# REPORTS

— OF THE —

# EXCHEQUER COURT

— OF —

# CANADA.


**CHARLES MORSE, D.C.L., BARRISTER-AT-LAW.**

REPORTER.



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# JUDGE

OF THE

# EXCHEQUER COURT OF CANADA.

THE HONOURABLE GEO. W. BURBIDGE.

*Appointed on the 1st day of October, 1887*

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## LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

*During the period of these Reports :*

| | | | |
|---|---|---|---|
| The Honourable | A. B. ROUTHIER, - - - - - | Quebec | District. |
| do | JAMES McDONALD, C.J.S.C. - - | N. S. | do |
| do | EZEKIEL McLEOD, - - - - - | N. B. | do |
| do | WILLIAM W. SULLIVAN, C.J.S.C. | P. E. I. | do |
| do | A. J. McCOLL, C.J.S.C. - - - | B. C. | do |
| | (Died 16th January, 1902.) | | |
| do | ARCHER MARTIN. - - - - - | B. C. | do |
| | (Appointed March 1st, 1902.) | | |
| do | JAMES CRAIG, J.T.C. - | Yukon Territory | District. |
| | (Appointed 5th May, 1900.) | | |
| His Honour | JOSEPH E. McDOUGALL - - - | Toronto | District. |

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## ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA

*During the period of these Reports :*

THE HONOURABLE DAVID MILLS, P.C., K.C.
HE HONOURABLE CHARLES FITZPATRICK, P.C., K.C.

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## SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE CHARLES FITZPATRICK, K.C.
THE HONOURABLE H. G. CARROLL, K.C.

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# CASES

DETERMINED IN THE

# EXCHEQUER COURT OF CANADA.

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IN THE MATTER OF THE PETITION OF RIGHT OF

CHARLES HENRI LETOURNEUX.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

1900

Nov. 15.

*Damages to land—Public work*—50-51 *Vict. c.* 16 *sec.* 16 (*c*)—*Liability.*

It is the owner of the land at the time a public work is constructed that is entitled to damages for lands taken for, or injuriously affected by, such construction, and not his successor in title.

*Held*, in view of the opinions in *The City of Quebec* v. *The Queen* (24 S. C. R. 420) that where the injury to property does not occur on a public work the suppliant has no remedy under 50-51 Vict. c. 16 s. 16 (*c*), which provides that the Exchequer Court shall have jurisdiction in respect of: "Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

Where in the division of his land the owner dedicates a portion thereof to the public for a street or highway, a part of which is subsequently taken by the Crown for a public work, the owner is not entitled to compensation for the part so taken. *Stebbing* v. *The Metropolitan Board of Works* (L. R. 6. Q. B. 37), and *Paint* v. *The Queen* (2 Ex. C. R. 149 ; 18 S. C. R. 718) followed.

PETITION OF RIGHT for damages to lands alleged to have been caused by a public work through the negligence of the officers or servants of the Crown.

1900

LETOURNEUX v. THE QUEEN.

Argument of Counsel.

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

May 29th, 30th and 31st, 1900.

The case came on for trial at Montreal.

*L. T. Maréchal and J. de Boucherville* for suppliants;

*H. Hutchinson Q.C. and A. Globensky* for respondent.

June 27th, 1900.

The case now came on for argument.

*L. T. Maréchal* for the suppliant:

We have brought our claim within the meaning of sub-sec. (*c*) of sec. 16 of *The Exchequer Court Act*, by showing that the public work has increased the volume of water of the annual floods. The collecting drain built by the officers of the Government is responsible for the increased flooding, and that shows that it is badly and inefficiently constructed. It has diverted the natural course of the surface water into the River St. Pierre. This is an injury for which an action will lie. *Kerr on Injunctions* (1); *Bertrand* v *The Queen* (2) *Audette's Exch. Prac.* (3). Arts. 1067, 1073 C.C.L.C.

Then, again, the Government officers have been guilty of negligence in not keeping the river and culvert free from obstruction. The suppliant is entitled to past and future damages.

*A. Globensky* for the respondent:

The suppliant is not entitled to past damages, because the *auteur* could claim for them at any time.

