows:

22. The Minister shall have the administration of this Act and the control and management of the collection of the taxation levied thereby, and of all matters incident thereto, and of the officers and persons employed in that service. The Minister may make any regulations deemed necessary for carrying this Act into effect, and may thereby authorize the Commissioner of Taxation to exercise such of the powers conferred by this Act upon the Minister, as may, in the opinion of the Minister, be conveniently exercised by the Commissioner of Taxation.

Acting under the provision of this section the Acting Minister of Finance has filed a document whereby he authorizes the Commissioner of Taxation

(1) An appeal has been taken to the Supreme Court of Canada.

to exercise the powers conferred upon the Minister under and by virtue of certain sections of the Act

—a power of attorney in the usual form.

Now the statute is clear and unambiguous in its terms and says that that power may be given by *regulations*. That was not done. And it adds that the authority is given

as may, in the opinion of the Minister, be conveniently exercised by the Commissioner of Taxation.

Does the word "conveniently" here mean anything else than that it is "fit and proper?" Indeed, the Commissioner of Taxation is the one who first pronounces upon the assessment and then he is made to hear an appeal from his own finding and, finally, his decision, from which there is appeal, is non-existing and not to be found on the record. Yet it is the finding, the pronouncement from which the present appeal is taken to this court. This state of things should be attended to and remedied. It is not proper to sit on appeal from one's own decision; it is subversive of good judicial tradition. This delegation of power involves in itself an irregularity.

The parties asked me to hear the appeal notwithstanding these irregularities and I have consented; but these matters should be straightened out in a reasonable and logical manner and records on appeal should be presented in a satisfactory condition.

Having said so much I now come to the determination of the question of what may be called the Admiralty salary which affects only seven persons in the Dominion of Canada.

The appellant was appointed, under the provision of section 8 of The Admiralty Act, a Local Judge in Admiralty, on the 14th November, 1916, and his salary as such is fixed by section 5 of The Judges' Act (ch. 138 R.S.C. 1906) which enacts that

the salaries of the local judges in Admiralty of the Exchequer Court, as such judges, shall be . . . .

There is a special section of the Act fixing such salaries as there is a special section fixing the salaries attached to the office of judge of the several other courts.

By subsection 3 of section 27 of the same Act it is provided that:

The salaries (of the judges) . . . shall be free and clear of all taxes . . . imposed under any Act of the Parliament of Canada.

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Then comes the Act 10-11 Geo. V, ch. 56 (1920), an Act to amend the Judges' Act, whereby the salaries of all high Court Judges were increased excepting, however, the salaries of the Admiralty Judges and by section 11 thereof it was provided as follows:

> 11. (1) The provision of subsection three of section twenty-seven of the said Act as to taxes and deductions shall not apply to any judge whose salary is increased by the present Act, or whose salary was increased by chapter fifty-nine of the statutes of 1919, and who accepts or has accepted such increase, and the salaries and retiring allowances and annuities of judges appointed after the seventh day of July, 1919, and of all judges accepting any increase of salary under this Act, or accepting or having accepted any increase of salary under chapter fifty-nine of the statutes of 1919, shall be taxable and subject to the taxes imposed by The Income War Tax Act, 1917, and the amendments thereto.

This section 11 of the Act of 1920 provides clearly that the provisions of section 27 of the Judges' Act which exempt their salaries from taxation shall not apply to judges whose salaries have been increased by ch. 56 of the statute, 1919, and who accepted the increase given by the Act of 1920. Then the section proceeds to declare that the salaries of all judges accepting any such increase of salary under this Act, etc., shall be taxable and subject to the taxes imposed by the Taxing Act.

There was no increase enacted in the salaries of the Admiralty Judges. Therefore as section 27 of the Judges Act, which exempts the salary of a judge from taxation, has never been repealed and remains in full force and effect with respect to a salary which has not been increased, as qualified by section 11 of the Act of 1920,—it must apply to the case of a judge whose salary has not been increased and who becomes in the same position as that of a judge who would have refused to take the increase provided by the Act of 1920. This special Act overrides the general Taxing Act.

It is perhaps trite to add that the two offices of Admiralty judge and judge of a supreme provincial court are distinct and separate. One is a federal judge and the other a provincial judge. The office of the former is created by the Dominion Parliament and that of the latter by the Provincial Legislature. Both courts function under separate and distinct power and jurisdiction with a special salary attached to each office as specified by the Judges' Act.

The salary belongs to the officer as an incident to his office and he is entitled to it because the law attaches it to the office. The right to the salary grows out of the rendition of the services.

The Supreme Court Judge,—who has accepted increase in his salary as such, may resign and still hold the office of Admiralty Judge. The governing intention of the Act, as is hereafter shewn, is to increase the judge's salary and make it liable to income tax; it is not its intention to reduce a salary. Were the Admiralty salary declared subject to taxation, it would be materially decreased and it is not either within the intention or the text of the law to do so.

The incumbent may be a person already a judge of a High Court or may be a person of the legal profession and the subtle and specious distinction set up in refusing the exemption on account of the incumbent in office being already a judge of the Supreme Court who has accepted increase in his salary as such, is mere sophistry. There is no difference between the salary attached to the office when it is earned either by a judge of another court or by a member of the legal profession.

I have therefore come to the conclusion that the salary of the appellant as Local Judge in Admiralty is

free and clear of all income taxes imposed under any Act of the Parliament of Canada.

Coming now to the second branch of the case, that is the appellant's salary as a judge of a supreme provincial court which has been increased by 10-11 Geo. V, ch. 56, an Act to amend the Judges' Act, assented to on the 1st July, 1920, it must be borne in mind that the increase in such salary is made subject to the provisions of section 11 of that Act and which section is recited above.

The appellant was appointed a judge of a provincial supreme court on the 1st November, 1912, and has accepted the increase in salary as provided by section 11 and his salary has thereunder from that time become

taxable and subject to the taxes imposed by the Income War Tax Act, 1917, and its amendments.

The acceptance of the increase estops him from claiming exemption, since section 11 of the Act of 1920 which provides for this increase in salary also provides for a commutation of the benefits enjoyed under section 27 thereof.

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The exempting provision of subsection 3 of section 27 of the Judges' Act has no force and effect in respect of a judge who has taken the increase provided by the Act of 1920, as is the case in the present instance.

The appellant cannot seek any help in that respect from either the Judges' Act or from the Taxing Act.

Under section 4 of the Taxing Act the assessment is made upon the income of every person residing in Canada and for that purpose it becomes necessary to find what constitutes the "income" of a person residing in Canada. Section 3 of the Act defines it as

> the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount, etc.

All that is necessary for the purpose of this case is to find that the salary of a person resident in Canada is subject to the Taxing Act. It is unnecessary to inquire into the source from which the salary is derived, as the tax is a charge imposed, by the legislature, upon the person,—and judges are persons under the Act. When the salary is paid it mingles with the rest of the income.

It is not necessary for judges to be subject to the Taxing Act that the Act itself should say so in so many words; they are like the rest of the community subject to the Act, unless they are exempted by some enactment.

Then section 3 of the Taxing Act of 1917, which defines the word "income" has been amended by the Act of 1919, by adding after the word contract, in the 22nd line of said section the following words:

> and including the *salaries*, indemnities or other remuneration of . . . any Judge of any Dominion or Provincial court appointed after the passing of this Act.

The appellant seeks help from those last words.

This provision is of no doubtful import. It is quite in harmony with the Judges' Act and its amendments. That Act increases the salaries of all judges subject to the provision of section 11 of 1920, meaning if the judges accept the increase they become subject to the Taxing Act.

This last amendment of section 3 defining the word "income," obviously,—consistent with its legislation upon the subject of *pari materia*—provides that appointees after the passing of the Act of 1920 will receive that high increased salary,—an increased salary—but it will be, as in the case

of all judges who accepted the increase, subject also to the Taxing Act,—as it is the case for all the judges appointed before who took the salary at an increased rate.

To properly understand the amendment, one must scrutinize the intent, meaning and spirit of the Act as a whole and guard against and avoid adhering too narrowly to the words of the statute in a segregate manner; but one must endeavour to breathe the spirit of it, which is clear, unambiguous and admits of no doubt. A statute must be construed in a natural and grammatical manner and the whole Act must be inspected in interpreting any of its parts.

This amendment of 1919 was made, *ex majore cautela* to express how the law necessarily stood after all the amendments and to remove all possible doubt as to the intention of making the person receiving a salary, at increased figure, subject to the Taxing Act.

Moreover, the amendment is introduced by the word "including." That is the amendment does not restrict but enlarges and extends the definition and it is not a case coming within the maxim of *expressio unius exclusio alterius*.

Moreover, if one statute enacts something in general terms—in this case (sec. 11 of ch. 56 of 10-11 Geo. V, 1920) that judges receiving certain increase in their salary shall be taxable and *subject* to income tax—and that afterwards another statute is passed on the same subject exempting one judge, who is taken to be subject to that statute, from taxation for part of his salary—is not such amending Act [11-12 Geo. V, ch. 36, sec. 1 (1921)] declaratory by Parliament of the construction and interpretation of the Act of 1920, as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit? (Interpretation Act, ch. 1, sec. 15, R.S.C. 1906). This is a different proposition from that contemplated by section 21 of the Interpretation Act.

This Act of 1921 [11-12 Geo. V, chapter 36, section 1] enacts clearly that the Act of 1920 (10-11 Geo. V, ch. 56, sec. 11) shall not apply to a certain part of the then Chief Justice's increased salary; thereby declaring, by necessary deduction (unless the Act of 1921 is passed for naught) that

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before the passing of the Act of 1921, the Chief Justice had to pay income tax upon the whole of his salary. The court finds confirmation of its view in the passing of that Act.

It is conceded that the judge's salary could become liable to taxation only since the 1st July, 1920, the date at which the Act to amend the Judges Act came into force.

On the considerations to which I have adverted above, there will be judgment allowing the appeal in respect of the salary of the Local Judge in Admiralty for the year 1920, declaring it free from income tax. And the appeal will be dismissed in respect of the salary, for the year 1920, as a judge of a provincial supreme court.

Judgment accordingly.

1924
May 23.

DOMINION BEDSTEAD COMPANY ET AL ..... } PLAINTIFFS;

AND

JOSEPH GERTLER ET AL..... DEFENDANTS.

Patents—Infringement—Narrow Patent—Prior Art—Strict Construction.

Held, that the question of infringement of a patent must be determined by the limitations placed upon the patent by the state of the prior art when it was issued; and in case of a subsequent narrow patent, as distinguished from a pioneer patent, it should receive strict construction.

2. That it is always open to a subsequent inventor to accomplish the same results as a former inventor by substantially different means.

ACTION to have plaintiffs' patent declared valid and infringed by defendants.

April 23rd, 24th and 25th, 1924.

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

John W. Cook K.C. and *A. A. Magee for plaintiffs.*

R. S. Smart and *M. B. Rose* for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J., now (this 23rd May, 1924), delivered judgment (1).

This is an action for an alleged infringement by the defendants of the Canadian Patent No. 209,206, bearing date the 8th March, 1921.

The grant covered by the patent is

for an alleged new and useful improvement in Bed Frames,

(1) An appeal has been taken to the Supreme Court of Canada.

as substantially set out in the two claims of the patent, as follows, viz:—

What I claim is:—

1. In a bed frame having head and foot frames and side bars, bracket bases secured to the posts of said head and foot portions and forming mountings for cross bars, brackets of angular form set on said bases and having a pin and notch fastening parts and plates secured to and distanced from said side bars and having corresponding pins and notches.

2. A bed frame comprising a head frame having posts, rails, and an angular cross bar, a foot frame having posts, rails, and an angular cross bar, bracket bases having inset faces and vertically grooved backs fitting said posts, angle brackets vertically set on said inset faces and having notches and pins in the projecting leaves, screws securing said brackets, bracket bases, cross bars and posts together, side bars of angular formation having one section fitting between the ends of said cross bars and the projecting leaves of said brackets, and plates having offsets secured to said side bars and distanced therefrom to form recesses for said projecting leaves and having notches and pins for fastening purposes.

The plaintiffs produced at trial exhibits 5a and 5b as the product of their patent and claim that exhibits 8 and 9, manufactured and sold by the defendants, constitute an infringement on 5a and 5b, and confine and narrow down their complaint as to whether or not there has been an infringement of their patent in manufacturing and selling bed frame corner devices similar to exhibits 8 and 9.

There may exist a couple of minor differences between 5a and 5b and the plaintiffs' patent, which are taken to be immaterial for the determination of the present issues.

The plaintiffs' patent is in itself very narrow, considering the state of the prior art, and the question of infringement or non-infringement must be determined by the limitations placed upon the patent by the state of the art when it was issued. *Grisworld* v. *Harker* (1); *McCormick* v. *Talcot* (2).

Moreover the patent's claims, being narrow, should receive and be upheld to a strict construction, and under such construction and limitation the controversy submitted for determination is whether the defendants are infringers. *Moodie* v. *Canadian Westinghouse* (3); *Johnson* v. *The Oxford Knitting Co.* (4); *Barnett-McQueen Co.* v. *Canadian Stewart Co.* (5).

(1) [1894] 62 Fed. 389, 10 C.C.A. 435.
(2) [1857] 61 U.S. (20 How.) 402.
(3) [1916] 16 Ex. C.R. 133 at 145.
(4) [1915] 15 Ex. C.R. 340 at 349.
(5) [1910] 13 Ex. C.R. 186.

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The question which first and readily suggests itself for consideration, after analysing the facts of the case, is whether there is more difference between the plaintiffs' patent and the prior art, than between the patent and the defendants' devices Exhibits 8 and 9. They all seem to embody the same fundamental devices, differing in structural details and perhaps mechanical equivalents, but performing the same function under the very same principle.

Let us now examine and compare exhibits 5a and 5b with exhibits 8 and 9, and their respective compound parts, being 6a, 6b and 6c as compared to 10a, 10b and 10c.

Exhibits 5a and 8 have both a base bracket. Prior art had it; 5a has an angle bracket, 8 has two angle brackets. Prior art had angle brackets. That angle bracket in 5a has one notch and one pin. Exhibit 8 has no notch, but has two pins performing the dual function of locking pins combined with the space or offset within which the locking plate runs, thereby procuring a locking space on 8 which is absent in 5a. The locking in 5a is exclusively made with pin and notch on one side.

5b is composed of the longitudinal bar to which is attached a curved or bent plate procuring one offset or spacing. Exhibit 9 has a longitudinal bar to which is attached a flat plate with two bolts, and is intersected and spaced by two washers which procure another offset or spacing.

Exhibit 6a is the plaintiffs' base plate manufactured somewhat differently from the specification. There is a recess for the support of the cross bar. It has two recesses called inset faces performing two different functions. The deeper inset is used for mounting the cross bar and the shallow one is used to engage the angle bracket. Exhibit 10a the defendants' base plate is clearly different from the plaintiffs'—it is flat with no recesses or inset faces, but has shoulders at top and bottom—and thereby performing different functions. In 6a the inset serves as a support to the cross bar. In 10a there is no recess and the support of the cross bar is found on the double bracket in 8.

Base plates existed in prior art, as shewn by exhibits E1 to E7.

Exhibit 6b is the angle plate, already referred to, with one pin and one notch. Exhibit 10b is also the double angle

plates, already referred to, with the inner plate cut so as to be used as a support for the cross plate instead of the support on the base plate as in exhibit 5a.

Exhibit 6c is the plaintiffs' cross bar cut in a particular fitting shape at the end. Exhibit 10c is the defendants' cross bar, plain all through, without any cut at the end.

The locking of 5a with 5b is done in one downward movement. The locking of exhibits 8 and 9 is made in two movements; first one horizontal move then a downward one, obviously required by the conformation of the notch in its plate through this cam-notch. From observation and comparison of the plates on 5b and on 9 it must be found that this cam-notch on 9 combined with the double channels, is an improvement on 5b, and this new combination results in a better locking and gripping. Can the defendants' device be held to be an infringement if it presents a new combination of elements that are found in the plaintiffs' patent or substitute for one or more of the same—some new ingredients, such as the cam, the double channels which perform a new function? *Singer Mfg. Co.* v. *Brill* (1). The parts are not interchangeable between plaintiffs' and defendants' devices. They are put together differently and removed differently. It is always open to a subsequent inventor to accomplish the same results, if he can, by substantially different means.

Coming now to the question of the prior art, as shewn by the several patents put in by the defence, it appears that the following elements were not new when the plaintiffs' patent was granted as appears in these several patents as common to all, namely:—bracket base, angle bracket, fastening device with pins, notches or slots, cross bar supported on the base. They are all of the same general type and under the prior art no claim *per se* could be made to any of these devices.

Having already stated that the plaintiffs' patent, which is not a pioneer patent, but a very narrow one indeed, in view of the state of the prior art, which has therefore to be strictly construed, and adverting to the consideration of the facts above set forth,—I have necessarily come to the conclusion that there is no infringement and that there should

(1) [1892] 54 Fed. 380.

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be no restraint imposed on the commercial freedom to the defendants in the use of their device.

Having done so it becomes unnecessary to decide the question of the validity of the plaintiffs' patent raised by the statement in defence. *Moodie* v. *The Canadian Westinghouse Co.* (1); *Johnston et al* v. *The Oxford Knitting Co.* (2); *Hocking* v. *Hocking* (3).

The question of estoppel raised at trial as resulting from the assignment of the patent becomes also unnecessary to decide, even with the special qualifications and circumstances under which it was raised, namely as to whether there was a covenant as to its validity, *Gillard* v. *Watson* (4); Nicolas on Patent Law 91, and also as to whether it could be attacked by the assignee's partners, *Heugh* v. *Chamberlain* (5); and as to whether the assignee could be allowed to show that on a fair construction of the patent he had not infringed. *The Indiana Mfg. Co.* v. *Smith* (6); *Consolidated Car Heating Co.* v. *Came* (7); *Clark* v. *Adie* (8).

The defence has filed Hyman Gertler's new patent granted on the 11th March, 1924; but it must be held that a subsequent patent is no defence to the infringement of a prior patent. *Treo Co.* v. *Dominion Corset Co.* (9); *Grip Printing and Publishing Co.* v. *Butterfield* (10).

The action is dismissed with costs.

Judgment accordingly.

(1) [1916] 16 Ex. C.R. 133 at 145.
(2) [1915] 15 Ex. C.R. 340 at 349.
(3) [1889] 6 R.P.C. 69 at p. 77.
(4) [1924] 26 Ont. W.N. 77.
(5) [1877] 25 W.R. 742.
(6) [1904] 9 Ex. C.R. 154.
(7) [1903] 20 R.P.C. 745.
(8) [1877] 2 A.C. 315.
(9) [1918] 18 Ex. C.R. 115 at 131.
(10) [1885] 11 S.C.R. 291.

1924
May 22.

TORONTO ADMIRALTY DISTRICT

CANADIAN DREDGING COMPANY, LIMITED ..... } PLAINTIFF;

AND

NORTHERN NAVIGATION COMPANY, LIMITED, ET AL..... } DEFENDANTS.

Shipping and seamen—Collision—Demurrage of dredger—Measure of Damages—Interest.

Held, that in estimating the amount of damages to be allowed in a case of collision with a dredge, an allowance will be made on the principle set out in *The Marpessa,* 1906, P. 14 and 95, and 1907 A.C. 241.

(2) Interest, in admiralty cases, will be calculated on the damages allowed from the date of the collision; and on payments made in respect of wages, and payments made by reason of the collision, from the dates of such payments.

ACTION for damages resulting from collision with a dredge. Judgment was given on the 26th of April, 1923, in favour of the plaintiffs (1), and directing a reference to the District Registrar to settle the amount due.

An appointment was made by the Registrar and particulars of the plaintiffs' claim were filed, of which the following were contested:

1. June to July, 1920—	
To paid crew of dredge for nine days time and board in repairing dipper handles of dredge..	$ 459 15
4. 4th to 12th Sept., 1920, inc.—	
To paid crew of dredge and tug stripping dredge for repairs at shipyard, removing crane to replace foot casting, replacing rivets and drawing in heel of crane, replacing foot casting, replacing crane in dredge and for board and coal..	1,293 40
7. 23rd Aug., 1919—	
To lost time of dredge on day of accident, 4 hours at $35 per hour..	140 00
8. 4th to 12th Sept., 1920—	
To 6 days working time lost by dredge while being stripped for removal of crane and replacing footing casting, replacing crane, etc., at dock of Port Arthur Shipbuilding Co., Ltd., at 13¾ hours per day (being the average for the month of September), making a total of 82½ hours lost time at $35 per hour..	2,887 00

(1) [1923] Ex. C.R. 189.

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Deduct 6 days wages, board and coal (included in above item of $1,293.40), $862.26..	2,024 74
9. 24th Aug. to 26th Nov., 1919—	
To average of ½ hour lost time each working day for 74 days, balance of season of 1919 due to dipper handle and crane being bent and twisted and not in good working condition and which could not be repaired till dredge was laid up for a considerable period at $35 per hour..	1,295 00

The District Registrar in his report allowed practically the whole amount claimed by the plaintiffs. His report is as follows:—

I find that there is due to the plaintiffs the sum of seven thousand nine hundred and thirty-six dollars and seventeen cents, including interest as set out in the schedules hereto annexed.

I am of the opinion that the plaintiffs are entitled to an allowance for lost time for the use of the dredge and tug, and I am of the opinion on the evidence that thirty-five dollars ($35) per hour is a reasonable sum to be allowed for the services of the dredge and tug for such lost time.