The petition would not lie in any event, because there was no expropriation of any land from the suppliant, and the damage does not arise from the construction of a public work. Nor does it arise from the negligence of any officer or servant of the Crown while

(1) P. 364. (2) 2 Ex. C. R. 285.
(3) P. 103.

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acting within the scope of his duties or employment on a public work. *City of Quebec* v. *The Queen* (1); *Larose* v. *The Queen* (2).

*M. Hutchison Q.C.*, follows for the respondent:

The suppliant bought the property in 1892, and it was subject to being flooded then at certain seasons. Nothing was done by the Government since to increase the liability of the property to be flooded.

The injury did not arise 'on' a public work, and, therefore, it is not within the operation of 50-51 Vict. c. 16, sec. 16 (*c*). Then, there is no liability on the part of the Crown. *McFarlane* v. *The Queen* (3). There was no officer charged with the duty of keeping the culvert clear. *City of Quebec* v. *The Queen* (4). If there is negligence proved, not coming within sec. 16 of 50-51 Vict. c. 16, the Crown is not liable. *Burroughs* v. *The Queen* (5); *Kerr* v. *Atlantic and North-West Railway Co.* (6); *Martin* v. *The Queen.* (7).

THE JUDGE OF THE EXCHEQUER COURT now (November 15, 1900) delivered judgment.

The suppliant brings his petition to recover damages to lands at St. Henri, in the District of Montreal, of which he is seized. It is alleged that these damages, resulting from the flooding of the lands, have been occasioned "by the fault, guilt, negligence and wrong-"ful deeds of the Government of Canada, and more "especially of the Department of Railways and Canals, "and of the employees of the said Department while "acting within the scope of their duties and employ-"ment." The lands in question were purchased by the suppliant in 1891 and 1892 for the sum of $18,-

(1) 24 S. C. R. 420.
(2) 6 Ex. C. R. 425
(3) 7 S. C. R. 216.
(4) 24 S. C. R. at p. 434.
(5) 2 Ex. C. R. 293.
(6) 25 S. C. R. 197.
(7) 20 S. C. R. 240; Art. 2188 C. C. L. C.

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209.19. Omitting a claim of $544 for the value of land alleged to have been taken by the Government for works upon the River St. Pierre, to which it will be necessary to refer again, he claims for past damages a sum of $16,055.96, made up of interest upon capital invested, taxes paid, and damages to a house. For future damages he claims a sum of $51,542.90.

The lands are bounded on the south by the River St. Pierre, and are situated near the Lachine Canal, a public work of Canada. In their natural state they were low or bottom lands, liable to be wet, and at times to be flooded. Their condition has been affected from time to time by the construction of the canal and works done on it, and in improving the River St. Pierre. The canal was built a great many years ago, and the principal works of which the suppliant complains were constructed prior to the time when he acquired the property. On the whole it appears, I think, that its condition has been made better rather than worse by these works, though that is not a material issue in the case. If, in the time of some predecessor in title it may have been injuriously affected by the construction of some public work, such predecessor, and not the suppliant, would be entitled to the damages. Since 1891, the earliest date of the latter's title, a drain has been constructed along the canal to collect the leakage therefrom. This drain also carries some water from the neighbourhood of Lachine. Besides this the River St. Pierre has been deepened in part, and the work of deepening is proceeding. This deepening of the river does not injure, but benefits the suppliant's lands. As to the drain there is no doubt that to some extent, when there is a heavy rainfall, it enables the water to reach the part of the river adjacent to the suppliant's land more quickly than it otherwise would; but on the other hand it tends to keep the

lands higher up the river dry, and in consequence in condition to absorb more of the rainfall. On the whole I agree with the witnesses who think that there is nothing in this collecting drain in itself to occasion or increase the flooding of the suppliant's lands. The real cause, apart from natural causes, and the liability of land situated as this is to be occasionally flooded, is the siphon-culvert by which the River St. Pierre at a point below the suppliant's lands is carried under the canal. This siphon-culvert as it now exists was constructed in 1878 or 1879. The expert witnesses, the engineers called by the suppliant on the one side, and those called for the Crown on the other, differ as to its sufficiency for the purposes for which it was intended; but that as has already been observed is not a material issue now. The present owner has no claim to the damages, if any, occasioned to the lands in question by the construction of this culvert, in 1878 or 1879. So it seems to me that this is not a case in which the suppliant can recover for damages to property injuriously affected by the construction of a public work. (*The Exchequer Court Act*, s. 16 (*b*)).