I am of the opinion that it was not through any fault of the plaintiffs that they could not get the dredge under the shear leg at an earlier date than they did, and I think on the evidence they are entitled to the amount claimed in item No. 9 of the particulars.

I am of the opinion that in Admiralty Cases (differing generally from Common Law Cases), interest should be allowed from the date of the disablement of the earning power of the dredge, and the dates of payments made in respect of repairs of wages, etc., caused by such disablement, and I adopt as reasonable the proposition as to interest submitted in the argument in reply of counsel for the plaintiffs, and allow interest as set out in the schedule hereto annexed.

I am of the opinion that the items in Claim No. 9 of the particulars, for survey and correspondence, should be disallowed, and I allow the other items of the claims as set out in the particulars, as shown in the schedule hereto annexed.

I am also of the opinion that the plaintiffs are entitled to the costs of this reference.

An appeal was taken to the Local Judge in Admiralty to vary the Registrar's Report, and on May 17, 1924, this appeal was heard by the Honourable Mr. Justice Hodgins at Toronto.

F. W. Grant for plaintiffs.

R. I. Towers, K.C. for Northern Navigation Co.

S. Casey Wood, K.C. for Canadian Towing and Wrecking Company.

HODGINS L.J.A., now this 22nd May, 1924, delivered judgment.

Appeal by defendants from Report of Local Registrar allowing $6,694.82 as damages due to collisions with $1,241.35 for interest thereon.

There are several items in dispute.

Item 1. $459.15 I confirm the Registrar's Report.

Item 2 and 3 are not contested.

Item 4. $1,293.40. I allow this and will consider it in connection with item 8.

Items 5 and 6 are not contested.

Item 7. The rate of $35 per day is said to be excessive. I allow this at $96 for reasons given under item 8.

Item 8. $2,024.75 is for the earnings of dredge said to have been lost by reason of the collision, the actual expense being already charged in item 4. I think this claim is based on a misapprehension of what the plaintiffs are entitled to. When the collision occurred the plaintiffs had to decide whether to operate in the dredge's damaged condition and finish their contract or give up work. No other work was contemplated in 1919, nor was any available so far as the evidence shows. They decided to continue and lost 6 days time. In item 4 they are allowed for the expenditure during the time occupied in making the temporary repairs which enabled them to finish their contract that autumn. The fact that they cannot show any loss beyond these expenses during the 6 days and the cost of the repairs is not decisive. The *Greta Holme* (1), determines that the plaintiffs are entitled to some damages and the case of the *Marpessa* (2), sets out some of the items that will make up such damage in a case like this.

In order to save the parties further litigation, I would assess these damages at $1,000 in addition to the expenditure during the period in question and the cost of the repairs.

But if either party prefers it, such party may at his own expense have it referred back to the Local Registrar to arrive at these damages upon the basis of the *Marpessa, ubi supra.*

At present this item will be allowed at $1,000 instead of $2,024.75 and these damages will be substituted for the profit included in items 4 and 9.

(1) [1897] A.C. 596.

(2) [1906] P. 14 and 95; [1907] A.C. 241.

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Item 9. $1,295 being for an average of ½ hour a day for time lost while finishing the contract by reason of the injury which necessitated spending this ½ hour in replacing bolts destroyed or lost owing to operating the machinery in its damaged condition. The temporary repairs having been done and their cost allowed for, as well as the running expenses, this item represents or should represent the cost of the extra time which had to be taken to complete the contract over and above that which it would have taken if the dredge had not been injured. Half an hour every day for 74 days is of course an estimate but no doubt there was much lost time in doing the job under the conditions then existing. The defendants were saved a considerable amount by the decision to operate instead of abandoning the work and claiming damages for its non-completion, and I think a reasonable amount should be allowed.

The $35 per day is, however, based upon profits. I think this is wrong for the reasons I have already given. It should be calculated on the daily expense of $215 per day plus certain elements of damage which I have allowed at $1,000 as covering 9 days, giving an amount of $111 per day, a total of $326. I would allow this on that basis of 3 days at $3.26 per day or say $978 which amount I allow.

Interest. I allow interest on the items, calculated on the basis adopted by the Local Registrar.

The items are allowed as follows, with interest as indicated, given below:

	Allowed		Struck Off
1	$ 459 15		
2	212 86		
3	691 05		
4	1,293 40		
5	541 29		
6	37 33		
7	96 00	7	44 00
8	1,000 00	8	1,024 75
9	978 00	9	317 00

The report will be varied as indicated. If a reference is required notice must be filed with the Local Registrar within one week, in which case there will be a reference back to him limited to the question dealt with under item 8.

As success is divided there will be no costs.

Judgment accordingly.

1924
June 24.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE EASTERN TERMINAL ELEVATOR COMPANY .....} DEFENDANT.

Constitutional Law—Canada Grain Act, subsection 7, section 95, 9-10 Geo. V—Ultra vires—Property and civil rights—B.N.A. Act, sections 91 and 92—Ancillary provision.

Held, that subsection 7 of section 95 of the Canada Grain Act, 9-10 Geo. V, c. 40, providing that:

"In the month of August in each year, stock shall be taken of the quantity of each grade of grain in the terminal elevators; if in any year after the crop year ending the thirty-first day of August, 1919, the total surplus of grain is found in excess of one-quarter of one per cent of the gross amount of the grain received in the elevator during the crop year, such excess surplus shall be sold annually by the Board of Grain Commissioners and the proceeds thereof paid to the said Board * * *."

deals with a subject-matter falling within the powers exclusively assigned to the provincial legislatures by the B.N.A. Act, namely, property and civil rights, and is *ultra vires* of the Dominion Parliament.

2. That said section is not in the nature of an ancillary provision, which whilst encroaching upon matters assigned to the provincial legislatures, is required to prevent the scheme of a Dominion law being defeated; nor is it a case where in order to operate a validly enacted law, procedure must be adopted to make effective that law even though it invades the legislative fields of the provinces in respect of property and civil rights.

ACTION to recover from defendant certain surplus grain, or the value thereof, under subsection 7 of section 95 of the Canada Grain Act.

April 15th and 16th, 1924.

Action now tried before the Honourable Mr. Justice Maclean, the President at Fort William.

E. L. Taylor, K.C., and *F. P. Varcoe* for the Crown.

A. E. Hoskin, K.C., and *E. W. Ireland* for defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., this 24th June, 1924, delivered judgment (1).

This is an information exhibited by the Attorney General of Canada against the defendant for the delivery of definite quantities of certain grains, or alternatively, for

(1) An appeal has been taken to the Supreme Court of Canada.

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the payment of the sum of $43,431.20, under the provisions of subsection 7 of section 95 of the Canada Grain Act, as enacted by chapter 40, Statutes of Canada, 1919, and which is as follows:—

> In the month of August in each year, stock shall be taken of the quantity of each grade of grain in the terminal elevators; if in any year after the crop year ending the thirty-first day of August, 1919, the total surplus of grain is found in excess of one-quarter of one per cent of the gross amount of the grain received in the elevator during the crop year, such excess surplus shall be sold annually by the Board of Grain Commissioners and the proceeds thereof paid to the said Board. Such proceeds shall be applied towards the cost of the administration of The Canada Grain Act in such manner as the Governor in Council may direct.

The defendant company was incorporated under the provisions of The Manitoba Joint Stock Companies Act, and was empowered, *inter alia,* to carry on the business of general warehousing in all its branches, to carry on all business generally transacted by the owners of elevators and grain warehouses, to issue certificates and warrants negotiable to persons warehousing goods with the company, to acquire and operate elevators, mills and property of all kinds in which grain and other products are handled, manufactured or used, to receive, buy, store, sell, crush and manufacture grains of all kinds and the products thereof. The defendant was engaged in operating terminal elevators, at Fort William and Port Arthur, in the province of Ontario, during the period within which the claim referred to in the plaintiff's information, originated and accrued, that is for the crop year ending August 31, 1920. The defendant was authorized to carry on its business, and generally exercise its corporate powers, in the province of Ontario, by the issuance of a license by the Lieutenant Governor in Council of that province, under a statute of that province respecting the licensing of extra-provincial corporations.

A considerable amount of evidence was received explanatory of the operations of the Canada Grain Act and the practices of the grain trade, in respect of the storage, inspection, grading, cleaning, weighing, shipping and exporting of grain, from the point of production, until the same was ready for marketing, or for export from Canada. It is perhaps therefore desirable to summarize the principal provisions of the Grain Act, and such of the evidence as is

descriptive of the manner in which these provisions function in actual operation.

The Canada Grain Act, ch. 27, Statutes of Canada, 1912, and as amended, is administered by a Board, called the Board of Grain Commissioners. For inspectional purposes Canada is divided into two divisions, the Western Division including all that part of Canada lying west of, and including the city of Port Arthur; the Eastern Division including that portion of Canada lying east of Port Arthur. The board is clothed with authority to appoint chief inspectors, and inspectors of grain, whose duty it is to establish official standard grades, to grade grain in accordance with the grades defined in the Act, and to issue certificates of inspection, specifying the grade of grain so inspected. The Act authorizes the appointment by the Board, of weighmasters, who have control of the weighing of grain inspected, or subject to inspection, or received into or shipped out of any terminal elevator. The elevator is required to issue a certificate of the receipt of grain to the owner, shewing the amount and the grade thereof. Grain of the same grade must be kept together, and stored in elevators with grain of a similar grade. Grain to be stored or stored in a terminal elevator in the Western Division must be inspected both inwards and outwards, and grain grown in the Eastern Division must be inspected in that division in the same manner. Grain inspected in the Western Division need not be inspected again, except for special reasons, if it is later stored in an elevator in the Eastern Division. All grain produced in the provinces of Alberta, Saskatchewan and Manitoba, passing through Winnipeg en route to the head of the Great Lakes, must be inspected as prescribed by the Act at Winnipeg, which inspection is final. The Act establishes the various grades of the various grains, designating the same by names and numbers, and provides what shall be the quality or characteristics of such grades.

A terminal elevator or warehouse under the Grain Act, is one which receives grain from the public for storage, or cleaning or both, and which ships out graded grain in a marketable condition, by rail or water, and is located at such points as are declared terminal points by the Gov-

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ernor in Council. Terminal elevators in the Western Division are chiefly located at Port Arthur and Fort William, being the first shipping ports available for grain shipment by water, after leaving Winnipeg and eastward bound, though from those points grain may be forwarded by rail. Much the greater part however is forwarded by water to other Canadian ports, and American ports. A terminal elevator, though representing private capital, is required by the Grain Act to procure from the board annually, a license before transacting business, and is prohibited from buying or selling grain by the Grain Act. Private elevators are permitted to buy and sell grain, as may elevators used in connection with flour mills. At Port Arthur and Fort William private elevators greatly exceed in number terminal elevators, and at the present time handle a much greater volume of grain. When the cause of action arose the defendant's elevators were terminal elevators, though they are now operated as private elevators.

Specifically in respect of the Western Inspection District, the Act prescribes that grain marked by the inspectors at Winnipeg for cleaning, shall be cleaned at a terminal elevator under the supervision of an inspector, who has also the direction and supervision of the binning of the same, and such officers are granted quite extensive powers to enforce and ensure the proper cleaning of grain, and the board is empowered to make regulations regarding the same. No grain shall be shipped out, transferred or removed from terminal elevators without the supervision of the inspecting officers, and the inspectors are authorized during business hours to examine grain stored in terminal elevators. Grain shipped from any terminal elevator shall be shipped out only as graded into such elevator, and certificates of inspection and grade are to accompany the grain to its destination. In the case of unclean grain inspected in the Western Inspection Division, at Winnipeg, the inspector is required to state in his certificate the percentage of foreign matter to be removed therefrom, in order to clean the grain to the certified grade.

There are other sections of the Act dealing with such matters as hospital elevators, flat warehouses, railway, appeal boards, loading platforms, the supply of railway

cars, grain buyers and dealers, etc., but it is not necessary I think to make any extended reference to the same.

It might be helpful here to state what in actual practice occurs in the case of grain produced in the Western Division, from the time it leaves the farm until it reaches a terminal elevator at say Port Arthur. The producing farmer usually sells, or stores, his grain to, or in what is termed a country elevator, the business of which is to store grain for a charge, or to purchase the same outright. He may store on the basis of receiving the identical grain, or grain of the same grade, at a terminal elevator. He may also load his grain on a car consigned to a commission agent to sell for his account. In due course, the grain is forwarded to a terminal elevator at say Port Arthur, and in transit thereto, passes through Winnipeg, where the first inspection under the Grain Act takes place. An inspection certificate issues from the office of the chief inspector of grain of the Western Division, setting forth for whose account the grain was inspected, the number of the car, the railway station shipped from, the kind of grain, the grade, and the percentage of dockage, if any, "dockage" meaning the inspectors' estimate of unmarketable grain and foreign matter in the carload, which must be removed by the terminal elevator when cleaning the same. This non-commercial grain and foreign matter when separated from the grain at the terminal elevator is called, "screenings." If the grain is considered sufficiently clean by the inspector, or is estimated not to contain more than three-fourths of one per cent of foreign or unclean matter, the carload is marked as "clean," and is stored with grain of the same kind and grade when it reaches a terminal elevator.

The inspected car then proceeds to Fort William or Port Arthur, the inspectors' certificate reaching there at the same time or earlier, and then being in the possession of an officer of the board. The grain is subsequently weighed into an elevator, and pursuant to the Grain Act a certificate of weight is issued. This certificate shews: the number of the car, the place where weighed, the date, the kind of grain and the weight of the carload of grain. Thereupon, and in conformity with the Grain Act, the receiving elevator company issues to the owner of the grain, a ter-

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minal warehouse receipt to the effect that it has received and holds subject to the order of the owner, a specified quantity of a definite kind of grain expressed in bushels, of an inspected and designated grade, to be stored with grain of the same grade. The quantity is the weight of the carload, less the deduction for dockage. This grain, or grain of the same grade, is deliverable upon the return of the warehouse receipt, properly endorsed by the holder thereof, and upon payment of storage and other charges. The certificate further states that the grain will be kept stored and insured for the benefit of the person to whose order the receipt is issued, or his assignee, and in conformity with the provisions and conditions of the laws of Canada relating to the warehousing of grain. The evidence shews that Canadian grain is usually sold in international markets, on the certified grades established by the inspection under the Grain Act, and the certificate shewing the grade, accompanies the shipment to the ultimate market. Grain exported from Australia, India or Argentina is usually purchased on the basis of, fair average quality on arbitration.

At the trial there was filed three specimen exhibits, indicating the actual results of the inspection of a carload of wheat at Winnipeg after arrival there, the subsequent weighing into an elevator at Port Arthur, and the ultimate result as expressed in the certificate of the terminal warehouse receipt. The inspection certificate at Winnipeg shews the car number as being No. 303015, consigned to Pioneer Grain Company, Limited, the station shipped from being Kamsack, the grade being Manitoba Three Northern, and the dockage 4½ per cent. The certificate issued from the office of the weighmaster, shews the car was weighed at Port Arthur, at the defendant's elevator, the kind of grain, and the weight, 72,100 pounds. The terminal warehouse receipt was issued by the Eastern Terminal Elevator Company, Ltd., the defendant, and shews the quantity to be 1,147 bushels and 40 pounds, which is the weight stated in the weighmaster's certificate, after the deduction of the dockage of 4½ per cent as stated in the inspector's certificate.

After the issuance of the terminal warehouse receipts, which are registered with the board at Fort William, they are forwarded to the board's office at Winnipeg, for delivery to the proper parties, and they are then bought and sold on the Winnipeg Grain Exchange. In actual sales of grain and for which delivery must be made, these warehouse receipts must be purchased by the grain dealer or shipper. There is an association of grain dealers, known as the Lake Shippers Clearance Association, at Port Arthur, to which the grain shipper forwards his warehouse receipts when making a shipment by rail or water, and the association procures the necessary grain from the elevator, by surrender of receipts representing the amount of grain required for any shipment.

Section 246 of the Act provides that the expense of the administration of the Act shall be paid for by the imposition of such fees as are necessary for that purpose, and the board shall fix such fees, and determine how and by whom they shall be paid. The board also fixes the tariff charges for storing, cleaning, etc., of grain by terminal elevators. If there is a dockage of three per cent or over, on a carload of wheat, the receiving terminal elevator, under the tariff prescribed by the Board of Grain Commissioners, is obliged to make a return to the owner of the wheat for the screenings, that is the dockage screened from the grain, after deducting one-half of one per cent of the gross weight of the car for waste, and the owner pays the elevator for cleaning his wheat. Where there is a dockage of less than three per cent, the screenings are retained by the elevator in lieu of cleaning charges. Where the wheat contains other recoverable commercial grain, such as oats, there is an additional charge for this separation. In the case of oats, barley and rye carrying a dockage of five per cent or more, a return is to be made to the owner for the screenings, after deducting one-half of one per cent of the gross weight of the car for loss and waste. When the dockage is less than five per cent, the screenings are retained by the elevator in lieu of cleaning charges. If there is no dockage on a carload of wheat the elevator is allowed thirty pounds per car to cover invisible loss, in the case of oats and barley, fifty pounds per car, and in the case of flax and

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rye, fifty-six pounds per car. A warehouse receipt usually in practice issues for the screenings. In this particular case, the returns to the owners for such balances of screenings for which the defendant elevator company was liable, was made by paying the owner for the same in cash at the current market price. It is admitted that for the crop year ending August 31, 1920, the defendant company commuted its liability for the return of all balances of screenings to owners, by cash payments, amounting to $33,384.17, the amount of screenings for which such payments were made, aggregated 3,186,894 pounds. In practice an actual return of the screenings to the owners by an elevator is impracticable, and the screenings returnable to the owners are purchased by the elevators and by them sold, at current market prices.

It is necessary to refer briefly to the causes leading up to the enactment of subsection 7 of section 95 of the Grain Act, evidence of which was given on behalf of the plaintiff. In 1919 and prior thereto, much dissatisfaction existed among grain growers in respect of the earnings of the terminal elevators at Port Arthur and Fort William, it being claimed they were in receipt of undue profits from grain surpluses. An investigation or audit, in respect of certain named terminal elevators at Fort William and Port Arthur, was then caused to be made by the Government of Canada, through a reputable accounting firm, covering the capital investment, cost of operation and maintenance, cost of depreciation, sources of revenue and amount thereof, gross and net profits, etc., of such elevators. The Order in Council passed providing for the audit, March 12, 1918, states that the purpose of the same was:—

> to assist the Government in deciding as to whether the grain surpluses which annually result in the operation of the said elevators shall be continued in whole or in part as a source of necessary income to enable the elevators efficiently equipped to make any addition to their other earnings as a reasonable compensation on the outlay of capital and business management put into the enterprise.

A consequence of the audit was the enactment in 1919, of subsection 7 of section 95, of the Grain Act which I have already textually quoted, the audit or investigation having apparently sustained the claim which was the genesis of the inquiry. The report of the auditors is an exhibit in the cause.

The question for determination is the liability of the defendant under this legislation. In August, 1920, the Board of Grain Commissioners, pursuant to subsection 7 of section 95 of the Grain Act took stock of the quantity of each grade of grain in the defendant's elevators. The total receipts by the defendant's elevators of all grains for the crop year ending July 31, 1920, was 5,247,862 bushels, the surplus was 39,224 bushels of all grains, and the value of that surplus was $49,027.07. These figures are not in dispute, though, in the admissions it will be found that the defendant contends that the net surplus quantity and value, and its net liability, are not properly calculated, but I shall later refer to this.

The defendant submits that in respect of its elevator operations for the crop year ending July 31, 1920, it delivered to the owners all grain inspected and weighed into its elevators, according to the certificates of the inspectors and weighmen respectively, and as represented by its issued terminal warehouse receipts. That the difference between what came into its elevators and the issued terminal warehouse receipts must be attributable to grain recovered from the dockage or screenings, and which was earned by the elevators as payment in kind in lieu of the tariff charges as already explained, and from screenings purchased from the owners, and for which as already explained the elevators were obliged to make a return, and from the other allowances permitted by the regulations of the board, to cover invisible losses on each car of wheat, barley, oats, etc., when there is no dockage. The defendant claims that having extinguished the right and title of all persons in both the grain and screenings, the remainder is its property, earned under and by virtue of the tariff charges set up and allowed by the Grain Act, and which tariff the defendant acted upon, or in the ordinary course of its business as warehouseman, or purchased by it from the owners, or by whatever circumstances accrued, and that the title to the same cannot be taken from it by any legislation enacted by the Parliament of the Dominion of Canada.

The defendant further submits that grain is forwarded to it as warehouseman in the usual course of business, by grain shippers for the purpose of cleaning and warehous-

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ing, and subject to the order and direction of the consignor. That the inspecting, grading, weighing and binning of the grain are matters which the grain shipper, by direction or implication, requests or requires to be done for his benefit, as is his right, and these matters the defendant must observe, as warehouseman, in so far as it is necessary or possible for it so to do, all of which are requirements relating to the grain so stored, and not to the elevator or its business. Again the defendant in substance contends that the owner of the grain ships the same to a terminal elevator upon the understanding, and in conformity with the established practice that the elevator will adopt and observe the tariff of charges for services set up by the board, and if the defendant adopts and observes that tariff in its business relations, as warehouseman, with its customers, and thus earns these charges with the consent of its customers, the same cannot be taken away by any legislation of the Parliament of Canada. The defendant specifically challenges the validity of subsection 7 of section 95 and says it is beyond the competence of the Dominion Parliament under the British North America Act and is an invasion of the legislative powers assigned exclusively to the provincial legislatures by that Act. The plaintiff's submission on this point is that under several heads of section 91 B.N.A. Act, the Dominion is empowered to enact the legislation upon which this action is based.

Number 17 of section 91 is invoked by the plaintiff. The jurisdiction there assigned to Parliament, is in respect of weights and measures, which is quite a different thing from weighing and measuring, as involved in the transactions already described, or the things weighed or measured. I do not think this contention can be seriously entertained. The concurrent powers of Parliament under the head of agriculture, section 95, are invoked, as also the powers reserved to the Dominion under head 10 (*a*), (*b*), (*c*) of section 92, to control certain local works and undertakings. I am of the opinion that the legislation in question cannot be sustained under the former power, upon the ground that grain is an agricultural product. When it reaches the railways, or at least the terminal elevators, it has become an article of commerce, and traded in daily.

I do not think therefore that the legislation in question can be brought within the powers assigned to Parliament by section 95. Neither in my opinion can it be successfully urged, that because railways of the class defined in section 92 (*a*), (*c*) and which have been declared works for the general advantage of Canada, carry grain into and out of elevators, that therefore the legislation in question dealing with surpluses, can be upheld as coming within the legislative powers of Parliament. True, grain enters into and departs from elevators, by transportation agencies, such as defined in section 92, No. 10 (*a*), (*b*), (*c*), but if Parliament can thus acquire jurisdiction to legislate in respect of what railways carry as freight, it would have little difficulty in absorbing much of the legislative field expressly assigned to the provincial legislatures. I cannot conclude that this contention is entitled to weight.

It was contended before me that the export of Canadian grain was a matter of national concern, by reason of its value and volume, by itself, and in relation to the total export trade of Canada; that such grain was sold in international markets as inspected and graded under the Grain Act, much to the advantage of Canadian grain growers and exporters, and that the whole enactment should be regarded in its entirety as a legislative scheme evolved in the interest of a primary industry of great magnitude, and for high national interests, and it was urged that under head 2 section 91, "regulation of trade and commerce," there was legislative authority for the Grain Act, and the particular section under consideration. This view is not without force, and must be seriously considered. The validity of the Grain Act as a whole is not challenged and I am not called upon to decide whether the more prominent features of that Act, such as the inspection, grading, and weighing of grain, are within the legislative competence of Parliament by virtue of section 91 (2) or otherwise.

It appears to me that such provisions of the Grain Act as might be said to constitute its main purposes and objects might stand, while others might fall for want of jurisdiction, and without destroying the vital parts of the legislative scheme. The general scheme of the Act may be of paramount national concern and of national dimensions,

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and assuming its principal provisions to be within the legislative authority of the Dominion Parliament, such as inspecting, grading, weighing, cleaning, railway car facilities, etc., it does not, I think, follow that subsection 7 of section 95 is a necessary factor in that scheme. That is to say the Grain Act might operate in the way of a regulation of trade and commerce, as well without this section as with it, as in fact it did for many years. If the general scheme of the Act comes within the head of "regulation of trade and commerce" or any other part of section 91, that might stand and function by itself, without subsection 7 of section 95. That legislation it seems to me assumes to do something, unrelated to the general scheme and purpose of the Grain Act.

The reason for the enactment of the section in question, as is I think obvious, was to limit the amount and value of grain surpluses to be earned or acquired by terminal elevators in any one crop year, and was an attempt to regulate profits, or dealings which gave rise to profits. The legal title to the grain surplus in question in this case was vested in the defendant. The defendant, as contended, had extinguished every other right or title in the surplus, and no other claim or title therein is put forward, or can be put forward, except by the board under this legislation. The legislation I think attempts to deal with a subject matter, falling within one of the enumerated legislative powers assigned to the provincial legislatures, property and civil rights. This is not it seems to me the case where the Grain Act purports to do something coming within the powers assigned to Parliament by section 91 of the B.N.A. Act, but which incidentally and necessarily in its operation, comes in conflict with property and civil rights, a power assigned to the legislatures. It is not the case of an ancillary provision, encroaching upon matters assigned to the provincial legislatures, but required, to prevent the scheme of such a law, being defeated, nor is it the case, where in order to operate a validly enacted scheme, procedure must be adopted to make effective that law, even though invading the legislative field of the legislatures, in respect of property and civil rights.

By section 92 Nos. 11 and 13, the provincial legislatures are granted the exclusive power to make laws in relation to "property and civil rights in the province," and "the incorporation of companies with provincial objects." The defendant was incorporated under a provincial statute, to engage in the business of warehousing grains, etc., as already referred to and licensed by another province, Ontario, to carry on its business within that province, and its business of warehousing was wholly carried on within that province. While the defendant submits to other provisions of the Grain Act and observes its directions in many respects during the course of its business in the warehousing of grains, as do the owners of the grain, still these provisions do not attempt to legislate upon the ownership of, or title to the property itself dealt in by the warehousing elevators, which I think would come within the definition of "property and civil rights." If the scheme of the Act is of national concern, and an authorized and prudent regulation of trade and commerce, that end is I think achieved and consummated under other provisions of the Act, and is ended when the grain is for the last time inspected, and is loaded into a ship or car, and is in transit to a consuming market. Then the elevator has discharged its last liability as bailee to the owner of warehoused grain.

If it were once conceded that the Parliament of Canada had authority to make laws applicable to the whole Dominion, under the legislative powers assigned to it under section 91 No. 2, upon property or rights in property which represented the subject matter of commercial transactions, and which were substantially of a local or private nature, there would ensue such a curtailment of the powers enumerated under section 92 as to leave the provincial legislatures almost without a legislative field. The subject matter of warehouses and warehousing of goods, is clearly I think one for provincial legislation, and in the province of Ontario, wherein the defendant's elevators are located, there is legislation upon the subject. There may well be Dominion legislation which the elevator in the course of its business must nevertheless observe, for example the weights and measures used in weighing. To the legislatures of the provinces is given the power of regulating

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or restricting property and civil rights, and within that ambit their power is supreme. The words "regulation of trade and commerce" must be so restricted in their meaning as to give scope for the exercise of the powers which are given exclusively to the provincial legislatures. Without that restriction, all classes of business would fall within the legislative jurisdiction of the Dominion, which clearly was not intended in the structure of the federal system created by the British North America Act. The legislation in controversy may have a relation to the regulation of trade and commerce, but the important consideration is whether it is a regulation within the legislative competence of Parliament. Is not this regulative enactment one strictly referable to the rights of property as intended in section 92 No. 13, rather than an enactment to regulate trade and commerce, as provided in section 91 No. 2? In the case of *The City of Montreal* v. *Montreal Street Railway* (1), it was in effect laid down that the authority to deal with trade and commerce ought not to be so construed and applied, so as to enable the Parliament of Canada to make laws applicable to the whole Dominion in respect of matters which, in each province, are subjects of local or private interests, and in particular in relation to matters which, in each province, come within the legislative subject matters assigned to the provinces. The authority given by this legislation is somewhat on a parity with the legislation constructed by the Privy Council in the *Board of Commerce Act Case* (2), in that it seeks to limit the measure of and control the profits which any terminal elevator may make, in the course of a business coming within the legislative jurisdiction of the provincial legislatures. I cannot avoid the conviction that subsection 7 of section 95 of the Grain Act is in essence legislation dealing with property and civil rights, and is not a regulation of trade and commerce within the meaning of section 91 No. 2 of the British North America Act.

It was urged upon the trial, on behalf of the plaintiff that the object of the legislation in question was to raise revenue to defray the costs of administration of the Grain Act and to encourage the cleaning of grain to grade. I

(1) [1912] A.C. 333 at p. 344. (2) [1922] 1 A.C. 191.

cannot concur in this view. This was already anticipated by section 246 already referred to, and which enacts that the expenses of the administration of the Act shall be paid by the imposition of such fees as are necessary for that purpose and the Board is authorized, with the approval of the Governor in Council, to fix such fees. This power has been exercised by the board. If the legislation was primarily designed as a taxation scheme, more specific and appropriate language would I think have been employed to express that intention. The legislation was in reality designed to limit the profits of terminal elevators. It was the result of a public inquiry into the profits of terminal elevators. Subsection 7 of section 95 seems to anticipate a "surplus" of grain as being a probable event at the end of a year's operation of terminal elevators, and enacts that any surplus over one quarter of one per cent shall be sold by the board. It is with the surplus grain the statute deals with, and that seems altogether the purpose of the legislation, and not taxation, and the evidence supports that view. Private elevators, that is elevators which buy and sell grain, as well as store grain, and country elevators, are not subject to this legislation. If the legislation was intended to be merely a taxing statute, it is improbable these classes of elevators would be relieved of the tax, and only terminal elevators made subject thereto. Taxing laws should not only be for a public purpose, but should ensure uniformity in assessment and contribution, and should operate with the same effect in all localities in respect of the same class of property. I am of the opinion it was not intended as taxing legislation, and that its validity cannot be upheld as an exercise of the powers of Parliament in respect of the matter of taxation.

Neither can I attach weight to the contention that it was enacted to encourage the cleaning of grain to grade. The Grain Act purports to make ample provisions to secure this end by its inspectional clauses, and that is presumed to be done, and any evidence given upon the trial would affirm this presumption. I am bound to assume from the evidence given on behalf of both parties that the grain is cleaned to grade, or as nearly so as mechanical devices can accomplish that result, and apparently this must be the

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conclusion of the plaintiff's officers inspecting the grain in and out of the defendant's elevator during the crop year in question.

The defendant pleads that section 119 of the Canada Grain Act is *ultra vires*. This section provides that all licenses issued under this Act shall expire on the 31st of August in each year, and such annual licenses are required to be taken out by owners and operators of elevators, warehouses and mills. This point was not urged at the trial by the defendant, and I think was but casually mentioned. The plaintiff did not contend that the defendant was in any way estopped from challenging the validity of section 95 subsection 7 by having taken out a license for the crop year 1920. The plaintiff in his original reply pleaded that the defendant was estopped from denying the constitutional validity of the Canada Grain Act or any part thereof. Subsequently and pursuant to order, this reply was struck out and a simple joinder of issue pleaded. With this reply struck out and the plaintiff not having contended on the trial, that the defendant was in any way estopped by having taken out a license under section 119, and the defendant not having pressed its plea, I do not think it necessary to discuss the point.

In the event of an appeal from this judgment and section 95, subsection 7 of the Grain Act being held *intra vires* of Parliament, it is perhaps desirable that I dispose of the question of the amount recoverable by the plaintiff in that event, and the manner of computing the *total surplus of grain* under that section.

[His Lordship here deals with the *quantum*, and manner of arriving at same.]

Altogether I am of the opinion that the plaintiff's action must fail upon the ground that subsection 7 of section 95 of the Canada Grain Act is beyond the legislative competence of the Dominion Parliament. The action is dismissed with costs.

Judgment accordingly.

WILLIAMSON CANDY COMPANY.....PLAINTIFF; 1924 June 30th

AND

W. J. CROTHERS COMPANY.....DEFENDANT.

Trade Marks—"Proprietor"—"Person aggrieved"—Improper registration —Misleading—Expunging.

W. C. Co. were owners of the trade-mark "OH HENRY," registered in the United States and there used by them, but no user thereof had been made in Canada, though they had extensively advertised in papers circulating there. The said trade-mark having come to the notice of W. J. C. he adopted it as his, knowing the mark to be so registered and used as aforesaid, and registered the same in Canada as his own mark. The application by him failed to disclose the existence of plaintiff's mark, and declared that he was the first and only user thereof. Hence the present action to expunge.

Held, that the defendant was not the "proprietor" of the said trade-mark within the meaning of the Trade-Mark and Designs Act, and that the trade-mark was improperly registered, was calculated to mislead and deceive the public, and should be expunged.

2. That the word "Proprietor" in the sense used in section 13 of the Trade-Marks and Designs Act infers adoption and user before the capacity of proprietorship is created, and that a person, before he can register a trade-mark, must have previously used the same or, at least have been the first to adopt it.

ACTION by plaintiff to expunge the trade-mark registered by defendant and to register their own.

Tuesday, 11th March, 1924.

Case now heard before the Honourable Mr. Justice Maclean, President, at Ottawa.

R. S. Smart and *J. L. McDougall* for plaintiff.

George Henderson, K.C. for defendant.

The facts are stated in the reasons for judgment.

MACLEAN, J. now this 30th day of June, 1924, delivered judgment (1).

The plaintiff carries on the business of manufacturing, selling and distributing confectionery, at Chicago, U.S.A., and its business is said to be extensive and growing. Prior to the month of November, 1920, the plaintiff adopted and first used the words *Oh Henry* as a trade-mark for his confectionery, and in July, 1921, an application was filed for the registration of the said words as a trade-mark, in the United States Patent Office. On February 22nd, 1922, the application was granted and the trade-mark duly registered. The trade-mark is applied or affixed to the goods, by placing theron a printed label, on which the trade-mark is shown. This trade-mark was not registered in

(1) An appeal has been taken to the Supreme Court of Canada.

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Canada. The defendant carries on business at Kingston, Ontario, where it is engaged in the manufacture and sale of confectionery and biscuits. In the latter part of May, 1922, W. J. Crothers, manager of the defendant company, attended a convention of confectionery manufacturers at Chicago, and while there he saw on a bill board the advertised mark *Oh Henry,* and practically at the same time learned that the plaintiff was using the mark *Oh Henry* on a class of its product, chocolate bars, and he also saw some of the labels, containing such mark, and as used by the plaintiff. He thereupon telegraphed his brother, N. G. Crothers, the treasurer of the defendant company, on May 26th, at Kingston, Ontario, to apply at once for the registration of the words *Oh Henry* as a trade-mark in Canada for use in connection with certain candy. On June 13th, 1922, the defendant company applied for the registration of the words *Oh Henry* as a specific trade-mark, to be applied to the sale of chocolate bars and biscuits, and on the 15th day of the same month the application was granted and the words *Oh Henry* were registered in the defendant's name as a specific trade-mark. The defendant's manager frankly admits that he copied the plaintiff's mark, the colour only being changed. Upon the labels bearing the defendant's registered trade-mark and as used by him, which are in evidence, there appears also the words *Crothers—Kingston* in quite large letters though not so large as those used in printing the trade-mark itself. There is no claim however that the defendant is attempting to pass off his goods as those of the plaintiff. Upon some of the earlier labels used by the defendant there also appeared the words *registration applied for.* If labels bearing these words were actually used by the defendant, it could have been for a day or so only, because his application is dated at Kingston, June 13th, and the same was granted on June 15th of the same year.

The plaintiff did not attempt to prove any user of his trade-mark in Canada, apparently no sales of his confectionery ever having been made here. Counsel on behalf of the defendant admitted that the plaintiff had, prior to and since the defendant's registration, advertised in American publications, many of which had substantial circulation in Canada, its confectionery under the trade-

mark in question. There is no doubt, I think, but that the plaintiff advertises very extensively. It is not alleged that the defendant ever obtained the plaintiff's consent to the registration of this mark.

The plaintiff claims an injunction and damages, and also that the defendant's trade-mark be expunged and the plaintiff's be registered. The plaintiff pleads that the defendant's registration was procured by false statement made upon its application for registration, and also pleads that it was refused registration in Canada upon application, by reason of the defendant's prior registration. The defendant's case is that it was the first to register and use the mark in Canada, and that there was no user in Canada by the plaintiff.

The important matter in issue is not without its difficulties, and I confess much perplexity in attempting to decide the same. It has never been directly determined in our courts, whether domestic registration of a mark, which mark was then registered and in user in a foreign country, to the knowledge of the domestic registrant, is properly made, there being no user in the domestic country of the foreign mark, at the time of the registration here.

It might be convenient here to refer briefly to some of the provisions of the Trade-Marks Act. Section 13 provides:—

> Subject to the foregoing provisions, the proprietor of a trade-mark may, on forwarding to the Minister a drawing and description in duplicate of such trade-mark, and a declaration that the name was not in use to his knowledge by any other person than himself at the time of his adoption thereof, * * * have such trade-mark registered for his own exclusive use.

Under section 11 the Minister may refuse to register any trade-mark (*a*) if he is not satisfied the applicant is undoubtedly entitled to the exclusive use of such mark, and (*b*) if it appears that the trade-mark is calculated to deceive or mislead the public. The Act does not require publication of notice of the intended application for registration, either by the applicant, or by the Minister, and therefore the latter is unlikely to have any information, other than that supplied by the applicant. Section 13 as already quoted, requires from the applicant a declaration, that the trade-mark for which he seeks registration was not in use to his knowledge by any other person than him-

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self at the time of his adoption thereof, and this declaration was made on behalf of the defendant by Mr. N. G. Crothers. The important part of the declaration (not sworn to) is as follows:—

> We, The W. J. Crothers Company, Limited, of the City of Kingston, in the County of Frontenac, Province of Ontario, hereby request you to register in the name of ourselves a Specific Trade-Mark to be used in connection with the sale of chocolate bars and biscuits, which we verily believe is ours on account of having been the first to make use of the same. We hereby declare that the said Specific Trade-Mark was not in use to our knowledge by any other person than ourselves at the time of our adoption thereof. The said Specific Trade-Mark consists of the words *Oh Henry.*

Trade-marks could prior to any legislation on the subject and may still be acquired by user, independently of registration, and although the technical action for infringement cannot be maintained in respect of an unregistered trade-mark (section 20), still protection could and may be secured for such marks by passing off actions. The litigation of trade-marks prior to the enactment of the registration system was expensive, protracted and unsatisfactory. The essence of a trade-mark right being that the mark connected the goods of the plaintiff in the market, considerable evidence was necessary to establish this reputation, and as the infringers were usually persons of no substance, it was often not possible for the successful litigant to recover his costs. Again though the plaintiff succeeded against one infringer that did not relieve him of the necessity of bringing action against another or other infringers. From this condition of affairs sprang the necessity of the establishment of a Register of trade-marks, and the creation of trade-mark rights by registration, as exemplified in the Trade-Mark legislation to-day prevailing in most countries of the world. Their purpose was to diminish the difficulty and cost of, or to remove altogether the necessity for, the proof of title by user and reputation, and to secure the publication of marks. Accordingly trade-mark legislation, including our own Act, in substance provides that registration shall be primâ facie evidence of the right of the registered proprietor in the registered mark, for the purposes for which it was registered. *In re Edwards* v. *Dennis* (1), Cotton L.J. discussing this point with reference to the English Act, said:—

(1) [1885] 30 Ch. D. 454 at p. 470.

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In the first place, what is the object of that Act? Speaking generally, its object is, not to give new rights, but to place restrictions on the bringing of actions for infringement of trade-marks by requiring that a trade-mark shall be registered before any action to prevent its infringement can be brought. That is provided for by the first section of the Act as amended by the subsequent Act of 1876. Another object of the Act is to facilitate evidence of title to trade-marks by means of registration; for the third section of the Act provides that registration of a person as first proprietor of a trade-mark shall be *primâ facie* evidence of his right to the exclusive use of the trade-mark, and that five years' registration shall be conclusive evidence of his right to such exclusive use.

What is usually called a right of property in a trade-mark, being recognized by the common law, does not therefore depend for its inceptive existence or support upon statutory law, although its exercise may be limited or controlled by statute. This right is not alone conferred by legislative enactment and does not depend upon statute for its enforcement. By the common law every manufacturer has an unquestionable right to distinguish the goods that he manufactures, by a device or mark, and this right of property in a trade-mark may be asserted wherever the common law affords a remedy for a wrong. The right of property in a trade-mark, it should be said, only exists as appurtenant to a business or trade in connection with which the mark is used, and not otherwise. There is therefore only in a limited sense a property in a trade-mark. There is no right of property in the trade-mark by itself, and the statute does not purport to grant such property rights. Property in a word mark itself cannot exist, but property in that word does exist when applied to goods which go into the market. Registration is a condition precedent to bringing an action for infringement, but the question of title to a trade-mark is one to be determined outside of the matter of registration.

Reverting now to section 13 of the Trade-Marks Act, it is to be observed that the applicant for registration must be the *proprietor of a trade-mark* and that to his knowledge the same was not in use by any other person than himself *at the time of his adoption thereof*. There is no statutory definition of *proprietor* nor is there any provision equivalent to that found in the English Trade-Marks Acts of 1883 and 1888, to the effect that registration shall be deemed to be equivalent to public use of a trade-mark, nor does our Trade-Marks Act provide that a trade-mark shall mean a mark "used or proposed to be used" in con-

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nection with goods, to denote they are the goods of the proprietor of such trade-mark, as is provided in the English Trade-Marks Acts, 1905 to 1919. It would seem clear that mere registration was not intended by our Act to confer title. However, that is not perhaps important, because at most registration can only be primâ facie evidence of title.

Now what does "proprietor" mean in the sense used in section 13 of our Trade-Marks Act? It seems to me that the section rather points to adoption and user before the capacity of "proprietorship" is created. At the moment of time when one comes to register a trade-mark it should be something which is then considered a trade-mark, adopted and in use. Proprietorship must mean a property in a thing in some way established. The declaration required to be made by the applicant for registration is to the effect that the mark was not in use by any other person than himself, and would appear to imply that it must have been in use by him prior to the application. There is nothing in section 13 or in other sections to indicate that mere registration is equivalent to public use of such mark. To hold that "proprietor" means one who has used the mark prior to registration, may be too narrow a construction of the word, but it must at least mean one who claims to be the first to adopt a mark, whether there had been user or not. It is not necessary to decide here whether user alone under our Act constitutes proprietorship and the right to register. I think that *proprietor* at least was intended to mean one who was the author of the mark, or entitled to a mark by first adoption. Something at least must be done to establish his rights as a proprietor, and if not by user, then he must at least invent, design or in good faith adopt a mark, so that in truth and in fact he can say it is his, and that he is the proprietor. There should be found such a state of facts, that would impliedly constitute or create that which is primarily and ordinarily understood to be conveyed by the word proprietorship. A person registers because he is a proprietor, but does not necessarily become a proprietor because he registers. In *Partlo* v. *Todd* (1), Hagarty, C.J.O., discusses this point as follows:—

(1) [1887] 14 A.R. 444, at p. 452; Aff. 17 S.C.R. 196.