Is it a claim arising out of any injury to property on a public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment? (*Ibid.* s. 16 (*c*)). I think it is a fair inference from the evidence, and I find that between January, 1897, when the diver Fitzpatrick examined it, and the 23rd of July, 1899, when this petition was brought, this culvert was allowed to fill up to some extent. In April, 1900, it was found to be badly choked, and it would, I think, take some time to get into the condition in which it was then found. But for Fitzpatrick's evidence I should have thought that perhaps the filling up had been going on from a time prior to 1897. The exami-

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nation he then made is, I think, sufficient to rebut any case of negligence to keep the culvert clear prior to that time, that otherwise might arise. It was the duty of the superintending officer of the Crown in charge of this work to see that this culvert was kept clear. The necessary money was voted, and so far as I can see there was no excuse for the failure to keep it in good order and condition. The result was that the suppliant's lands were flooded more than they otherwise would have been, and for this he is, I think, entitled to damages if his case is within the statute, giving the court jurisdiction, but not otherwise. (*The Exchequer Court Act*, s. 16 (*c*).)

A somewhat similar question arose in the case of *The City of Quebec* v. *The Queen* (1). In the view taken of the statute by the learned Chief Justice Sir Henry Strong and Mr. Justice Fournier in that case, the suppliant might, I think, in a case such as this, recover under the clause that gives the court jurisdiction arising under any law of Canada (s. 15 (*d*)). But that view does not appear to have had the support of the majority of the court. Then as to clause (*c*) which gives the court jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of the Crown's officer while acting within the scope of his duty or employment, Mr. Justice Gwynne and Mr. Justice King were of opinion that it did not apply in a case of injury to property not occurring upon a public work, and the Chief Justice and Mr. Justice Fournier, for reasons not stated, thought that the provision was not applicable to the case then before the court. Mr. Justice Taschereau concurred in the judgment dismissing the appeal, because in his opinion the rock upon which the citadel

(1) 24 S.C.R. 420.

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at Quebec rests is not a public work or a work at all, within the meaning of the statute, and the suppliant had failed to prove negligence. With regard to the place where the injury to property on a public work occurs, I have always been inclined to think—I express my view with great deference to the opinions of the learned judges who think otherwise—that it is sufficient to bring the case within the statute if the cause of the injury is or arises on the public work. It would, I think, be no answer to those entitled to bring an action for the death of any one on a public work to say that the death did not occur there, if the injury causing death was received on the work; and so it seems to me that the intention of the statute was to give a remedy to persons whose property is injured by the negligence of the Crown's officers in the discharge of their duties on public works, whether such property is actually on the public work, or being near enough thereto to be injured by such negligence is actually injured thereby. But in view of the concurrence of opinion of four of the learned judges who took part in *The City of Quebec case* (1) that clause (*c*) of section 16 of *The Exchequer Court Act* conferred no jurisdiction in the case therein set up, I am, I think, constrained to hold that it is not applicable to the case now under consideration.

Then with reference to the claim made by the suppliant for land taken for a public purpose, there is no evidence of any taking in the manner set out in the statute. (*The Expropriation Act* (2)). It appears, however, that in widening the River St. Pierre where it is adjacent to the suppliant's land, part of the bank was dug up and thrown back. There is nothing to show whether this was authorized or not; whether it was in fact a trespass or an expropriation of land. But

(1) 24 S. C. R. 420. (2) 52 Vict. c. 13, s. 8.

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assuming for the moment that it was an act of expropriation, it is clear, I think, that the suppliant cannot recover. For it appears that the portion of the bank so dug up and thrown back was part of a street or highway that the suppliant in 1892 dedicated to the public by registering the plan and subdivision of his property. For the taking by the Crown of a portion of this street, even if taken according to law, the suppliant would have no valid claim. *Stebbing* v. *The Metropolitan Board of Works* (1); *Paint* v. *The Queen* (2)