The case seems in my mind to be reduced to this: Does our statute create a new right vesting in any person who succeeds in registering a trade-mark, rightfully or wrongfully, the exclusive use of it for say twenty-five years? Is not the fact of proprietorship or ownership of such trade-mark the necessary condition precedent of the right to register or obtain any advantage under the Act?

On the best consideration I can give the case, I come to the conclusion that from the beginning our legislation has been and is based upon the fact of proprietorship and ownership, and that registration does not create or confer that status on an unqualified person, and that his right thereto can be challenged.

All through the Acts the provisions are that the proprietor may have his mark registered, and that when registered such person shall have certain rights.

In re Hudson Trade-Marks (1), often referred to as affirming that registration was equivalent to public use, Cotton L.J. in discussing what constituted proprietorship said, at page 319:—

Is a man to be considered as entitled to the use of any trade-mark when he has never used it at all? That is a difficulty, but I think the meaning is this. If a man has designed and first printed or formed any of those particular and distinctive devices which are referred to in the first part of section 10, he is then looked upon as the proprietor of that which is under that Act a trade-mark, which will give him the right so soon as he registers it. How can it be said he is entitled to the exclusive use of it? He never has used it; but in my opinion the language, though not appropriate, means this, that a man who designs one of those special things pointed out in section 10, is, as designer, to be considered as the proprietor of it, and if there is no one else who has used it, or who can be interfered with by the registration and subsequent assertion of title to the mark, then he is to be considered as entitled within the meaning of the Act to the exclusive use of that which in fact has never been in any way used, but which has only been designed by him, and which he can be treated as the person entitled to register, if no one else had so used it as that his user would be interfered with by the registration.

Fry, L.J. in the same case said at page 325:—

Therefore, although not without hesitation and not without difficulty, I come to the conclusion, that the true meaning of the Act was to enable a person who had invented a trade-mark, which had not been previously used by some other person, to obtain registration of that trade-mark, and to treat its being on the register as evidence of public user or equivalent to public user.

Further it seems to me that our Trade-Marks Act definitely intended to make adoption and proprietorship a condition precedent to registration, or it would not have gone so far as to grant an exclusive use immediately upon registration, without notice or publication of an intention

(1) [1886] 32 Ch. D. 311.

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to apply for registration. Even if contended that the Act was intended to effect, as was said by Fry, L.J. in the Hudson Trade-Marks Case, a great and fundamental change in the law of this country, making registration the equivalent of user, yet I think the defendant must be required at least to adopt a mark of his own, and must not take that of another. Fry, L.J. in *Appollinaris Company's Trade-Marks* (1), said that a person who puts another's trade-mark on the register cannot be a person under the Act. I cannot find that the defendant designed or originated the work in issue, or that it ever adopted or used it as *proprietor* prior to registration, or that in any true sense it ever was the proprietor of the mark. Any adoption or acquired proprietorship was not such as contemplated by the Act. I think therefore that the registration was improperly made for the reason that the defendant was not the proprietor of the mark when registered. In *Collins Co.* v. *Cowen* (2); *Collins and Brown* (3); *Taylor* v. *Carpenter* (4), though the facts are different from this case, there will be found expressed, principles which I think may well be invoked in this case.

It would appear very desirable that the Minister administering the Act should know if a similar mark was registered elsewhere, so that he might properly exercise his discretion in deciding whether or not the proposed mark should be registered and whether or not it might be deceptive or misleading to the public. If the applicant knows this to be the case, then the Minister should know it. The citizens of all countries are normally permitted to export goods to Canada, and citizens of this country have the right to import from any other country, and it would be quite proper I think to insist that any citizen of Canada, proposing to register a trade-mark, here, which he knows to be registered and in use in another country, should at least disclose that fact, so that the Minister might carefully consider the public and all other interests involved in such a situation. If upon the application for registration made in this case, the defendant had disclosed to the Minister the fact that he was copying the plaintiff's mark,

(1) [1891] 2 Ch. D. 186 at p. 226.
(2) [1857] 3 K. & J. 429
(3) [1857] 3 K. & J. 423.
(4) [1844] 11 Paige, Ch.R. N.Y. 292.

registered and in use in the United States, and which he now admits, I doubt if its application would have been granted. Under section 11 (*c*) the Minister, with this fact disclosed, and with the knowledge of the plaintiff's advertising, might well have held that the mark was calculated to deceive or mislead the public, and if so, I do not think it could later be said, that it was an arbitrary or capricious exercise of his discretion. The use of trade-marks was adopted to distinguish one person's goods from those of another, on the market, and to prevent one person selling his goods as those of another. The system was designed to encourage honest trading, and the protection of the buying public. One may safely say that our Trade-Marks Act was not enacted to encourage in Canada the adoption of foreign registered marks, even if there were no user by the foreign registrant here. That would cause confusion and deception, just the thing that trade-marks were supposed to avoid, and it would be a fetter upon trade, another thing quite foreign to the purposes of trade-marks. Trade-mark legislation was designed as much for the benefit of the public, as for the users of trade-marks.

If such a practice were knowingly permitted by all countries, the use of trade-marks would end in hopeless confusion and bring about a result which trade-marks were originally supposed to avoid. Happily the tendency is always towards the protection of marks registered in another country. In fact a convention exists to-day, to which many important countries are parties, which provides for a system of international registration. In so far as possible each country should I think respect the trade-marks of the other country, or else international trade and public interests would suffer. I think knowledge of foreign registration and user, of a mark applied to the same class of goods, as in this case, and particularly where the foreign user is in a contiguous country using the same language, and between which travel is so easy, and advertising matter so freely circulates, should in most cases be a bar to registration knowingly, of that mark here. This should be particularly true where, as in this case, the plaintiff's advertising, circulating substantially in Canada, might very likely mislead the public into thinking that the defendant's goods were the same as the advertised goods

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of the plaintiff. The conspicuous presentation of the word mark on the label would influence the eye to that conclusion, notwithstanding the less conspicuous but clearly printed matter on the label, indicating the name of the maker of the goods. That rule would impose no hardship on any person. Conceivably there might be instances when this principle might well be ignored. The case of innocent user and registration is quite a different thing altogether and need not here be considered. Again if the plaintiff had neglected to apply for registration here for a long number of years after his registration in the United States possibly a different view might be taken of the case. That might be construed as a deliberate abandonment of this market, or of the mark in this market. I do not think that contention can yet fairly be made. The defendant registered the mark, in Canada, within four months, after the plaintiff registered in the United States.

In view of the facts before me I am of the opinion that the registration in question was improperly made. The defendant was not the *proprietor* of the mark, and was not entitled to register the same and it should be expunged. Neither was the defendant the first to use the mark to his knowledge. The discretion placed in the Minister by section 11, and now in this court, may well be exercised against the defendant's registration, and I am of the opinion that the defendant's registration is calculated to deceive or mislead the public, and for that reason also, the defendant's registered mark should be expunged.

Accordingly the plaintiff's claim that the defendant's trade-mark be expunged, is allowed, with costs.

I think the plaintiff is entitled to registration of its mark but there is no evidence that the requirements of Rule 34 of the Practice of the Court have been complied with.

Judgment accordingly.

IN THE MATTER OF an Appeal under the Income War Tax Act, 1917

1924
June 2.

BETWEEN:

CECIL R. SMITH.....APPELLANT;

AND

THE ATTORNEY GENERAL OF CANADA ..... } RESPONDENT.

Revenue—Income War Tax Act, 1917—Profits from illegal sale of liquor—"Income"—Estoppel.

Held, that profits arising within Ontario from an illicit traffic of liquor therein contrary to the Ontario Temperance Act are "income" within the meaning of section 3, subsection 1 of The Income War Tax Act, 1917, and amendments and liable to be taxed under the provisions of the said Act.

2. That the taxes imposed under the said Act are so imposed upon the person and not upon his trade, business or calling, and it is not necessary for the taxing power to inquire into the source of the income or revenue.

3. That inasmuch as one is estopped from pleading his own illegality or wrongful act with a view of benefiting thereby, *S.* could not claim that revenue from his illicit traffic was exempt from taxation, because it was illegally or improperly obtained.

APPEAL by the appellant from the assessment for the year ending 31st December, 1920, under the provisions of the Income War Tax Act, 1917.

May 27, 1924.

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

George D. McEwen for appellant.

C. F. Elliott for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now, this 2nd day of June, 1924, delivered judgment (1).

This is an appeal,—under the provisions of sections 15 *et seq* of The Income War Tax Act, 1917, and the amendments thereto—from the assessment, for the year ending 31st December, 1920, of that part of the appellant's income dealing with his profits arising out of the illicit traffic in liquor, in the province of Ontario.

The facts of the case are admitted and the matter now comes on before the court in the form of a special case,

(1) An appeal from this judgment has been taken to the Supreme Court.

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under the provisions of Rule 161, and the question submitted for determination is stated as follows, viz:

Are the profits arising within Ontario from illicit traffic in liquor therein, contrary to the provisions of the said existing provincial legislation in that respect, *income* as defined by section 3, subsection 1 of The Income War Tax Act, 1917, and Amendments thereto and liable to have assessed, levied and paid thereon and in respect thereof the taxes provided for in the said Act.

The appellant was engaged, in Ontario, without license, in the illicit business of trading and trafficking in liquors, contrary to the Ontario Temperance Act. His business was limited within Ontario, with no exportation of liquor outside the province. He now claims that the profits earned out of that traffic were illicit, contrary to the Ontario laws and that therefore they are not taxable as

income within the proper interpretation of the Income War Tax Act.

It is true that trading in liquor is not illicit or illegal at common law. To quote the language of Blackstone it is not *malum in se,* but only *malum prohibitum,* and is not a criminal offence. It has, however, been made illegal and illicit by the laws of Ontario, and the appellant now invokes and sets up that illegality to be relieved from paying taxes.

This is not a case with a meritorious quality commending itself to a court of justice. The appellant invokes his own turpitude to claim immunity from paying taxes and to be placed in a better position than if he were an honest and legal trader, and asks the court to discriminate in his favour as against other honest traders. As against an innocent taxpayer no man shall set up his own iniquity to operate such discrimination in his favour. His claim rests upon and is tainted with illegality and no court will lend its aid to a person who rests his case on an illegal act.

The old rule, formulated as far back as 1584 in the Heydon's case (1) is still in force and in harmony with the duty of the court in our days, where it says that

the office of all judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*

To claim an immunity is to claim something that is in derogation of the proper incidence of taxation under the

(1) 2 Coke's R. 18 at p. 20.

law. Any immunity of the individual shifts the burden that should have been borne by him on the shoulders of his fellow citizens.

Whoever seeks justice must come into court with clean hands. The appellant knew of the impropriety of carrying on such a trade in Ontario; he knew it was wrong and no man can take advantage of his own wrong, *nullus commudum capare potest de injuriâ suâ propriâ*. The author of a wrong cannot be allowed to take advantage or avail himself of his wrong. The appellant is estopped from benefiting by his wrongful act and on that ground alone the appeal must be dismissed.

I may, however, add that the appellant comes under section 4 of the Taxing Act, being a person residing in Canada, carrying on business therein and his income is thereunder subject to assessment. As I have had occasion to say in a recent case, all that is necessary to find in the present case is that the *income* is subject to the Taxing Act. It is not necessary to inquire into the source from which the revenue is derived, as the tax is a charge imposed by the legislature upon the person, and all his revenues—from whatever source derived—mingle with the rest of the income. The tax is imposed upon the appellant personally and not upon his trade, business or calling, whatever it is called.

The *illicit traffic* in question is not a criminal offence and while it is illegal in Ontario, it may not be so elsewhere and the Dominion Taxing Act is not affected by that provincial legislation; such legislation is within its respective power and jurisdiction and is *intra vires*. But the exercise of the right by the province to regulate the traffic of liquor cannot curtail the dominion laws with respect to revenue. Moreover it admits of no doubt that the appellant's business comes within the ambit of the definition of the word *income* found in the Taxing Act. That definition is broad enough to include earnings or gain of every kind.

The Taxing Act, in its definition of the word *income* enacts that

> for the purposes of the Act, the income means the profit or gain of a trade, business or calling,

all of which cover the facts of the present case.

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In re *Partridge* v. *Mallandaine* (1), it was held that the words *vocation* and *calling* are synonymous terms and that there is no limit to

> a lawful vocation nor . . . that the fact that it is unlawful can be set up in favour of these persons as against the rights of the revenue to have payment in respect of the profits that are made.

and Denman J. adds:

> But I go the whole length of saying that, in my opinion, if a man were to make a systematic business of receiving stolen goods, and to do nothing else, and he thereby systematically carried on a business and made a profit of £2000 a year, The Income Tax Commissioners would be quite right in assessing him if it were in fact his vocation.

See also *The Consumer's Cordage* v. *Connolly* (2); *Lapointe* v. *Messier* (3); *Brownlee* v. *McIntosh* (4); Montgomery Income Tax Procedure 441; *Sykes* v. *Beadon* (5).

The appeal is dismissed and with costs.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT

1924

May 31.

CANADA STEAMSHIP LINES, LTD.....PLAINTIFF;

AGAINST

STEAMER *JOHN B. KETCHUM 2ND*

Shipping and Seamen—Collision—Action in rem—Navigation.

A collision occurred between the *C.* and the *K.* on the St. Lawrence, off shore near Graveyard Point; the former coming down stream and the latter going up. The *C.* gave a two-blast signal to the *K.*, in ample time to warn the *K.* of her election to pass to port, which was not answered, and the *C.* came on at full speed. When about 1,000 feet apart, the *K.* being on a course nearly at right angles to the *C.*, the *C.* still at full speed, sounded the danger signal, immediately followed by a two-blast signal, answered by the *K.* with two-blast, putting her helm to starboard and her engines at full speed astern. The *C.* starboarded and then ported her helm to avoid grounding, and struck the *K.* amidship. There was an open space of 250 or 300 feet between the *K.* and the shore through which the *C.* could have passed.

Held, that the *C.* coming down with the current had the right to elect which side she would take, under Rule 25, and that no alleged custom or convenience can override said rule.

(1) [1886] 2 R. of Tax Cases 179, at p. 181.
(2) [1901] 31 S.C.R. 244 at 296, 297.
(3) [1913] 49 S.C.R 271, at p. 282.
(4) [1913] 48 S.C.R. 588.
(5) [1879] L.R. 11 Ch. D. 170.

2. Held, however, that notwithstanding the neglect of the *K.* to obey this rule and to conform herself to the signal given by the *C.*, such faulty navigation obligated the *C.* to careful seamanship to avoid injuring the *K.*, and that the act of the *C.* in so porting immediately before collision, against her own signals, was the proximate cause of the collision.

3. Where a Judge in Admiralty is assisted by two nautical assessors and there is a conflict of opinion between such assessors, as the decision both of fact and law is the decision of the court, it is clearly the duty of the judge to form his own opinion (1).

ACTION *in rem* for damages and counter-claim, arising out of collision between the steamer *Cataract* and the schooner *John B. Ketchum 2nd.*

May 21, 1924.

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

A. R. Holden, K.C. for plaintiff.

Francis King, K.C. for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A., now this 31st May, 1924, delivered judgment.

This is an action *in rem* for damages and a counter-claim arising out of a collision between the plaintiff's steamer *Cataract* and the steamer *John B. Ketchum 2nd,* belonging to the George Hall Coal & Shipping Corporation, which occurred in the St. Lawrence River on 8th November, 1923.

[His Lordship here gives the case as stated by plaintiff and defendant, and proceeds.]

The collision occurred in daylight on 8th November, 1923. The *Cataract* was a steel steamer of 839 tons gross and 451 tons net register, 185 feet long, 36 feet beam, drawing 13 feet 6 inches, laden with grain and bound from Port Colborne to Montreal. The *Ketchum* was a steel steamer of 1,103 tons gross and 763 tons net register, light, 193 feet long, 42 feet beam, drawing 2 feet 2 inches forward and 11 feet aft. When the *Cataract* arrived about opposite the lower lock of Farran Point Canal, coming down the river at a speed of fifteen miles an hour, she gave a two-blast signal to the *Ketchum* coming up and which had then rounded Graveyard Point and was heading almost at right angles across the *Cataract's* bow. There is some contradic-

(1) See in re steamship *Euphemia* [1907] 11 Ex. C.R. 34.

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tion as to how far the vessels were apart when this signal was given. The master of the *Cataract* said at first that it was probably a little better than a quarter of a mile, and the captain of the *Ketchum* put the distance at 1,800 feet. I am satisfied both were mistaken as to the distance. The master of the *Cataract* testified later that the signal was given opposite or a little below the lock, and his evidence in that connection is corroborated by his second officer and by two lockmen and three officers on other vessels, one of which was in the lock and the other approaching its entrance. The evidence of these independent witnesses establishes conclusively that the *Cataract's* first signal was given when she was opposite or a little below the first lock of the canal, which would place her more than half a mile from the *Ketchum*. The river below the canal bends to the north and broadens into a bay down to Graveyard Point, about three-quarters of a mile below. The *Cataract* on giving the two-blast signal starboarded to follow the course of the north shore of the bay. The *Ketchum* at the same time was well around Graveyard Point heading also for the north shore, and although the *Cataract's* signal was heard on the *Ketchum* no reply was given. Both vessels continued their course until within a distance of 1,000 or 1,200 feet, the *Ketchum* being on a course nearly at right angles to that of the *Cataract*, the latter still proceeding at full speed sounded the danger signal immediately followed by a second two-blast signal, the *Ketchum* replied with a two-blast signal, put her helm to starboard and her engines full speed astern, the *Cataract* starboarded at first and then ported (her master says to avoid running ashore), and in about one minute or a little more the collision occurred, the stem of the *Cataract* hitting the port bow of the *Ketchum* almost at right angles about thirty feet from her stem.

When the *Cataract* gave the second two-blast signal she was heading for the *Ketchum's* port side amidships, according to the evidence of the master, first and second officers and firemen of the *Ketchum*. The master of the *Cataract* says the *Ketchum* was then four points on the *Cataract's* starboard bow, and her second officer says the *Cataract* was facing to the north of the *Ketchum*. The *Ketchum*

reversed her engines full speed astern at the second two-blast signal; she was going against a strong current, quickly responded to the reverse action of her engines, stopped in her course over the ground and took on sternway. Her master swears that, a minute after her engines were reversed, she stopped and her head began to swing to starboard and came down with the current. Her wheelsman swears she was going astern by the land at the time of the collision and her fireman says she was going astern. The second officer of the *Cataract* testified that just before the collision the *Ketchum* was stopped, then that she was going ahead, and when further questioned by opposite counsel said he did not see whether she had stopped and that he did not look. His evidence, if it does not corroborate that of the *Ketchum's* witnesses that she was stopped or had sternway at the time of the collision, does not contradict it. The *Ketchum* was struck on the port bow about thirty feet abaft her stem or about fifty feet forward amidships, which would indicate the *Ketchum* was backing out of the course of the *Cataract*. The latter's master admitted to counsel for the *Ketchum* that, if she had gone astern three or four feet more, there would have been no collision. When the *Cataract* gave the second two-blast signal she starboarded at first and then ported before the collision, her master giving as a reason that he ported to avoid going on the north bank, and in another part of his evidence he stated:—

If I had not done that (ported) he would have very likely hit us right amidships.

The latter answer suggests he thought there was space enough between the shore and the *Ketchum* for him to pass. At the time the *Ketchum's* engines were put full astern her master says he was about 300 feet from the shore, her first mate put it at 250 feet and her wheelsman says she was about 150 feet from the shore at the time of the collision. The master of the *Cataract* marked the place of the collision on the Canadian Chart about 260 feet from the shore and, according to the mate of the *Ketchum* who marked the place of collision on an American Chart, it happened over 300 feet from the shore.

The current at the foot of the canal is seven or eight miles an hour and follows the north shore of the bay to

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Graveyard Point and gets slower as it approaches the Point. There is an eddy on the south side between the canal and the Point, and it was to avoid getting into this eddy that the *Cataract* decided, as was her right under Rule 25. to go down on the north side when she gave the first two-blast signal to the upbound *Ketchum,* although the latter had turned the Point and was 200 or 300 feet above it then heading well in for the north shore. There is some evidence that she was following the customary track for upbound vessels, but no alleged custom or convenience can override Rule 25 which states:—

> That in narrow channels where there is a current and in the River St. Lawrence, when two steamers are meeting, the descending steamer shall have the right-of-way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.

In this case the *Cataract* had the right to elect which side she would take and did so at a proper distance by giving the required signal that she intended to go to port, which was heard on the *Ketchum* but met with a deliberate refusal on the part of the latter to obey the signal and pass the *Cataract* starboard to starboard. There is no excuse for the *Ketchum* refusing to obey the signal, and her persistance in following her course heading for the north shore was improper and wrongful. Her master admits that he could have then starboarded his helm and passed the *Cataract* starboard to starboard. But that does not dispose of the case, as there is a question whether or not, notwithstanding the neglect of the *Ketchum* to obey the rule and conform to the signal of the *Cataract,* that neglect is the cause of the accident. The faulty navigation of the *Ketchum* obligated the *Cataract* to careful seamanship to avoid injuring her, notwithstanding the failure of the *Ketchum* to observe the rule. As the *Ketchum* had been observed from the time she turned Graveyard Point to the moment she put her engines full speed astern persisting in keeping her course to the north shore, there was nothing sudden about the critical position in which the *Cataract* was placed and the principle of the *Bywell Castle* case (1) can have no application. The master of the *Cataract* dur-

(1) [1879] 4 Asp. M.C. 207.

ing all this time had before him the port side of the *Ketchum* heading for the north shore almost at right angles to the course of his own vessel and he did nothing except to continue at full speed until within 1,000 to 1,200 feet of the *Ketchum*. He admits in his evidence that he was then in a dangerous position. One of my assessors advises me that, as it was clearly apparent that the *Ketchum* was continuing her course heading for the north shore, the *Cataract* before arriving 1,000 to 1,200 feet from the *Ketchum* should have cancelled her first signal, given the danger signal and one short blast and put her helm to port, which would have enabled her to pass the *Ketchum* port to port. My other assessor disagrees and is of opinion that the *Cataract* was right in continuing on her course, giving the danger signal and two blasts on her whistle. When these two blasts were given for the second time by the *Cataract* the *Ketchum* answered with two blasts, put her helm to starboard and her engines full speed astern. Both my assessors concur in saying that what the *Ketchum* did then was good seamanship, as by reversing she gave a little more room between herself and the north shore for the *Cataract* to pass. One of my assessors however thought the *Ketchum* should have gone sooner astern so as to give more room for the *Cataract* to pass between her and the north shore. When the *Ketchum* put her engines astern she was about 300 feet from the shore, she was facing the current and very soon lost headway and began going astern, so that at the time of the collision there was between 250 and 300 feet of deep water between the bow of the *Ketchum* and the shore, more than sufficient to enable the *Cataract* to have passed down without colliding with the *Ketchum*. My assessors advise me that there was room enough for the *Cataract* to pass between the *Ketchum* and the shore, but say it would have been dangerous for the *Cataract* to attempt it, as while she would not collide with the *Ketchum* she might possibly run ashore after passing the *Ketchum*. However that may be, this collision would not have happened if the *Cataract* had not ported her helm after she gave the second two-blast signal and just before the collision. Was that negligence? The master of the *Cataract* saw the *Ketchum* going astern and there was an open space

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of 250 or 300 feet between the shore and the *Ketchum* through which the *Cataract* could have passed. The porting immediately before the collision against the *Cataract's* own signal of two blasts when there was sufficient room for her to pass, in my opinion was gross negligence and was the proximate cause of the collision and in this opinion one of my assessors concurs. No negligence on the part of the *Ketchum* which was over before the *Cataract* negligently ported her helm could be contributory negligence in the sense which is required to relieve the *Cataract* from the consequences of that negligence; *Spaight* v. *Tedcastle* (1). In the latter case Lord Selborne L.C., at page 219, said:—

> Great injustice might be done if in applying the doctrine of contributory negligence to a case of this sort, the maxim, *causa proxima, non remota spectatur,* were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs cannot be established merely by shewing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred.

In the case of *Cayzer Irvine & Co.* v. *The Carron Co.* (2), Lord Watson, in giving judgment in the House of Lords, and dealing with the breach of a Thames rule by a steamer called the *Clan Sinclair,* said, at p. 887:—

> The new and wrong position into which I assume *The Clan Sinclair* had been brought by her neglect of the rule was perfectly apparent to those on board *The Margaret,*—apparent for a considerable time and a considerable distance,—for a time and distance of such appreciable extent that they could, with ordinary care, have avoided the collision which ensued; and the ground of my judgment is shortly this, that assuming that there was a breach of the rule and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of *The Margaret.* Instead of exhibiting ordinary care and prudence, those in charge of that vessel adopted a reckless course of navigation which is described so well in some of the opinions of the judges of the court below that I need say nothing further about it.

In that case the House of Lords reversed the Court of Appeal in which both vessels were held to blame and restored the decision of the Court of Admiralty holding the *Margaret* alone to blame.

(1) [1881] 6 A.C. 217. (2) [1884] 9 A.C. 873.

In the case of *The Volute* (1), Viscount Birkenhead L.C., said:—

> Where a clear line can be drawn, the subsequent negligence is the only one to look to.

In the case of *The Ravenna* (2), Pickford L.J., in the Court of Appeal at p. 219 said:—

> A person is not justified in carrying on in a course fraught with danger for himself or some other person in the hope that the other person will do the right thing and avert the danger.

While the *Ketchum's* failure to observe the rule cannot be too strongly condemned, her course and conduct were perfectly apparent to the *Cataract* for a considerable time and distance, while the latter vessel carried on in a course which her master admitted was dangerous, when he might by porting have avoided the collision by passing the *Ketchum* port to port. Porting then would have been a precaution required by the special circumstances to avoid immediate danger under Rules 37 and 38. In failing to port at that time the master of the *Cataract*, in my opinion, failed to show ordinary care, and in this conclusion one of my assessors concurs. Later, when the *Cataract* gave the danger signal and two blasts on her whistle, although she first starboarded intending to pass the *Ketchum* starboard to starboard and having plenty of room to do so, she deliberately and improperly ported and brought about the collision. As her master frankly admitted he preferred to hit the *Ketchum* to have the *Ketchum* hit the *Cataract,* although he had ample room to cross the bows of the *Ketchum,* then going astern and backing out of his course. In my opinion, what Viscount Birkenhead called the *clear line* existed between the negligence of the *Ketchum* and the negligence of the *Cataract,* and therefore the subsequent negligence of the latter is the one which was the direct and immediate cause of the collision and in this conclusion one of my assessors concurs. The *Cataract* did *neglect* some *precaution* which was *required by the special circumstances of the case* and is alone to blame.

Although the two assessors disagree on some of the nautical questions involved in this case and the court can call in a third and after submitting the evidence to him have

(1) [1922] 1 A.C. 129; 91 L.J. Adm. 38.

(2) [1918] P. 26. at p. 29; 87 L.J. Adm. 215.

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the case re-argued before the three assessors, I did not deem it necessary to put the parties to the additional expense which would be involved in having a third assessor and a re-argument. As the decision both of fact and law is the decision of the court, in the conflict of the assessors, it is clearly the duty of the judge to form his own opinion; *The Philotaxe* (1), *The City of Berlin* (2), and *The Gannet* (3).

There will therefore be judgment dismissing, with costs, the action of the plaintiff, and maintaining, with costs, the counter-claim of the defendant against the plaintiff, with a reference to the Deputy Registrar to assess the damages.

Judgment accordingly.

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June 25.

QUEBEC ADMIRALTY DISTRICT

ST. LAWRENCE TRANSPORTATION COMPANY, LIMITED ..... PLAINTIFF;

AGAINST

SCHOONER *AMEDEE T.*

Shipping and Seamen—Maritime lien—Act of the Crew.

Plaintiff's scow was tied to its dock in Quebec Harbour, and the persons in charge of the defendant schooner in order to come alongside the dock cast off the lines of the schooner and let her drift on the rocks, without any right or excuse, causing her considerable damage.

The present action *in rem* is taken to enforce a maritime lien against the schooner for such damage.

Held, that inasmuch as the damage sought to be recovered was due to an act of the schooner's crew and did not arise from any wrongful act of navigation of the schooner, and as the schooner was not the instrument which caused the damage, the present action must fail. *Currie* v. *McKnight,* (1897) A.C. 97, followed.

MOTION to dismiss for want of jurisdiction.

Motion heard before the Honourable Mr. Justice Maclennan at Quebec on 21st June, 1924.

Antoine Rivard for plaintiff.

A. C. M. Thomson for defendant.

The facts are stated in the reasons for judgment.

(1) [1877] 3 Asp. N.S. 512. (2) [1908] 77 L.J. Adm. 76.
(3) [1900] A.C. 234; 69 L.J. Adm. 49.

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MACLENNAN L.J.A., now this 25th June, 1924, delivered judgment.

Defendant moves to dismiss the present action, to set aside the writ of summons *in rem*, the warrant and the arrest and to order the release of bail furnished by defendant, with costs against the plaintiff, on the ground that the facts alleged disclose no right of action *in rem* against defendant, nor the existence of any maritime lien and for want of jurisdiction to hear and decide the issue raised in the action.

The plaintiff's case, as set out in the statement of claim, is that on 23rd October, 1923, when its scow was tied up to its dock in the harbour of Quebec, the persons in charge of the schooner defendant, in order to come alongside the dock, unmoored or cast off the lines of the plaintiff's scow and let her go adrift on the rocks, without any right or excuse, thereby causing her considerable damage for the recovery of which this action *in rem* has been instituted and the schooner arrested. The purpose of this action is to enforce a maritime lien against the schooner.

There was no physical contact between the scow and the schooner, they did not come into collision. The unmooring of the scow by the crew of the schooner was to enable the latter to come alongside the dock where the scow had been moored. This proceeding on the part of the crew may be assumed for the purpose of this action to have been an unlawful act subjecting those responsible for the acts of the crew to liability for the damage suffered by the scow, but that is not the case now before the court. By the Admiralty Court Act, 1861, this court has jurisdiction *over any claim for damage done by any ship.* The question to decide is: Was the damage to the scow done by the schooner by any wrongful act or manoeuvre or negligent navigation on her part in such a manner that it can be said that the schooner was the active cause and instrument of mischief in what happened to the scow?

In the case of *Currie* v. *McKnight* (1), Lord Halsbury L.C., said:—

* * * the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship

(1) [1897] A.C. 97, at p. 101.

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against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.

In the same case Lord Watson, at page 106, said:—

I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage.

The injuries sustained by plaintiff's scow were not caused by any manoeuvre or movement of the schooner, but by an act of some of her crew. The decision of the House of Lords above cited is directly in point and is decisive on the non-existence of a maritime lien on the schooner for the damages sustained by the scow. The facts of that case are almost identical with the facts in this case and the principle applied in that case is equally applicable in this action. The damage here sought to be recovered did not arise from any wrongful act of navigation of the schooner, and, as the schooner was not the instrument which caused the damage, the present action must fail. See also *Mulvey* v. *The Barge Neosho* (1), where I dealt with a claim for damage alleged to have been done by a ship.

There will therefore be judgment for the defendant dismissing the writ of summons *in rem* and the warrant, setting aside the arrest and ordering the release of the bail furnished by defendant, with costs against the plaintiff.

Judgment accordingly.

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April 30.

NEW BRUNSWICK ADMIRALTY DISTRICT

FRANK K. WARREN .....PLAINTIFF;

AND

R. P. & W. F. STARR, LTD.....PLAINTIFF;

AGAINST

SS. *PERENE*

Shipping—Collision—"Lookout"—Preliminary Act—Amendment—Presumption of fault—Burden of proof.

On February 1, 1924, about 4 a.m., a collision occurred near the entrance of St. John Harbour, between the steamer *P.* outbound and the

(1) [1919] 19 Ex. C.R. 1.

schooner *M.* of *S.* inbound, sailing with a light breeze off land. The night was clear and the visibility good. The *M.* of *S.* was painted white and carried main, fore-stay sail and jib, and even without lights, could have been seen a quarter mile off. All required lights were burning and visible at the regulation distance. Between 20 and 30 minutes before the collision the *M.* of *S.* first saw the *P's* lights, about one mile away. She was then on her port tack steering E.N.E., intending to make harbour on that tack. About 20 minutes before collision, then finding water too deep, she wore ship and decided to beat up to the harbour. At this time the green light of the *P.* was noticed. When 70 feet away, seeing the *P.* coming down on her, the captain of the *M.* of *S.* waved a burning torch, but the *P.* did not change her course, none of these lights being seen by her officers. Just before collision, the *M.* of *S.* ported her wheel to escape from the *P.* but she was struck on the starboard side at the mizzen rigging. The man acting as "lookout" on the *P.* had also been assigned the duties of clearing the anchor. The *P.* claimed at trial that by wearing ship, which was an unnecessary manoeuvre, the lights of the schooner had been hidden, which was the cause of the accident.

Held, on the facts, that the manoeuvring of the schooner in no way contributed to the collision, but that the collision was entirely due to want of care and negligence of the steamer, particularly in not having a proper lookout.

2. That the burden of proof that she had a proper lookout was upon the *P.*, and that a lookout, to whom is also assigned the duty of tidying up on the forecastle head and clearing the anchor, is not a sufficient or efficient lookout.

3. That, as by article 20 a steamer is obliged to keep out of the way of a sailing vessel, there is a presumption of responsibility on the part of the steamer in case of collision with such vessel, only to be rebutted by proof of some fault on the part of such vessel (1).

4. That whilst amendments to the Preliminary Act cannot be allowed, at the instance of the party who filed it, error or misstatement therein is not fatal, but may be rectified in the pleadings. If, however, parties go to trial without pleadings, they will be held strongly to the allegations contained in their Act. This particularly, as in this case, where the Act was prepared and filed after inquiry by the Wreck Commissioner. (*The Westmount,* 40 S.C.R. 160 at p. 176 followed).

Semble, that even where a schooner has been negligent in not showing proper lights, the fact that the steamer itself had not sufficient "lookout" would be conclusive to hold it responsible for a collision.

ACTIONS *in rem* by the owners of the schooner and freight respectively for damages arising out of a collision between the steamer *Perene* and the schooner *Maid of Scotland,* which resulted in the sinking of the schooner and loss of almost all its crew. March 12 and April 4, 1924. Both

(1) *Note:* Compare decisions in Fraser v. Aztec, 19 Ex. C.R. 454; Geo. Hall Coal Co. v. Parke Foster, (1923) Ex. C.R. 56, and Geo. Hall Coal Co. v. Maplehurst, (1923) Ex. C.R. 167; (1923) S.C.R. 507.

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Argument of Counsel.

actions were tried together, before the Honourable Mr. Justice Sir Douglas Hazen at St. John.

F. R. Taylor K.C. and *Hugh H. McLean, Jr.* for plaintiffs.

J. B. M. Baxter K.C., A. N. Carter and *J. B. Hunter* of the New York Bar for defendant.

F. R. Taylor K.C.: The steamer was at fault in not keeping out of the way, in not having adequate lookout, not slackening speed or reversing and in backing out of the hole made in the schooner. *The Bold Buccleugh* (1); 26 Hals. 703; *The Diana* (2); *The Batavier* (3); *The Glannibanta* (4); *The Morning Light* (5); *The Belgen Land* (6); *The Shakkeborg* (7), and article 29.

The only fault alleged upon the schooner was lights not displayed or of sufficient visibility. The parties are confined to their Preliminary Act and bound by it and no other fault than there alleged can be claimed against it at the hearing. *The Franklin* (8); *The Mirenda* (9); *The Vortigern* (10); *The Godiva* (11); *Montreal Transportation Co.* v. *New Ontario Steamship Co. (The Westmount)* (12).

The steamer was obliged to keep out of the way of the sailing vessel, Article 20, and when a collision happens the steamer is *primâ facie* liable, Marsden, 6th ed. pp. 34, 405 and 406. *The Alepo* (13); *The J. D. Peters* (14); *Higgins* v. *The Gypsum Packet Co.* (15); *The Pennland* (16); and *The City of Truro* (17).

The lights were all burning on schooner and should have been noticed by steamer. *McLaren* v. *Cie Française de Navigation à Vapeur (The Thames)* (18). There was confusion on the steamer and improper navigation and manoeuvres. The captain's story was not confirmed by wheelsman's or engineer's log. He also cites the following cases: *The John Harley* v. *William Tell* (19); *The Val-*

(1) [1853] Pritchard's Adm. Digest, 3rd ed. p. 221.
(2) 1 W Rob. 131.
(3) [1854] 9 Moore P.C. 286.
(4) [1875] 1 P. 283.
(5) [1864] 69 U.S. (2 Wall.) 550.
(6) [1885] 114 U.S. 355.
(7) [1911] P. 245, n.
(8) [1872] L.R. 3 A. & E. 511.
(9) [1881] 7 P. 185.
(10) [1859] 1 Swaby 518.
(11) [1886] 11 P. 20.
(12) [1908] 40 S.C.R. 160.
(13) [1865] 35 L.J. Adm. 9.
(14) [1890] 42 Fed. Rep. 269.
(15) [1895] 67 Fed. Rep. 612.
(16) [1885] 23 Fed. Rep. 551.
(17) [1888] 35 Fed. Rep. 317.
(18) [1884] 9 A.C. 640.
(19) [1865] 2 Asp. 290.

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des (1); *The Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Navigation Co.* (2); *The Julia David* (3). Even if schooner negligent she did not contribute to the accident. *Cork Steamship Co.* v. *Kiddle,* 1920, unreported, cited in *The Volute* (4).

J. B. Hunter: The schooner observing a green light on her port bow should have obeyed Article 21, binding on a sailing vessel. *The Highgate* (5). A schooner must not go about ahead of the steamer so as to embarrass her. *The Palatine* (6). Her wearing ship instead of going about to windward was improper and greatly contributed to the cause of the collision by concealing her lights. *The Falkland* (7). Showing flare when steamer only 50 feet away is too late and gross negligence.

A. N. Carter: The schooner was not sailing in westerly direction when collision took place but was wearing around to starboard. When schooner first sighted the courses were crossing courses, and in such directions as to cause "risk of collision" and she should have kept her course and speed. She was an overtaken vessel and should have shown the required stern lights. He cited: *The Beryl* (8); *The Stanmore* (9); *The Orduna* v. *Shipping Controller* (10); *The Haugland* v. *SS. Karamea* (11); 28 Hals. p. 451; *The Highgate* (12); *The Kirkwall* (13); Marsden p. 335; *The Main* (14); *The Essequibo* (15); *The Fenham* (16); *The Basset Hound* (17); *H.M.S. Hydra* (18); *The Breadalbane* (19); *The Patroclus* (20); *The Saragossa* (21); *The Cumberland Queen* (22); *Kennedy* v. *Sarnation* (23).

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

(1) [1914] 31 T.L.R. 144.
(2) [1880] 5 A.C. 876.
(3) [1877] 46 L.J. Ad. 54.
(4) [1922] 91 L.J. Ad. 38.
(5) [1890] 6 Asp. 512.
(6) [1872] 1 Asp. N.S. 468.
(7) [1863] Brown and Lush 204.
(8) [1884] 9 P. 137.
(9) [1885] 10 P. 123.
(10) [1921] 1 A.C. 250.
(11) [1922] 1 A.C. 68.
(12) [1890] 6 Asp. 512.
(13) [1909] 100 L.T. 284.
(14) [1886] 11 P. 132.
(15) [1888] 13 P. 51.
(16) [1880] L.R. 3 P.C. 212.
(17) [1894] 7 Asp. 467.
(18) [1918] P. 78.
(19) [1881] 7 P. 186.
(20) [1888] 13 P. 54.
(21) [1892] 7 Asp. 289.
(22) [1922] 126 L.T. 679.
(23) [1880] 2 Fed. Rep. 911.

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Hazen L.J.A.

HAZEN L.J.A., this 30th day of April, 1924, delivered judgment.

These two actions were tried together, and the case arises out of a collision between the steamer *Perene* and the schooner *Maid of Scotland* in the early morning of the first of February last, a short distance from Partridge Island near the entrance to St. John harbour.

The *Perene* is a steamer of about 1,800 tons gross, 284 feet long, while the schooner was 148 feet long and 341 tons gross. The *Perene* carried a crew of 42 men, including three certified officers and three engineers. The schooner's crew consisted of six all told.

The steamer *Perene* left its dock at St. John bound for sea between two and three o'clock on the morning of February 1, with a pilot (McKelvey) on board. He was discharged near the bell-buoy off the northeast corner of Partridge Island at about three o'clock in the morning, and the collision occurred, while there is some dispute as to the hour, at some time as nearly as I can figure between 3.30 and 4 o'clock in the morning.

It was a fine night, the weather being clear and the visibility good, and according to Pilot McKelvey the loom of a vessel even without lights could have been seen at a distance of a quarter of a mile. He says that the weather was clear and starlight, and a light breeze was blowing, but the sea was smooth, the wind being off the land, and that when he was leaving the steamer at the bell-buoy he saw three vessels at anchor. The lights were showing all right, and there was no fog, nothing to interfere with the visibility but just a low vapor in spots that would not interfere with the seeing of the side lights and there was not sufficient wind or sea to cause spray to be thrown on the lights of the schooner, and there was nothing in the weather conditions that would prevent side lights being visible at the regulation distance of two miles. The schooner was painted white and was carrying main sail, fore stay sail and jib, and it was with regard to these conditions that McKelvey said a vessel should be seen a quarter of a mile even without lights. The pilot left the ship at what is known as the bell-buoy, and it then proceeded on its course and came into collision with the schooner about half an hour afterwards, near what is called the fairway buoy, the flash of which the

master of the *Perene* said he was able to see after leaving the bell-buoy.

As a result of the collision only two of those on board the schooner were saved, viz., two seamen named respectively Missick and Todd, who jumped into the rigging and succeeded in making the deck of the steamer. A boat was lowered from the steamer and manned by two men from it, but it was lost and never returned, and those on board presumably lost their lives, as they have not been heard of since.