In conclusion, I may perhaps be permitted to say that I think the siphon-culvert that has been referred to ought to have been kept clean, and because it was not, the suppliant has, in respect of his property near thereto, suffered some loss and damage. Not that I think his damages from that cause to have been very considerable. The land affected was useful only for the purpose of selling it off for building lots; and there has been very little demand for them apart altogether from any additional flooding to which they were liable while the culvert was choked up. On that question the evidence of Mr. Mainwaring, a real estate agent called by the suppliant, is conclusive. He says that from the end of 1894 to 1899 there was no demand for real estate of this class. The market was practically dead. But it is possible that during the years 1897, 1898 and 1899 the sales may to some extent have been affected by the additional flooding to which the lands were liable because of the condition in which the siphon-culvert then was, and for any loss thereby suffered I should have awarded damages had I thougth that I had jurisdiction. There will be judgment for the respondent.

*Judgment accordingly.*

Solicitor for suppliant:—*L. T. Maréchal.*

Solicitor for respondent:—*A. Globensky.*

(1) L. R. 6 Q. B. 37. (2) 2 Ex. C.R. 149.; 18 S.C.R. 718.

THE BOSTON RUBBER SHOE COMPANY ..... } PLAINTIFF;

AND

THE BOSTON RUBBER COMPANY OF MONTREAL (Limited)..... } DEFENDANT.

1900
Nov. 15.

*Trade-mark—Infringement—Trade-Name—Statement of claim—Sufficiency of—Demurrer.*

In an action for infringement of a trade-mark, it is a sufficient allegation that the trade-mark used by the defendant is the registered trade-mark of the plaintiff to charge in the statement of claim that the registered trade-mark of the plaintiff and the mark used by the defendant are in their essential features the same.

2. It is not necessary in such statement of claim to allege that the imitation by the defendant of the plaintiff's trade-mark is a fraudulent imitation.

3. It is not necessary to allege that the defendant used the mark with intent to deceive, and to induce a belief that the goods on which their mark was used were made by the plaintiff.

DEMURRER to the statement of claim in an action for infringement of a trade-mark.

The statement of claim filed by plaintiff was, in substance, as follows:

"The plaintiff is a company duly incorporated in the year 1853 or thereabouts to carry on the business of manufacturing and selling rubber boots and shoes, having its chief place of business at the cities of Boston and Malden, State of Massachusetts, in the United States of America.

"The defendant is a company incorporated by letters-patent on or about the 27th day of November, 1896, under the laws of the Dominion of Canada to carry on a similar business to that of the plaintiff, and having its chief place of business in the City of Montrea., Canada.

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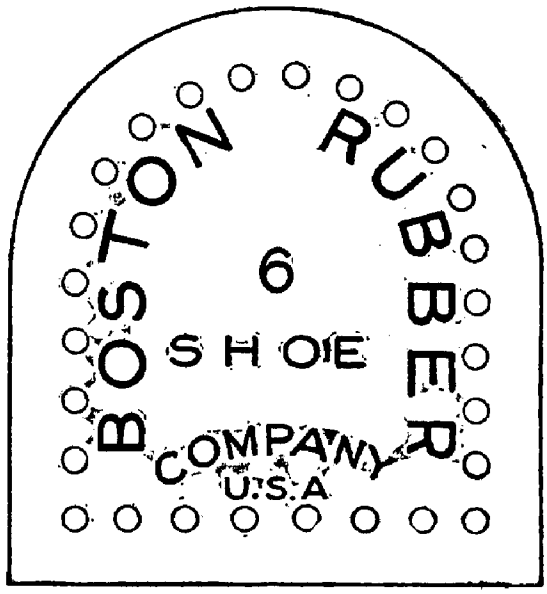
"That ever since its incorporation the plaintiff has been and still is carrying on the said business of manufacturing rubber boots and shoes and selling the same to dealers and consumers in the United States of America and in the City of Montreal and elsewhere throughout the Dominion of Canada, as well as in almost every other civilized country of the world.

"That ever since its incorporation the plaintiff has used as its trade-mark applied to and placed upon rubber boots and shoes so made and sold by it a mark the essential features of which consist of the words "Boston Rubber Shoe Company" generally arranged as follows;




but sometimes with the words otherwise arranged and with the form of the diagram altered or omitted.

"That the plaintiff is the owner of said mark, it or its predecessors in said business having been the first to use the same and having continuously down to the present time so used it.