The case was tried without pleadings. In the preliminary act filed by the steamer the fault attributed to the *Maid of Scotland* is lights not displayed or not displayed so as to be visible more than 200 feet away; while in the preliminary act filed by the schooner the fault attributed to the *Perene* is that it failed to keep out of the way of the *Maid of Scotland* as required by the regulations; that it did not keep an adequate or any lookout; that it failed on approaching the *Maid of Scotland* to slacken speed, stop or reverse; that it failed to reverse when danger of collision was obvious; that it was in default in backing out of the hole made in the *Maid of Scotland* before the crew of the schooner were saved.

It is well known that the object of the preliminary act is to obtain from the parties statements of fact at the time when they are fresh in their recollection and before either party knows how his opponent's case is shaped, and it is evident that at the time the preliminary act in this case was made up and filed on behalf of the steamer, the only fault alleged on behalf of the schooner was not displaying its lights so as to be visible more than 200 feet away. The rule is established that the amendment of a preliminary act will not be allowed at the instance of the party who has filed it, but an error or misstatement is not absolutely fatal or binding on the party making it, but may be rectified in the pleadings afterwards, and if so rectified will be a subject for comment on the hearing. But if the parties go to trial without pleadings the parties will be held most strongly to their preliminary acts. (See the *Westmount, Montreal Transportation Co.* v. *New Ontario SS. Co.* (1).

(1) [1908] 40 S.C.R. 160 at p. 176.

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It is important to remember that in this case before the preliminary act was filed an inquiry had been held in the Wreck Commissioner's Court and evidence taken, and the facts gone into and a report had been made by that court consisting of the Dominion Wreck Commissioner and two assessors, so that there could be no fault or neglect it appears to me on the part of the schooner which could not be presumed and was not known to the steamer at the time of the filing of the preliminary act. The collision took place a fortnight before the preliminary act was filed.

The plaintiff went to trial relying on the preliminary act as filed by the steamer, and while it was quite open to the defendant to have had an order made for pleadings, they did not do so but went to trial with the preliminary act as their record. In my opinion in this matter the case must be tried on the allegations contained in the preliminary act. As admitted by the learned counsel for the steamer, it was its duty to keep out of the way of any sailing ship. No fault on behalf of the schooner can be shown unless it is specified in the preliminary act. The important question, it seems to me, therefore is as to whether or not lights were properly displayed on the schooner at the time the accident occurred, for unless some fault can be shown on the part of the schooner the authorities are clear that there is a presumption of responsibility on the part of the steamer.

The evidence on behalf of the plaintiff with regard to the lights was given by the seamen Missick and Todd, who alone escaped from the schooner. I was favourably impressed with the manner in which they gave their evidence, and as both were disinterested witnesses I am prepared to accept it. There were six people on board the schooner. Missick was on the watch from 12 to 4 in the morning, and was at the wheel at the time the accident happened. He says the steamer struck the schooner about ten minutes to four. They had a bell and the custom on the ship was when the bell struck every hour for the man who was on watch to report to the Captain as to whether the lights were burning bright, and this was done on the night of the collision. The man on watch with him was a Porto Rican named Brown, and he reported to the Captain every hour that the lights were burning.

Coming towards St. John harbour he saw the lights, of what afterwards turned out to be the *Perene,* before the collision, and he judged her to be a mile away, though he believed more, and he first saw the light on the *Perene* about half an hour or 20 minutes before the collision took place. The schooner was then on the port tack, steering East North East. After that they wore ship, all hands being on deck except the cook, and when they wore ship they came on full and by the wind, and after wearing ship he noticed the green light on the *Perene* once. After wearing ship it was about twenty minutes before the collision occurred. He states that they wore ship a good while before the collision about twenty minutes, and that was after they had seen the lights of the steamer, the steamer being away up in the harbour at that time. All hands were on deck except the cook, as they were expecting to make harbour on that tack, but the Captain sounded the lead and found 16½ fathoms of water and it being too deep to anchor he wore ship and said he would beat it up for the harbour.

When the captain of the schooner saw the steamer coming down upon him he ran below and got a torch which he lit and held the flare out to the ship and by the time the torch burned the ship was about 50 feet away. After the captain of the schooner burned the flare there was no change in the course of the steamer. The captain of the schooner shouted out to the man on deck to see if the lights were burning bright, and Todd, the man in question, shouted to the captain that the lights were burning bright. The schooner at this time was carrying main sail, fore sail, stay sail and jib. He says there was no fog or mist, and after the captain burned the flare he shouted to those on board the steamer, and just before the collision he ordered Missick to port his wheel and see if he could run away from her. There was no time, however, for this to take effect, and the steamer struck the schooner on the mizzen rigging, the bow going into the schooner, striking the schooner on the starboard side. At the same time, and before the collision occurred, one of the crew of the schooner was working on the deck with a lantern removing ice from some of the ropes.

Missick swears that before the collision the schooner continued on the starboard course after wearing ship for about

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twenty minutes, and during the time on that tack there was nothing that would obstruct the view of the lights—no sail or anything over the lights. As a matter of fact the sail was on the port side and there was nothing to block a clear view of the starboard light from the steamer.

Missick's evidence is confirmed by that of Todd, who was the man who was on the deck with a lantern beating the ice off the main halyards. He says that he came out on deck about forty minutes before and noticed the light on the steamer the minute he did so. This would be about twenty minutes past three, and from the time he came on deck he saw the steamer's lights. He was the one who was told by the captain to look at the side lights and see if they were burning bright, and he says they were all burning bright, and he so reported. The lights were of the kind ordinarily used on schooners. He confirms Missick's statement as to the Captain burning the torch, and he saw him standing on the house swinging it in his hand. At this time he says the steamer was about 65 or 70 feet away approaching the schooner's starboard side.

If these witnesses are to be believed, and as I have already said I was impressed with the manner in which they gave their testimony, the schooner lights were properly displayed, and according to the evidence displayed so as to be visible more than 200 feet away and should have been seen by those on board the *Perene* in ample time for the steamer to take steps to avoid the collision.

The Captain and other witnesses on board the *Perene* say that they did not see the lights of the schooner or the schooner itself until they were within 200 feet of it. Even if the schooner carried no lights at all it is hard to understand why those on board the steamer if a proper watch was kept failed to see the schooner until they were so close to it, and further it is remarkable that they failed to see the flare that was burned by the Captain on board the schooner.

The pilot McKelvey, to whose evidence I have already referred, said there was nothing that night that would prevent side lights being visible at the regulation distance, and that without any lights at all under the weather conditions of that night the vessel should be seen at a distance of a

quarter of a mile. I cannot ignore the evidence of an experienced man like this, supported as it so strongly is by the evidence of the two sailors who were saved from the wreck, and I am forced to the conclusion that the lights were properly burning, and that the failure to see them was caused by a want of a proper lookout on board the steamer. They had been put up at six o'clock the night before and inspected every hour.

The burden of proof that the defendant had an efficient lookout is undoubtedly on the defendant, and it is want of due caution for the lookout forward to be engaged in other duties, such as clearing the anchor. See the *Bold Buccleugh* (1).

The evidence of Ewart White, master of the *Perene*, stated that a man called Albarrican was the lookout, and he states that he was on the forecastle head at the time of the collision, and that he had orders to fix everything after leaving the side of the wharf in St. John harbour. These were his instructions, not to act as lookout, but to fix everything, and the pilot McKelvey says there was not to his knowledge any lookout detailed on the steamer, but that men were working on the forecastle at the time and he does not believe they had finished when he left the ship about half-past three o'clock.

Now it is apparent from this that Albarrican, even if he was assigned to act as a lookout had had other duties assigned to him as well, and the only evidence is that he was on watch and clearing up things on the forecastle head. It would take some time for him to tidy things up after the vessel left the wharf and while it could easily have been ascertained, there is no evidence that he ever stopped doing so, and this I think accounts for his not having reported any lights which could be seen at long distance or of not having seen the loom of the sails and hull until within a very short distance of the schooner. He was engaged in other duties than those of lookout which is contrary to the laws laid down by the authorities, and I am disposed to agree with the contention of the learned counsel for the schooner that even if it was negligent in not showing proper lights, which I think the steamer has failed to prove, the

(1) [1853] Pritchard's Admiralty Digest 3rd ed. 221.

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fact that the steamer itself had not sufficient lookout is conclusive to hold it responsible.

I am of opinion that the schooner had proper lights, properly shown and that the collision did not occur in consequence of its not displaying those lights so as to be visible more than 200 feet away, but on the contrary I am of opinion that if there had been a proper lookout on board the *Perene*, they might have been seen at a much greater distance, and if there had been a proper lookout and due caution exercised the schooner would have been seen at a much greater distance than 200 feet, even though no lights were visible at all. In addition to the port and starboard lights, the lantern referred to was on the deck, and a flare was burned by the captain, and yet none of these lights were seen, and it is impossible to reconcile this fact with careful attention to duty on the part of those on board the steamer.

It is claimed, however, that those on board the steamer were unable to see the lights of the schooner in consequence of the manoeuvre of wearing ship that was made by the schooner before the accident occurred, and that the schooner was guilty of a fault in making this manoeuvre, and that there was no necessity for its so doing. The schooner had expected to get into the harbour on the tack on which it was proceeding, but found the water too deep to anchor and so wore ship and came on the starboard tack, and the contention is that in wearing ship there was a period of time during which the lights could not be seen from the steamer as it was approaching, the contention being that the schooner's side lights showed from dead ahead to a point abaft the beam on both sides, leaving a dark sector around the stern of the ship of 12 points, the lights ahead showing through 20 points so that if a vessel is approaching another vessel from anywhere more than two points abaft the beam, the approaching vessel would always be in a dark sector unless there was a white light on the stern. It is claimed that she changed her course by bearing away which was an unusual manoeuvre, and that she turned the black sector of 12 points in the direction of the steamer and showed no light.

This contention is not set out in the defendant's preliminary act, and no fault or default in that respect is in that document attributed to the schooner, and while I do not think it can be raised now, in view of the fact that a full inquiry took place in the wreck commissioner's court before the preliminary act was filed, and all the facts were known to the steamer, yet I think it better that I should deal with the matter briefly in event of my conclusion regarding the matter being confined to the preliminary act being considered on appeal.

Now the contention is that this accident was caused by the *Maid of Scotland* wearing ship at the time it did. I once more refer to the evidence that the Captain expected to make the port on the preceding tack and that all hands were on deck preparatory to anchoring, and it was only when the Captain sounded and found there was too much water for him to anchor that he decided he would wear ship and beat up for the harbour. The evidence of Missick shows that the lights of the *Perene* were seen from the schooner up in the harbour. They saw the lights on the steamer before they wore ship and having worn ship they came about and proceeded for a considerable time after they wore ship before the collision. One of the witnesses says that the time occupied in running on the course on which they were when the collision occurred after they wore ship was about twenty minutes, so that it is clear that if there was a period of time during which the schooner was wearing ship when the lights could not be seen it would only be for a very few minutes, and would not justify the action of the steamer in colliding with the schooner, and if a proper lookout had been kept the *Perene* almost from the time it left the harbour would have known that the schooner was ahead and would have taken care to keep a proper lookout so as to prevent a collision taking place. The steamer should have seen one or more of the lights of the *Maid of Scotland* for a very considerable time, with the exception of a short portion of the time during which the *Maid of Scotland* was wearing ship.

Edward C. Williams, who had had much experience as a schooner captain and was called by the defence as an expert, although he disclaimed the right to be considered such,

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estimated that the schooner in wearing ship would travel 900 feet and for about 5/12 of this distance her lights would not be visible. Accepting this evidence as correct there would be 375 of this 900 feet when the lights could not be seen, and travelling at a speed of 5 miles an hour, which is the rate fixed by Cambridge, a marine engineer on the *Perene*, it would take about three-quarters of a minute to traverse that distance, and if this was the case it could not have affected the collision. It appears to me that there was a great deal of excitement on the *Perene*, and that the Captain made a mistake in leaving the bridge from which place he could have commanded a full view of everything that took place, and making his way down to a lower deck, and it is also extraordinary that it took the length of time it did to lower a boat in order to go in search of the men who were on board the schooner at the time of the disaster. This all has a bearing on the discipline on board the steamer, and leads to the conclusion in view of the other evidence, that an efficient and effective lookout was not maintained, and that failure to see the lights and the flare and the lantern, or even the schooner, must have been the result of very great negligence.

I am compelled to the conclusion that the collision was due to negligence on the part of the steamer.

Judgment accordingly.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

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Sept. 17.

CATHERINE MUSGRAVE ET AL.....DEFENDANTS.

Expropriation—Rights of tenant and owner—Separate and distinct tenders —Tenant at will.

Held, that where the Crown expropriates a property which is occupied by a tenant at will, with rights in tenancy and who is not a trespasser, the owner and such tenant have each separate and distinct interests and each is entitled to a separate tender and offer.

The King v. *Goldstein* (1924) Ex. C.R. 55 referred to.

INFORMATION to fix damages suffered by the defendants herein by reason of the expropriation of their property and the subsequent abandonment thereof by the Crown.

John A. McDonald for plaintiff.

N. A. MacMillan, K.C. and *Joseph Macdonald* for defendants.

Case was heard before the Honourable Mr. Justice Audette, at Sydney, on the 20th June, 1924.

AUDETTE J., now this 17th September, 1924, delivered judgment.

This is an information exhibited by the Attorney General of Canada whereby it appears, *inter alia*, that certain property belonging to the defendants Musgrave was taken and expropriated by the Crown, under the provisions of the Expropriation Act, for the purpose of "an Airship and Seaplane Station," in Upper North Sydney, in the municipality of the county of Cape Breton, N.S., by depositing, on the 7th day of September, 1918, a plan and description of the land so taken, in the office of the Registrar of Deeds for the said county.

The defendants' title is not contested.

The Crown expropriated 15.2 acres out of a farm of 52 acres, adjoining the town boundary of North Sydney, upon which the defendants Musgrave were carrying on a small milk business, with eight heads of cattle. These defendants Musgrave, owners of the farm, had in May, 1918, entered into a verbal agreement with the defendant Gannon whereby permission was given the latter to install a piggery upon a portion of the farm, and to use some small portion of the land for growing feed—in all about 5 acres—and the owners were to get the fertilizer from the piggery. Gannon installed a piggery in May, 1918, sowed feed, employed labour at different wages for some time, and the defendant H. C. Musgrave received as much as $200 of these wages.

The two defendants Musgrave on the one hand, and the defendant Gannon on the other, sever in their defence. The defendants Musgrave claim the sum of $1,200 and the defendant Gannon claims the sum of $7,090.

When the piggery was in full operation and seed in the ground, the Crown's officers came upon the ground and ordered Gannon, without previous notice, to get the pigs off the premises. Hence the damage claimed by defendant Gannon, and they began their work of installation by tearing down fences, hauling stone and heavy material over the ground. In the result all crops were destroyed and some of the pigs lost. Gannon closed up his business and realized as best he could. This sudden expropriation resulted in heavy loss to all defendants. The surface of the land, when

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abandonment took place, was left useless for a time for farming purposes and the expropriation terminated Gannon's business.

The Crown having expropriated the land in question on the 7th September, 1918, on the 4th April, 1919, under the authority of section 23 of The Expropriation Act, duly abandoned the same. By exhibit No. 2, it further appears that, in July, 1921, the Crown, alleging and reciting the above related circumstances, tendered in full compensation the sum of $600 to the three defendants, without severing the amount coming to any of them. The defendants having separate and distinct interest were entitled to a separate and distinct tender or offer.

This tender of $600 is renewed, in the offer made by the information, in full satisfaction for *all* damages or injuries caused to the said land, while in possession and occupation of the plaintiff and for all damages resulting from the user of the said land and the entry upon the same. Subsection 4 of section 23 of The Expropriation Act which allows the Crown to abandon land already expropriated, provides as follows:—

> 4. The fact of such abandonment or revesting shall be taken into account, *in connection with all the circumstances of the case,* in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

Under such circumstances, as decided in the case of *Gibb* v. *The King* (1), it is the intendment of the above enactment that the damages are to be assessed once for all; and when property has been so taken and returned or abandoned, all damages arising out of the interference with the owners' rights in respect of leasing the land or otherwise, during the period the expropriation was effective, are a proper subject of compensation.

The defendants Musgrave are clearly entitled to recover. I find the defendant Gannon is a tenant at will, and not a trespasser, who has rights in tenancy, and for the reasons recently given by me in the case of *The King* v. *Goldstein* (2), I have hereafter ascertained this compensation under what I think is a proper basis.

[His Lordship then deals with the amount of compensation, allowing an amount to the owners and tenant separately.]

Judgment accordingly.

(1) [1918] A.C. 915.
(2) [1924] Ex. C.R. 55.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1924
June 12.

THE *PASCHENA* .....PLAINTIFF;

AGAINST

THE *GRIFF*

Shipping—Salvage Action—Appraisement—Varying same—Powers of Court.

Held:—That depreciation is an important element in arriving at the market value of a scow or vessel; and in appraising a vessel, its age and the care taken of her must be considered.

2. That in the case of a wooden scow twelve years old, but in good condition for its age, a depreciation at the rate of 2½ per cent for the first year, 5 per cent on the diminished value for the next five years and 10 per cent on the diminished value for the next six years is a fair depreciation to allow.

3. The power of the Court to depart from an appraisement made under its authority should only be exercised under extraordinary circumstances and with great caution and,

Semble. That where in a salvage action the defendants allow the Court to proceed to judgment and to award salvage upon such an appraisement without taking exception to it or making any application to have the value of the property ascertained by sale, they cannot call upon the Court to vary the decree merely because it has been found, for some unexplained reason, that the property has been sold at much less than the appraised value.

MOTION to vary an appraisement made under an order of Court in a salvage action.

Victoria, June 12, 1924.

Motion now heard before the Honourable Mr. Justice Martin.

E. P. Davis K.C. for plaintiff.

E. C. Mayers for defendant.

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

MARTIN L.J.A. now, this 12th June, 1924, delivered judgment.

This is a motion in a salvage action to set aside the appraisement of the salved scow *Griff* upon the ground that said appraisement has not been according to the true value of the scow, as directed by the commission to the marshal but had proceeded upon a wrong principle. The certificate of value, dated 27th April, 1924, signed by the deputy mar-

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shal and two appraisers and returned to the court under the said commission, fixed the value of the ship at $10,000 and the cargo at $3,213. It is only the value of the ship that is attacked. The long established practice of this court upon an application of this kind is, I find after examining a large number of cases, that unless *a speedy application* is made to the court to set it aside, it *will unless under extraordinary circumstances* stand as binding upon the parties even though a higher or lower price may have been realized upon a later sale. Williams & Bruce's Adm. Prac. (1902) 199; Mayer's Adm. Prac. (1916) 283; Roscoe's Adm. Prac. (1920) 305; *The R. M. Mills* (1); and the *Cargo Ex. Venus* (2), wherein Dr. Lushington said:—

> It would in my opinion, unless under extraordinary circumstances be imprudent on the part of the Court to allow an appraisement made under its authority, to be departed from. In the first place, an appraisement made by the authority of this Court is made with great care and perfect impartiality, and is always considered to be a fixed sum, unless it is objected to on particularly strong grounds at the moment it is brought in. But an appraisement might be attempted to be barred in both ways —by one it might be attempted to be said the appraisement is too high, and by the other it is too low, and great delay and expense would be incurred if the Court encouraged proceedings of this kind. I cannot do so. I must adhere to the appraisement.

This decision was cited and followed by Sir William Young in the Vice-Admiralty Court of Nova Scotia, in *The Scotswood* (3) and in *The Georg* (4), by Bruce J., who also said, at p. 333-4:—

> There are authorities which establish the power of the Court to rehear cases, and, in its discretion, to vary its decrees in cases where it has proceeded upon a mistake; *The Monarch* (1 Wm. Rob. 21) *The Markland* (Law Rep. 3 A & E. 340); *The James Armstrong* (Law Rep. 4 A. & E. 380); but this power ought to be exercised rarely and with great caution, for otherwise much inconvenience and uncertainty would ensue. (The learned judge then dealt with the figures as to the appraisement and the sale, and continued): Beyond the discrepancy between the figures of the appraisement and the proceeds of the sale, there is nothing in the case before me to point to any mistake in the appraisement. The defendants allowed the Court to proceed to judgment on the appraisement without taking any exception to it, and without making any application to have the value of the property ascertained by sale.

It seems to me to be clear that where the defendants have allowed the Court to proceed to award salvage upon the

(1) [1860] 3 L.T. 513.
(2) [1866] L.R. 1 A. & E. 50.
(3) [1867] Young's Ad. R. 25.
(4) [1894] P. 330.

appraisement they cannot call upon the Court to vary the decree merely because it has been found for some reason which is not explained that the property has been sold at much less than the appraised value.

The latest decision upon the practice is *The San Onofre* (1) wherein the President said, at p. 103:—

> The ship was valued by her owners at a sum of about 160,000 pounds. The salvors were not contented with that value, and obtained an order for appraisement by the marshal of the Court. The result of the appraisement is that the value of the ship is stated to be more than double the value given by the owners of the vessel. I allowed counsel for the defendants to make an application in this case, as if he were moving the Court, on proper material, to vary or set aside the appraisement of the marshal. Only in very exceptional cases can that be done, because, ordinarily speaking, where there has been an appraisement by the marshal of the Court that appraisement is conclusive on the point. I do not say that there may not be instances—there may be an obvious mistake or some other good ground for varying the appraisement—where such a motion would be entertained.

The ground there advanced was that the appraisement had not taken into consideration the value of the charter party but it was held that the valuation was "based upon right principles" in disregarding such an element.

The ship having been salved the salvors are entitled to arrest the *res*. If bail were not given, the ship might be sold. She would not be sold subject to charter parties, but sold as she was, to any body who wanted to buy a ship of her description.

The only modern case in which I have found a departure from the practice is *The Hohenzollern* (2) wherein Mr. Justice Deane, allowed an appraisement to be re-opened and a new valuation made on the ground, apparently, that the disparity between it and the owners' valuation was so great that the marshal must have omitted to notice important matters which decreased the value. This, with all due respect, unsatisfactory proceeding led to inevitable difficulty and to a consultation with the President of the Court after which the learned judge said (according to the better reports given in the Law Journal and Aspinall). See 10 Asp. at p. 297.

> I have seen the President about the matter, and he has seen the valuation and the appraisement. His view is that in the ordinary cases it is

(1) [1917] 86 L.J. Adm. 103; 14 Asp. 74; [1917] P. 96.

(2) [1906] 76 L.J. Adm. 17; 10 Asp. 296; [1906] P. 339.

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not desirable to go behind the appraisement, so I have gone rather farther than he would have gone in ordering this further valuation. His view is that following the judgment in *The Harmonides* (ubi sup.) (1) there is a proper principle upon which the appraisement should be made, and it does not appear from the appraisement upon what principle it has been made. As it is undesirable that the gentlemen who appraise should be brought into Court to be examined and cross-examined as to how they arrive at their conclusions, I shall ask Mr. Lachlan to send me a report as to the principles on which he proceeded in arriving at his conclusion.

With this object lesson in mind, I propose to avoid difficulty by adhering to the practice and approaching this matter in the proper spirit indicated by the decision of the Nova Scotia Vice-Admiralty Court in the *Scotswood, ubi supra,* wherein it was said, p. 30, in very appropriate language:—

I have been moved therefore, to set aside the appraisement, and issue a new one. But this is a delicate office, implying distrust either of the judgment, or the integrity of two men of the first standing in their respective communities, and who were chosen by the parties themselves.

The grounds relied upon herein to set aside the appraisement are two. The first is that the appraiser (Captain McCoskrie) appointed at the instance of the plaintiffs, deposes that though at the time of the appraisement he valued the scow at $23,000 from personal inspection, yet he did reduce that valuation to $10,000 because of his reliance upon the alleged statement made to him by Captain Cullington (the appraiser appointed by the defendants) that Cullington's proposed allowance for depreciation

was the usual rule and was accepted by the Court of Admiralty and that the Court of Admiralty had full jurisdiction to consider the matter.

Captain Cullington in his affidavit in answer to this allegation says:—

6. On the 29th April, 1924, I attended at the office of Jarvis McLeod, the Marshal's Deputy, and there in company with the said Jarvis McLeod and Captain McCoskrie whom I was informed by him and believe to have been the plaintiff's appraiser, discussed the value of the said scow.

11. The discussion between the said gentlemen and myself lasted for an hour and a half, and the whole subject was thoroughly discussed and the principle and the methods of my calculation were accepted by the said Mr. McLeod and Capt. McCoskrie.

16. With regard to paragraph 4 of the said affidavit the said Edward McCoskrie did not contend that my method was not a fair or proper way to value the scow, and I do understand the averment that my method of valuation did not take into consideration the condition of the said scow, because as before stated my valuation proceeded on the basis that the scow was in first-class condition for a scow of her age. I did not say that my method was accepted by the Court of Admiralty and that the said

(1) [1902] 9 Asp. 354; [1903] 72 L.J. Adm. 9.

Court had jurisdiction to reconsider the matter, as I neither had nor profess to have any knowledge of such matters. I did say that the method which I was adopting was the proper one for ascertaining the value of the scow to her owners at the time of the accident.

17. I do not know upon what principles the said Captain McCoskrie bases his valuation of $23,000, but I do know that that is not the figure which represents the value of the scow to her owners at the time of the accident.

In view of this specific denial by Captain Cullington and in the absence of any corroboration by the Deputy Marshal of the allegation against him, I would not be justified in holding that he had made the statement complained of, and therefore I must deal with the matter on the assumption that it was not made.

Then as to the second ground. It is objected that the depreciation relied on by Cullington is based on a wrong principle. He sets out in par. 10 of his affidavit and applied it after on examination of the scow while in drydock on the day preceding the appraisement and says (par. 5) that his "estimate of her value was based on her being in first class condition for her age." Pars. 10, 12 and 13 are as follows:—

10. Since the scow was built in 1911 I then applied depreciation at the rate of 2½ per cent for the first year, 5 per cent on the diminished value for the next five years, and 10 per cent on the diminished value for the next six years; thus with an initial value of $33,000, the depreciation for the first year amounted to $825 leaving a diminished value of $32,175 the depreciation on which at 5 per cent for five years amounted to $8,043.75, leaving a diminished value of $24,131.25, and the depreciation on this diminished value at 10 per cent for six years amounted to $14,478.75, leaving a value of $9,652.50.

12. The principle for depreciation and the percentages which I adopted are those which have always been applied by me in ascertaining the insurable value and amount of loss in the case of scows in good condition; the depreciation in scows not in good condition would be much heavier.

13. Thus if the scow had become a total loss on the day of the accident, which was on the 8th of February, 1924, the amount which the owners would have received would have been $9,652.50; and this therefore appeared to me to be what she was worth to her owners at the time of the accident; but in order to meet the express wish of the said McCoskrie I consented to her value being placed at $10,000.

It is unnecessary to quote further from this lengthy affidavit (all of which I have considered) going into the plans, specifications and quantities and setting out the deponent's special experience in valuations in these waters, the other contentious affidavits do not materially advance the matter.

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The question of the valuation of ships is sometimes a difficult matter to decide as I pointed out twenty years ago in *The Abby Palmer* (1), wherein I considered the question at length and very carefully; and also five years later in the case of *The Otter* (2), wherein most of the authorities are considered, and particularly the element of depreciation in the latter case, which was one of the value of a steam freighter seven years old, and an objection to a valuation under a reference by consent to the registrar (not a commission of appraisement to the marshal) was sustained on the ground that a deduction of 7 per cent per annum for depreciation *ab initio* was not a sound rule in the case of a vessel which was

better built than the average and had been well cared for and maintained

the Court observing, p. 438:—

> Whatever may be said of the allowance of such a depreciation in the case of wooden vessels on this coast as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed and the care she has subsequently received. In the case of *The Otter,* I do not think such a rule could fairly be applied.

In the case at bar the wooden scow is twelve years old and the rule of depreciation applied is much lower than in *The Otter,* and I am unable to say in all the circumstances, that it is an unfair rule to apply to the scow in her present condition, which is admittedly first-class for her age; the rule of depreciation would of course vary with the condition of the vessel. It is beyond question that depreciation is an important element in arriving at the market value and upon the whole evidence before me I do not feel justified in disturbing the appraisement which in effect fixes that value at $10,000. The motion, therefore, will be dismissed with costs to defendant in any event.

Judgment accordingly.

(1) [1904] 8 Ex. C.R. 446.

(2) [1909] 18 B.C.R. 436; 12 Ex. C.R. 258.

NOVA SCOTIA ADMIRALTY DISTRICT

1920
Aug. 11.

PERLEY McBRIDE ET AL.....PLAINTIFFS;

AGAINST

THE SHIP *AMERICAN*

AND

JOHN S. DARRELL & CO.....INTERVENERS.

Shipping and seamen—Disbursements incurred by Master—Maritime Lien.

Besides wages the master claimed certain amounts alleged to have been paid for provisions and for accounts which he guaranteed to the ship's agents for money advanced by them to pay wages, provisions, etc. *M.* & Son, the ship's agents had been paying the bills, and drafts therefor were sent to *C.* Bros., of New York, who were managing the ship as owners. These were not satisfactorily paid and *M.* & Son declined to make further advances unless the master became personally responsible, which he did. *M.* & Son were aware of the situation and the master was in constant and direct communication with the owners or those acting on their behalf and the liability incurred by him was made after the ship had been arrested by another claimant.

Held, that under the circumstances the master had no maritime lien to cover such disbursements; and that the master could not create a maritime lien in his own favour merely by adding his own liability to that of the owners for necessaries for the ship whether in the form of wages or otherwise.

ACTION IN REM for wages and for disbursements and liabilities incurred on behalf of the ship.

Halifax, August 5, 1920.

Action now tried before the Honourable Mr. Justice Mellish.

L. A. Forsyth for plaintiffs;

W. C. Macdonald, K.C. for John S. Darrell & Co., Interveners.

The facts are stated in the reasons for judgment.

MELLISH L.J.A., the 11th August, 1920, delivered judgment.

This is an action *in rem* by the master of the defendant ship for wages due him, and for disbursements and liabilities incurred by him on behalf of the ship.

Certain members of the crew have also been added as plaintiffs, and are asserting claims for wages due them. The crew and master have a maritime lien for such wages and there will be a decree accordingly.

1920

McBRIDE v. THE SHIP *American*.

Mellish L.J.A.

The master claims in addition for two items $57.72 and $14.60, which he paid for provisions, an account of $86 which he guaranteed to R. B. Seeton & Co., and for further sums amounting in all to $3,679.35, for which he has become responsible to I. H. Mathers & Sons for money advanced by them to pay wages, provisions and repair bills, etc., as per vouchers produced.

I do not think under the circumstances disclosed in the evidence that the master has a maritime lien to cover such disbursements and to protect him against the liabilities so incurred by him. Messrs. Mathers & Son had been acting as the ship's agents and apparently paying her bills. Their drafts on Caracanda Bros., of New York, who were managing the ship as owners were not satisfactorily met, and they declined to make further advances, unless the master became personally responsible which he did. Messrs. Mathers & Son made the master aware of the situation when he became so responsible. It does not seem, however, that Messrs. Mathers & Son relied solely on the master's credit, as they made drafts on Caracanda Bros. for the amounts advanced by them, which were apparently dishonoured. I do not think the circumstances were such as to make it the duty of the master as such to make the disbursements or incur the liability in question. The master was in constant and direct communication with the owners or with those acting on their behalf, and the liability incurred by him was made after the ship had been arrested by another claimant.

I do not think the master can create a maritime lien in his own favour merely by adding his own liability to that of the owners for necessaries for the ship whether in the form of wages or otherwise. The liability so incurred by the master was incurred with the knowledge and apparent assent of the owner's agents. *The Orienta* (1).

It is said, however, that the master has at least a statutory lien for the amount of such disbursements made, and liability incurred by him. In other words I suppose it will be said that the master is in the position of one who has a claim *for necessaries supplied* to the ship. The answer to

(1) [1895] P. 49 at p. 55.

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McBRIDE v. THE SHIP *American.*

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this contention is, I think, that except as to the two items of provisions above referred to, the master did not supply such necessaries. Messrs. Mathers & Son, who, the master says made the advances on the credit of the ship, as well as himself, may have such a claim, but they are not before the court, and I give no definite opinion as to their rights.

It is no doubt established

that the person who pays for necessaries supplied to a ship has, as against that ship and her owners, as good a claim as the person who actually supplied them, and, further, that he who advances money to the person who thus pays, for the purpose of enabling him to pay, stands in the same position as the person to whom the money is advanced. See *Foong Tai & Co. v. Buchheister & Co.* (1).

Such a person is said to be in the position of one who has supplied necessaries to a ship on the credit of the ship. With some hesitation, however, I have come to the conclusion that the master cannot fairly be said to have supplied the necessaries for which Messrs. Mathers & Son paid. The same remarks apply to the account of Seeton & Co. for $86 so far as relevant thereto.

There will be a decree in accordance with the foregoing and I will hear the parties as to costs.

Judgment accordingly.

F. K. WARREN & R. P. AND W. F. STARR, LIMITED ..... } PLAINTIFFS;

AGAINST

THE SHIP *PERENE* ..... DEFENDANT.

1924

May 21.

Shipping and seamen—Loss of ship and cargo—Value of same—Method of estimating damage—Elements of damage.

Held, the damages to be allowed to owners of cargo for the loss thereof by collision is the market value thereof to the owners at the time and place of delivery, if there is one, and if not, the value is to be calculated, taking into account among other things the cost price, the expenses of transit and importer's profit.

2. That a schooner cannot be dealt with like an ordinary commodity sold every day, and in the absence of any market value, the question of damages for the loss of such vessel, resolves itself into what shall be deemed its proper value to the owners as a going concern, which in order to determine, many matters have to be considered such as

(1) [1908] A.C. 458 at p. 466.

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original price, cost of repairs, amount of insurance, etc. (*The Harmonides* (1903) 72 L.J. Adm. 9; *The Philadelphia*, 86 L.J. Adm. 112, and *The Ironmaster* (1859) 166 Eng. Rep. 1206 referred to and discussed.)

3. That in such a case the best evidence of value is the testimony of competent persons who knew her shortly before her loss, and next the opinion of persons well conversant with shipping generally.

4. Plaintiffs' ship was chartered from St. John, N.B., to Las Palmas when lost by collision, which trip it was proved would have netted her $2,000 profit.

Held, that such a loss of profit was a proper element of damage to be allowed against the defendant.

REHEARING before the court to determine the amount of damages due to the plaintiffs respectively under judgment of the 30th April (1) in the said cases finding the defendant responsible for the collision.

May 13, 1924.

Matter now heard before the Honourable Sir Douglas Hazen, Deputy Local Judge in Admiralty, at St. John, N.B.

F. R. Taylor, K.C. for plaintiffs;

A. N. Carter, for defendant.

The facts are stated in the reasons for judgment.

HAZEN L.J.A. now this 21st day of May, 1924, delivered judgment.

* * * * * * * * * *

In the case in which R. P. & W. F. Starr, Limited, is plaintiff, the amount which the plaintiff claims is $10,640.78, with interest at 5 per cent, from the first of February, and the claim is made up as follows:—

Amount paid for coal	$9,215 48
Ten per cent which Mr. Starr gives as the amount to cover commission, brokerages and overhead	921 54
Advance made on freight	58 20
Premium actually paid for U.S. funds	288 03
Marine insurance premium	156 93
	$10,640 78

together with interest from the time of the loss at 5 per cent.

Of these items the only one to which objection is taken by counsel for the defendant is the second item, viz., $921.54 and it is submitted that so far as that covers profits and

(1) [1924] Ex. C.R. 206.

commissions it is not competent to the plaintiff to claim it, and he is not entitled to it. In support of this proposition two cases were cited—*Ewbank* v. *Nutting* (1); and *British Columbia, etc., Company, Ltd.* v. *Nettleship* (2), both of which are common law cases, the facts being entirely different from those in the present case, and it is admitted by the defendant's counsel that they are not directly in point.

The rule regarding the loss of cargo owners seems to be laid down with clearness in Halsbury, Vol. 26, p. 541, par. 803, as follows: * * * *

No evidence was given before me to show what the market price of the goods was at the city of St. John, the place at which the coal ought to have been delivered to the plaintiffs. Such value must therefore be calculated, and among other matters to be taken into account as laid down in the paragraph which I have quoted from Halsbury are the cost price, the expenses of transit and the importer's profit.

* * * * * *

Coming now to the other case, *Warren* v. *SS. Perene,* the plaintiff claims damages for the loss of the *Maid of Scotland* of $40,000, and the following additional amounts:—

Value of stores and ship chandlery	$1,300 00
Cost of removing spars	1,000 00
Insurance premiums unexpired	1,634 00
Freight on coal for Starr payable in U.S. funds	750 00
Earnings of voyage to Canary Islands payable in U.S. funds	2,000 00
Premium on freight on coal and lumber to the Canary Islands for U.S. funds	81 00
	$46,765 00

Of these items those for the unexpired insurance premium, the freight on the Starr coal, the earnings of the voyage to the Canary Islands and the premium for United States funds are not disputed. The plaintiff also claims interest from the first day of April last, the date on which under the charter party the vessel after discharging its cargo at St. John and loading there with lumber would have delivered the same at the Canary Islands. That charter

(1) [1849] 7 C.B. 797. (2) [1868] 37 L.J.C.P. 235.

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WARREN, STARR, LTD. v. THE SHIP *Perene.*

Hazen L.J.A.

party was given in evidence. It was dated on the 17th January, 1924, and under it the vessel was chartered from St. John to Las Palmas, Grand Canary to carry a cargo of pine or spruce lumber not exceeding 450,000 s.f. The amount to be paid under the charter party at $10 s.f. amounted to $4,500 and the evidence was that the disbursements and expenses in connection with this would amount to $2,500 leaving a balance of profit of $2,000. Under the authorities it is quite clear that the plaintiff is entitled to this amount.

The principal controversy was over the amount that should be allowed as damages for the total loss of the *Maid of Scotland,* and it will be necessary to consider the principles that should be applied in arriving at such damages.

In the case of the *Harmonides* (1) it was held that where a ship has been sunk by collision and there is no market from which she can be replaced, the value of the ship to her owners as a going concern is the proper test of their loss. * * * *

In the case of the *Ironmaster* (2) the rule is laid down that in estimating the value of a vessel at the time of a collision whereby she was lost the best evidence is the opinion of competent persons who knew the vessel shortly before the time of loss; the next best is the opinion of persons well conversant with shipping generally. The original price of the vessel, the cost of repairs done and the amount at which she was insured, etc., these are evidence of value, but evidence of inferior weight. * * * *

In the case of *The Philadelphia* (3), Sir Samuel Evans in his judgment said that the right rule for arriving at the damages in the case of a total loss of a vessel under charter is to value the ship at the time of its destruction or loss and to add to this the proper sum for freight or profits at the end of the voyages fixed by her existing charters subject to proper deductions for contingencies and wear and tear. In the case of the *Kate* (4), which was referred to in the course of the argument before me, the question is declared to be simply whether the value of the lost vessel was to be

(1) [1903] 72 L.J. Adm. 9.
(2) [1859] 166 Eng. Rep. 1206; Swabey 441 at pp. 442, 443.
(3) [1917] 86 L.J. Adm. 112; [1917] P. 101.
(4) [1899] 68 L.J. Adm. 41.

fixed at the time of the collision as if she were a free vessel without reference to the benefit which might accrue under her then existing contractual obligations, or whether the profits which might be the result of the performance of her existing charter were to be taken into account as an element in her value, and the decision was that the latter was the correct rule of assessment, while the case of the *Racine* (1) it was declared did not differ in principle and only extended the application of the rule to a succession of charter parties.

In the case of the *Heather Belle* (2) Sullivan C.J. laid down the rule to be

that if a ship is totally lost the owner is entitled to recover her market value at the time of the collision.

While in Marsden, 8th ed., p. 116, citing the *Philadelphia, supra,* in support of the proposition, it is laid down by the editor that if a ship is totally lost the owner is entitled to recover her market value at the time of the collision. The defendant claims that he has established the market value of such a vessel as the *Maid of Scotland* to be about $32 a ton, net register. It will be seen from the citations that I have made, and the cases to which I have referred, that there is some apparent difference of opinion with regard to the principles on which damages should be assessed, but I think that after all in the language of Dr. Lushington, the question resolves itself into what shall be deemed the proper value of the vessel, and in order to determine this, many matters have to be considered.

[His Lordship here discussed the facts in evidence.]

Having regard to all the evidence I must say in the language of Gorrell Barnes J., that the schooner cannot be dealt with like an ordinary commodity which is sold every day, and I do not think that anything that can be fairly described as a market value at the time of the collision has been established. Having regard, however, to the fact that the best evidence of what shall be the proper value of the vessel is that of the opinion of competent persons who knew the ship shortly previous to the time it was lost, weight must be attached to the evidence of the managing owner, who said that he could probably buy a similar ves-

(1) [1906] 75 L.J. Adm. 83; [1906] P. 273.

(2) [1892] 3 Ex. C.R. 40 at p. 55.

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sel for from $20,000 to $25,000. Also to the evidence of Mr. Pugsley, which in the opinion of Dr. Lushington would be regarded as the second best evidence, as he was a person conversant with shipping and transfers thereof, who valued his schooners of a similar character that he owned at the sum of at least $50 a ton. Also taking into consideration the amount of insurance and the valuation placed upon the vessel at the time the insurance was effected and the several circumstances which were detailed in evidence, I am of opinion that the proper value of the *Maid of Scotland* at the time of the collision on the first of February would be fairly represented by a sum of $20,000 which is slightly in excess of $50 net registered tonnage.

* * * * * * *

I will allow $1,000 as damages for the loss of the ship's stores and supplies. The amount of damages to which the plaintiff is entitled will be therefore made up as follows:—

Loss of vessel	$20,000
Stores and ship chandlery	1,000
Insurance premium unexpired	1,634
Freight on Starr coal	750
Earnings on voyage to Canary Islands	2,000
Exchange	81
Cost of removing spars	1,000
	$26,465

with interest at 5 per cent on this amount from April 1 next the date at which the charter for carrying lumber to the Canary Islands would have expired.

In the above amount I have allowed $1,000 the cost of removing the spars of the *Maid of Scotland.* The owners were notified to do this by the Department of Marine and Fisheries, and under the law if they do not do so they can be removed by the Government and the amount charged to the owners of the schooner. I therefore think it is a proper charge to be allowed to the plaintiffs.

Judgment accordingly.