"That the plaintiff's goods always were and are well and favourably known throughout Canada and other parts of the world by said trade mark and were

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purchased and dealt in under the description indicated by said mark.

"That on or about the second day of October, 1897, the said trade-mark was duly registered by the plaintiff in the Department of Agriculture of the Dominion of Canada under the statutes of Canada respecting registration of trade-marks and a certificate therefor duly granted to the plaintiff, and said mark had also been therefore duly registered as a trade-mark in the United States of America under the laws in force there in that behalf.

"That on or about the 21st October, 1896, the Toronto Rubber Shoe Manufacturing Company (Limited) obtained the registration under the statute of Canada respecting trade-marks of a specific trade-mark consisting of the word "Boston," and a certificate for such registration was duly granted to said last mentioned company and on or about the 20th September, 1897, by assignment duly made the plaintiff became and now is the assignee of all the right and title of said Toronto Rubber Shoe Manufacturing Company (Limited) to the said trade-mark.

"That in or prior to the year 1899 the defendant began and has ever since carried on the manufacture and sale in said City of Montreal and elsewhere in Canada of rubber boots and shoes of similar classes to those made and sold by the plaintiff and put thereupon and applied thereto as the defendant's mark the following:


said mark being placed upon the same part of the boot

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or shoe made by the defendant as the plaintiff on its boots and shoes used to place its said trade-mark.

"That said defendant has not obtained the registration of said mark under the statutes of Canada respecting trade-marks.

"The said mark so used by the defendant is in its essential features the same as that of the first mentioned trade-mark of the plaintiff or in any event resembles the same and is an imitation thereof and is an infringement of the plaintiff's said trade-mark.

"The said mark so used by the defendant so closely resembles in its essential features and mode of application upon similar classes of goods the said mark used by the plaintiff as to be calculated to mislead the public in Canada and elsewhere into believing that in purchasing the goods made by the defendant and so marked they are purchasing goods made by the plaintiff.

"That said mark so used by defendant is also in its essential features the same as the trade-mark secondly above mentioned and of which the plaintiff is assignee as aforesaid or in any event resembles the same and is an imitation and infringement thereof.

"The defendant has made and is still making large profits out of the sale in Canada of boots and shoes so marked by it as aforesaid which sales and profits have been brought about in whole or in part by reason of the purchasers of said boots and shoes being misled by said defendant's mark into purchasing the said goods made by the defendant believing them to be goods made by the plaintiff.

The plaintiff therefore prays:

"That the defendant may be restrained by the order and injunction of this honourable court from continuing to use the said mark now in use by the defendant or any other mark similar thereto upon rubber

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boots and shoes or any other goods made or sold by the defendant and from in any other way infringing the plaintiff's said registered marks or either of them.

"That the defendant may be restrained from making, selling or otherwise disposing of rubber boots and shoes made by the defendant with said mark now in use by the defendant as aforesaid or any other mark calculated to mislead the public into believing that in purchasing said goods they are purchasing goods made by the plaintiff.

"That the plaintiff may be paid by the defendant all damages that the plaintiff may have sustained or may hereafter sustain by reason of the infringement of the plaintiff's said marks or either of them by the defendant as aforesaid and may also be paid all profits that the defendant has made from sales by the defendant of rubber boots and shoes with said defendant's mark upon them to the public in the belief that they were buying goods made by the plaintiff, and all damages that the plaintiff may have otherwise sustained by the use of said mark by the defendant owing to its closely resembling said marks or either of them of the plaintiff.

"That a reference to ascertain such damages may be directed if thought necessary.

"That the plaintiff may have such further or other relief as may be considered just and may be paid the costs of this action.

To the statement of claim the defendant demurred in substance, as follows:

The defendant demurs to the plaintiff's statement of claim, and says that the same is bad in law on the ground that it is not alleged in said statement of claim that the mark alleged to have been put upon the rubber boots and shoes made and sold by the defendant is the registered trade-mark of plaintiff set forth in

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paragraph 4 of said statement or a fraudulent imitation thereof.

"Because it is not alleged that defendant's said mark is the trade-mark set forth in paragraph 8 of said statement or a fraudulent imitation thereof.

"Because it is not alleged in said statement of claim that defendant's said mark has been made or used by defendant with intent to deceive and to induce any person to believe that the goods on which the defendant's mark was used were made by plaintiff.