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to ascertain for himself, by careful observation, whether the bridge is prepared to allow him to enter or pass; and furthermore that the regulations of the Board of Railway Commissioners of the 30th of April, 1914, passed under sections 30 and 232 of the Railway Act (R.S. 1906, c. 37), governing the opening of railway bridges and providing that a bridge is not so prepared until it is fully opened are valid and binding on vessels passing through the same.—3. That, the fact that it may have been customary to enter the bridge before the swing was fully opened did not absolve the ship from negligence; such a custom being dangerous and unreasonable could not be the foundation of a claim against another person where an accident had occurred by the injured ship putting the custom into practice.—(*Turgeon* v. *The King*, 15 Ex. C.R. 331; 51 S.C.R. 588 referred to). NIAGARA, ST. CATHERINES AND TORONTO RY. AND THE LAKES AND ST. LAWRENCE TRANSIT CO..... 1

2——*Collision—Canal—Rule 22 of Rules of the Road for the Great Lakes—Unseamanlike manoeuvre—Negligence.*] The *M.* was upbound on the Soulanges Canal, light in ballast, being high out of water forward, drawing 3 feet 2 inches forward and 12 feet 8 inches aft, and being 30 feet out of the water forward and only 15 feet aft; and the *F.* was coming down with the current loaded with grain. The night was fine and clear with southwest wind of 18 to 20 miles, blowing across the canal. The vessels had all regulation lights burning and the *M.*, before leaving Lock No. 3, saw the lights of the *F.* There is a slight bend in the canal about three-quarters of a mile above this lock and when the *M.* had rounded the bend the ships were four or five boat lengths apart. A two-blast signal was then given by the *M.* and answered by a similar signal from the *F.* Both ships were in mid-canal at the time and when they met and were passing, the bluff of the *M's* starboard bow, 25 feet abaft the stem, collided with the bluff of the *F's* starboard bow, about 15 feet abaft the stem.—*Held*: That under the facts as stated above the *M.* should not have attempted to pass the *F.*, which had the right-of-way under the rules, but should have moored to the bank until the *F.* had passed her; and to continue her course was not good seamanship on the part of the *M.*—2. That the *F.*, coming down the canal with the current had the right-of-way, under rule 25 of the Rules of the Road for Great Lakes.—3. That the burden of proof was upon the *M.* to establish that the collision was caused by the improper navigation of the *F.* GEORGE HALL CORPORATION *v.* SS. *Fifetown*..... 12

3——*Shipping—Collision—Overtaking vessel—Article 24 of the Rules of the Road—Force of suction—Evidence—Negligence.*]—1. *Held*: That applying the rule that ordinarily the testimony of one who testifies to an affirmative is to be preferred to that of one who testifies to a negative, where the evidence of those on board one vessel was to the effect that they saw the two vessels coming into contact, and felt the shock caused by the impact, while the evidence of those on board the other vessel was that no shock was felt and no impact seen, the court ought to hold that a collision did take place.—2. The collision took place on the St. Lawrence River below Champlain between the *S.D.*, plaintiff's ship, and the *L.S.*; the channel there being 400 feet wide. The *L.S.* was of greater size and draft than the *S.D.* and in overtaking and passing the *S.D.* attempted to pass too close to her, and the latter was drawn towards the *L.S.* by the force of suction until they came into collision.—*Held*: That having regard to the fact that the force of suction is a source of danger in close navigation, especially in shallow water, and as it was the duty of the *L.S.* as an overtaking vessel, under article 24 of the Rules of the Road, to keep out of the way and clear of the overtaken vessel until finally passed, she was, under the above facts guilty of negligence and responsible for the collision. GEORGE HALL COAL AND SHIPPING CORP. *v.* THE SS. *Lord Strathcona*..... 32

4——*Collision—Moderate speed—Fog—Article 16 of the Regulations for the prevention of collisions at sea—Evidence.*] On the morning of June 20, 1923, at the hour of 3.20 according to the *K's.* clocks and 3.26 according to the *F.H's.* clocks—the difference between them being accidental—a collision occurred on the St. Lawrence River near Red Island and Bicquette Island, between the *K.* outbound and the *F.H.* inbound. Both ships ran into dense fog half an hour or a little more before the collision. The *K.* stopped her engines at 2.50 a.m.; about three o'clock she heard a fog signal ahead, started at slow at 3.05 and her engines continued going ahead until 3.18 when they were put full speed astern. Repeated long blasts were heard by the *K.* from the other ship, which, however, was not seen until the ships were within 60 feet from each other. The speed of the *K.* from the time her engines were put at slow ahead until they were put full speed astern was at least 4½ to 5 knots, which was more than necessary to keep steerage way, and when she put her helm hard a-starboard, she swung around to port and her stem struck the port bow of the *F.H.* At 2.53 the engines of the *F.H.* were put at "stand by," then at 2.56

SHIPPING AND SEAMEN—*Continued*

at slow, stopping at 3 when the lights of the other ship were seen 2½ to 3 miles ahead. She then proceeded slowly, stopping her engines at intervals. The *F.H.* had the tide and wind against her and merely had steerage way, making very little, if any, speed over the ground. She did not run into the *K.*, but the *K.* ran into her. Two minutes before the collision the *F.H.* again having the *K* in sight gave one short blast putting her helm hard aport. This was answered by the *K.* with two short blasts, who put her helm hard a-starboard. The *F.H.* again gave one blast answered by the *K.* with two, and immediately followed by three short blasts. When the cross signals were given the *K.* was four points off the *F.H.'s* port bow. The *K.* contended that the *F.H.* was to starboard, its witnesses basing their opinion of direction on the whistles heard.—*Held*, that it was bad seamanship for the *K.* to give cross-signals and to put her helm hard a-starboard when she did, and that this, with her excessive speed, was the sole cause of the collision.—2. That a ship is not justified in altering her course in a fog until there is sufficient indication of the other's position, sufficient indication being a matter of circumstances in each case.—3. Where there is conflict of testimony as to the respective positions of the ships, the court, in view of the fact that sounds in a fog are notoriously unreliable, as between witnesses who testify to the position of a vessel as having seen her, and those whose testimony is only an opinion based upon hearing the whistle, ought to accept the version of the former.—4. That "moderate speed" within the meaning of Article 16 of the rules for preventing collision at sea, is such speed as will permit a vessel to pull up within the distance that she can see. KAMOURASKA SHIPPING CO. *v.* SS. *Fanad Head* AND ULSTER SS. CO. *v.* SS. *Kamouraska*..... **37**

5 —— *Maritime lien—Non-transferable—Wages of seaman—Meaning of seaman.*]—*Held*: (Affirming the judgment appealed from), That the claimant not having signed the ship's articles, not having lived on board, and the sum sued for not having been earned on board, he was not a seaman within the meaning of the Act and his claim did not carry privilege.—2. That the maritime lien attaching to a seaman's wages is personal to the seaman, and not transferable, and no one voluntarily paying the wages of one or more of the crew can claim a lien against the ship for the amount so paid. MCCULLOUGH *v.* SS. *Marshall*, AND ELIASOPH, AND STEEL CO. OF CANADA.. **53**

6 —— *Bill of Lading—"Weight unknown"—Carriage—Evidence of delivery—Burden*

SHIPPING AND SEAMAN—*Continued*

of proof—Recovery against ship for shortage—Customs duty paid thereon.] *W.* sued for an alleged shortage in the delivery of a cargo of coal received by the *R.* for delivery at Montreal. The *R.* contended that by reason of the words "weight unknown" in the bill of lading, *W.* was obliged to prove not only that they had received less than the amount stated in the bill of lading, but also that the ship had received the full quantity, and should have examined the weighers who put the cargo on board.—*Held*: That whatever effect should otherwise be given to the words "weight unknown" in a bill of lading for coal, where the Master of the ship stated in evidence that the said bill of lading showed the actual weight taken on board, and the consignee proved that the quantity delivered to him was less than was stated in the bill of lading, the onus was upon the ship-owner to establish that the weight in the bill was wrong; this he may do by showing mistakes by the tally-men from whose tallies the bill of lading was made out, or by indirect evidence sufficient to satisfy the Court, beyond reasonable doubt, that he delivered all he received.—2. That in such a case, where the ship-owner has failed to prove that the quantity mentioned in the bill of lading was not in fact put on board, the ship was bound to deliver the full quantity stated in the bill of lading; and that the Consignee having paid the shipper for the full quantity, was entitled to recover against the ship the proportion of the purchase price represented by such shortage.—3. That although the Consignee might be entitled to claim a refund of the amount erroneously paid for custom duty on such shortage from the custom's authorities, it cannot be claimed as an element of damage against the ship; and that likewise amounts overpaid for handling and discharging cargo should be claimed against those employed to do the work, and not against the ship. CORP. OF TOWN OF WESTON *v.* SS. *Riverton*.... **65**

7——*Charter-party—Discharging of cargo—"Default"—Delay fixed or ascertainable—Lay days—Demurrage—"Running days."*] *Held*: 1. That the provision in a charter-party that the discharge of a cargo would be "at the rate of * * * feet per day," becomes, once the cargo is ascertained, an undertaking to complete the discharge within a fixed period of time, such period to be computed by days calculated at the rate fixed in the charter-party, and not by hours, and that where a fraction of a day was required for the completion of the discharge, the charterer is entitled to the whole of that day.—2. That where there is an undertaking to discharge the ship in a fixed period, such a

provision is an absolute and unconditional undertaking by the charterer that the ship will be released at the expiration of the lay days, regardless of the difficulties and obstacles which might be met in the course of such discharge, and that the words "default of charterer" in the charter-party meant not merely default to receive the cargo, but generally an omission or neglect to perform the contract.—3. That "days" and "running days" in computing demurrage mean the same thing, in absence of some particular custom, and refer to calendar days, without excepting Sundays and holidays, and not any period of 24 hours; and in this case "lay days" being completed at midnight on the 13th June, 1923, and the unloading completed on the 18th at 11 p.m., the ship was entitled to five days' demurrage. KNOX BROS. LTD. *v.* SS. *Heathfield*..... **73**

8——*Wages of engineer—Loss thereof by desertion—Jurisdiction.*] On the 4th of July, 1923, O. shipped as engineer for the fishing season, lasting four months, at $150 a month. On October 4 there was a balance of $134 due him, and on the 25th October, he deserted the ship without lawful justification or excuse. He then sued for $286.64, balance of wages due up to October 20. It was contended by defendant, that all wages earned from October 4 to time of desertion had been forfeited, and further, that the balance being for a sum under $200, the court had no jurisdiction.—*Held*, that in this case the wages must be deemed to have been forfeited from the time of the last monthly payment which the contract contemplated, and that, as by deducting these from the claim, the sum due plaintiff was under $200, viz., $134, this court had no jurisdiction, and the action must be dismissed for want thereof. OSTRAM *v.* SHIP *Miyako*..... **86**

9——*Admiralty law—Claim for work done and material supplied—Interest on claim ex contractu—Time from which to be allowed.*] In an action against a ship to recover an amount due for work and labour done, and material supplied to the ship, with interest, it was *held*, that the plaintiff was entitled to recover interests upon the amount of his bill from the date of the formal demand of payment thereof, after due completion of the work under the contract. (The Northumbria, 1869, L.R. 3 Adm. & Ecc. 6, followed). WINSLOW MARINE RY. AND SHIPBUILDING CO. *v.* THE *Pacifico*..... **90**

10 —— *Negligence — Unavoidable accident—Forces of nature.*] At about 1 o'clock on October 27, 1922, the *R.P.*, a steamer of some 10,000 tons net register, was attempting to dock on the east side of Johnson Wharf on the south shore of Vancouver Harbour, which lies west of a wharf operated and owned by plaintiff, and at a distance of 300 feet. The ship was not under her own power, but had employed two tugs to bring her up to the wharf; tide was high-slack, weather clear with a breeze of considerable force from the west. The bow of the *R.P.* had entered the fairway between the wharves, when the pilot stopped the tug ahead, and ordered the other, which was lashed to the port quarter of the ship, to go astern and take the way off the ship, then proceeding at about one mile an hour. In so doing the tug carried away her headline and thereupon, the pilot dropped both anchors, bringing the vessel to a standstill. The vessel drifted upon the northwest corner of plaintiff's pier causing damage. The defence to plaintiff's action was one of unavoidable accident.—*Held*, that while no fault, in the abstract, could be found with the defendant ship's owners in employing the two tugs as they were employed, yet, on the above facts and considering the force and direction of the wind and its effect upon the ship, due care was not taken to approach the wharf in a proper and seaman-like manner. There was no good reason why necessary allowance for the forces of nature, to offset the leeway, should not have been made in approaching its berth under the restricted condition of a narrow slip, and that defendant was liable in the circumstances. EVANS, COLEMAN & EVANS, LTD. *v.* THE SS. *Roman Prince*..... **93**

11——*Wages of master and engineer—Lien on ship—Charterers—Engagement of master by charterers—No power to bind owner—Costs.*]—*Held*, that the court has jurisdiction over claims by Master and seamen for wages earned by them on board ship, which may be exercised *in rem*, and that the lien for wages of the master and crew attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship. *The Castlegate*, (1893) A.C. 52 referred to.—2. That where the master has not been engaged by the owners but by the charterers, he has no authority to pledge the credit of the owners for anything.—3. That in such a case the master has no right of action against the ship for money expended by him for board.—4. Master and engineer sued separately for wages and the actions were subsequently consolidated. *Held*, that as one action only should have been brought plaintiffs were entitled to costs of one action only. FUGERE *v.* SS. *Duchess of York*..... **95**

12 —— *Shipping — Collision — Harbour — Narrow channels—Negligence—Regulations.*] The *H.* was in dock on the west bank of the K. river intending later to proceed down river to Port Arthur, when the *F.* entered the K. river from Port Arthur intending to lay at the same dock, which instructions were changed. The channel is 450 feet average in width from this dock to the point of collision, a distance of about 2,000 feet. The McK. river joins the K. on its easterly bank, nearly 1,900 feet below the dock, which river is 820 feet at its mouth, gradually narrowing up to the railway bridge over the same, 850 feet up stream, constituting the McK. basin, which under the harbour regulations was a turning basin, turning in channel for such ships being forbidden. The *H.* proceeded down stream stern foremost to the basin, assisted by a tug, lashed to her port bow, there to turn and go down stream whilst the *F.* was coming up on her starboard side of channel at 3 miles an hour. When about 2,800 feet away the *F.* saw the *H.* leaving her dock. A westerly wind was blowing, and the *F.* straightened up from time to time to keep steerage way. When the *H.* had put her stern into the M. river, and lay across the *K.* close to the lower bank of the M., about to turn, but without indication of whether to port or starboard, both ships were close together, and a collision was imminent. The *H.* then gave a danger signal and when 75 feet away gave a two-blast signal, for the tug. The *F's.* engines were put astern, and the *H.* influenced by wind and tide was not well under command, and the ships collided.—*Held* (varying the judgment appealed from), that the *H.* going astern in such manner as to occupy considerable space of the stream, with better knowledge than the other ship of the probable degree of success with which her turning movement was being executed, and knowing the degree of command under which she was, and with knowledge of the up-going ship, should have used the danger signal in ample time and with such frequency as the situation and prudence would indicate and not wait until the collision was imminent or inevitable, and that she was not navigated with proper regard to the other ship; but that the *F.* was also navigated in an unseamanlike manner and without regard to the *H.*, that she should have held the starboard side of the river, should not have been so near the *H.* at her turn, and both ships were to blame.—2. That regulations are not merely made for the purpose of preventing collisions, but also to prevent a risk of collision.—3. That the *F.* was not entitled to any consideration by reason of the structural peculiarities she possessed, rendering it difficult

to exercise due and prompt command over her. Her captain knowing her peculiarities should have used corresponding care. That one ship should not be expected to know the navigating disabilities of another and base her own conduct thereon.—*Judicial observation.* The absence of specific regulations in the way of signals applicable to turning ships in narrow channels, which exist elsewhere, noticed and commented upon. The *Hamonic* v. The *Robert L. Fryer*. **102**

13 —— *Collision — Harbour — Narrow channels—Negligence.*] On the 17th November, a little after 5.40 p.m. a collision occurred between the *W.* and the *F.* in Port Arthur harbour, at the entrance to a slip, 1,100 feet long and 175 feet wide, which is narrowed on the south side of the entrance by 20 feet, due to a wreck. In the south wall of the slip there are two recesses, and in one was the said wreck and in the other the *J.* Another steamer, 48 feet beam, lay at the north wall (Government dock) 450 feet from its end. Directly outward, 2,400 feet, is a breakwater forming the harbour between it and the shore. From the harbour proper is a slip channel leading into the slip. The *W.*, a steel steamer, 550 feet long and 58 feet beam lay on the south side of the slip, and when the *F.* a wooden steamer 280 feet long, was not more than 300 feet from the end of the north wall, to which she was destined, the *W.* began to back out, swinging stern first across the slip, with considerable speed, intending to work along the north wall. The *F.*, unable to make her berth, signalled she was going to port, and in so attempting, the collision occurred. The visibility was low and the *W's* stern lights were out; she knew of the *F's* approach and gave no signal that she was to leave her dock.—*Held*, (reversing the judgment appealed from) that no fault should be attributed to the *F.* for not pursuing her efforts to make her dock; nor because she had got in too far into the slip channel to make a passage to port; that the *W.* by failing to signal her intention to leave dock, by her speed in swinging across channel and her general manoeuvring was guilty of negligence, which was the proximate cause of the collision, and the *W.* was wholly to blame. THE *Robert L. Fryer v.* THE *Westmount* **109**

14——*Collision—Practice of seamen—Canal navigation—Negligence—Tug and tow.*] A collision occurred on the Welland Canal, just below the Airline Bridge between the barge *B.L.* in tow of the tug *B.* coming down the current and the *K.* going up. The bridge swings on a pier in the centre of the canal, leaving a gap on the east and west sides for boats to

pass, being respectively 45 feet 6 inches and 43 feet 6 inches wide. When a considerable distance above the bridge the tug gave a one-blast signal which was answered by the *K.* with a similar signal. The *K.* was a steel vessel, 42 feet 6 inches beam and 250 feet long, and the barge was 40 feet wide, being loaded with grain. When between 625 and 650 feet from the bridge, the *K.* put her bow against the west bank, her engines just turning to hold her, her stern being 10 or 15 feet out, intending to let tug and tow pass and then go through the east gap. The tug and tow came through the east gap slowly, and then, as happens to all vessels at this place, she took a sheer to port. All possible manoeuvres were taken to minimize and counteract the effects of the sheer, and she was on her side of mid-channel at time of collision. There was a west wind of 22 miles an hour blowing, and the *K.* being light and drawing forward only 2 feet and being 34 feet above water, was exposed to the influence of wind, and her bow was forced away from the bank towards the centre, causing her to drift and the collision occurred. The *B.L.* had right of way.—*Held*, on the facts, that the collision was caused by the *K's* sheer to port due to want of care and seamanship on her part in selecting a place too near the bridge, and in attempting to keep stationary with her bow against the bank. That she should have either stopped further down to enable the tug to recover from an inevitable sheer, or placed her bow in the west gap until the tow had passed, and that in consequence the *K.* was wholly to blame for the collision.—*Held* further, that a tug with barge in tow has not the same facility of movement as if she were unencumbered, and that a vessel meeting them should make allowance therefor, and take additional care. KEYSTONE TRANSPORTS LTD. *v.* BARGE *Bernon L*..... 115

15——*Practice—Costs—Discretion of judge—Amendment.*]—*Held*, that it is impossible to formulate any general rule which could adequately cover or anticipate those ever varying circumstances which should determine the application of a milder or stricter order for costs, and that in exercising a proper discretion as to costs, each case must be carefully considered in the light of its special circumstances.—2. Where it was found, during the trial, that the proper person was not in the suit as plaintiff, and where by amendment he was added, the costs of such a motion, under such circumstances, should be paid by the plaintiff to the defendant in any event.—Two days of the trial were taken up with the hearing of expert evidence on behalf of plaintiff and defendant, on the question of whether the ship should have used two or three tugs in berthing. The court declined to accept plaintiffs' theory of responsibility, but held the ship responsible on other grounds. On application of defendant for the costs of these two days in any event.—*Held*, that costs of the trial should follow the event, in accordance with rule 132 and the Court did not deem it fit to make any other order. EVANS, COLEMAN & EVANS *v. Roman Prince*..... 129

16——*Practice—Amendment of judgment after entered—Error—Formal judgment not representing judge's judgment.*] In the course of the trial herein, leave was granted to plaintiff to add the E.C.W. Co. as co-plaintiff, with its consent. When judgment was handed down, the brief note of the judge only gave a short style of cause, as is usual, and in settling the formal degree the name of the added party was omitted. Plaintiff now moves to rectify this slip and error, by amending the judgment accordingly, which was opposed, it being contended that by failing to formally amend and by taking out and entering the formal judgment, and proceeding to assess the damages, plaintiff had abandoned the benefit of this order.—*Held*, that abandonment being a question of intention, in view of all circumstances of this case the court would not be justified in concluding that plaintiff had elected to abandon the order obtained and accepted after strong opposition; that, moreover, as the judgment now stands, it is not the judgment intended to be delivered, the style of cause in the judgment should be amended to show its true state. EVANS, COLEMAN & EVANS CO. *v. The Roman Prince*.. 133

17——*Seaman's wages—Plaintiff resident out of jurisdiction—Security for costs—Delay in making application—Practice—Rule* 134, *Interpretation.*] The defendant ship was arrested on December 3, 1923, the pleadings were closed in February, 1924, and it had been agreed between the parties that the case be tried on the 19th of May, 1924, though a date for trial had not been applied for. On May 6 an application for security for costs was made on the ground of plaintiff being resident out of the jurisdiction, etc.—*Held*, that, though in this case there had been delay which was not accounted for, and could only be conjectured, yet in the absence of any prejudice thereby occasioned to the other side, the court did not feel justified in refusing an application for security for costs.—2. That Admiralty rule 134, providing for the giving of bail for costs by a non-resident plaintiff or counterclaimant is not intended to be a declaration of the former practice of the court