"Because it appears from the said statement of claim that the words of the defendant's mark as set forth in paragraph 9 of said statement are essentially the corporate name of the company defendant; and that the wording and arrangement thereof are entirely different from the wording and arrangement of plaintiff's alleged trade-mark.

"Because the registration of the word 'Boston' as alleged in paragraph 8 cannot prevent the use by the company defendant of its own corporate name or of the essential and prominent words of its said corporate name.

"Because it does not in any way appear from the allegations of said statement of claim that the defendant has infringed any trade-mark of the company plaintiff."

October 25th, 1900.

The demurrer now came on for argument.

*A. McGoun*, Q.C. for the defendant in support of demurrer:

It is not sufficient to allege that the defendant has infringed by imitating the plaintiff's mark; it should also be charged that the imitation was done fraudulently. Secondly, it is no infringement upon a trade-mark to merely use the name of a corporation upon

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the goods manufactured by that corporation. That is all the defendant has done here. The words used by us, and of which the plaintiff complains, are in effect the corporate name of our company. This is no infringement. *Browne on Trade-Marks* (1); *Faber* v. *Faber* (2); *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Co.* (3); *Colonial Life Assurance Co.* v. *Home and Colonial Assurance Co.* (4); *Sebastian on Trade-marks* (5); *Kerly on Trade-marks* (6).

*R. V. Sinclair, contra:*

Plainly under the 3rd section of *The Trade-mark and Design Act* and under the authorities, an innocent infringement may be restrained. *Sebastian on Trade-marks* (7); *Kerly on Trade-marks* (8); The English courts have always granted relief without proof of fraudulent use. *Millington* v. *Fox* (9). The defendant has no authority for the proposition that fraudulent intention should be alleged.

Secondly, the defendant cannot escape the consequences of its infringement by saying that it merely uses its corporate name on its goods. Our trade-mark was known to the trade before it secured its corporate existence. (*Tussaud* v. *Tussaud* (10); *Plant Seed Co.* v. *Michel Plant and Seed Co* (11); *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.* (12); *Sebastian on Trade-marks* (13).

By its demurrer the defendant admits that the public have been deceived into purchasing its goods

(1) 2nd ed., secs. 196, 420.
(2) 49 Barb. 357.
(3) 17 L. J. Ch. 37.
(4) 33 Beav. 548.
(5) 4th ed., p. 256.
(6) P. 398.
(7) 4th ed. p. 124.
(8) p. 4.
(9) 3 My. and Cr. 338;
(10) 44 Ch. Div. 678.
(11) 23 Mo. App. 579.
(12) 32 Fed. Rep. 94.
(13) 4th Ed. p. 221 and foot note.

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for those of the plaintiff. *Johnston* v. *Orr-Ewing* (1); *Rose* v. *McLean Publishing Co.* (2).

*A. McGoun*, Q.C. replied, citing 26 *Am. and Eng. Encycl. of Law* p. 444; *Browne on Trade-marks*, sec. 386.

THE JUDGE OF THE EXCHEQUER COURT now (November 15th, 1900) delivered judgment:

By the demurrer to the statement of claim it is admitted, among other things, that the defendant company put upon rubber boots and shoes, a mark that is in its essential features the same as the plaintiff's registered trade-mark used by the latter upon rubber boots and shoes manufactured by them; that the mark is placed on the same part of the boot or shoe; that in any event it resembles the plaintiff's trade-mark and is an imitation and infringement thereof. It is also admitted that the mark so used by the defendant so closely resembles in its essential features and mode of application to similar classes of goods the plaintiff's registered trade-mark as to be calculated to mislead the public of Canada and elsewhere into believing that in purchasing goods made by the defendant and so marked they are purchasing goods made by the plaintiff.

The grounds of the demurrer are in substance as follows:

First, that the statement of claim is bad in that it is not alleged therein that the mark used by the defendant is the registered trade-mark of the plaintiff. As to this it seems to me that the allegation that the plaintiff's trade-mark (which is alleged to be registered) and the mark used by the defendant are in their essential features the same, is sufficient. It may

(1) 7 App. Cas. 219. (2) 24 Ont. A. R. 240.

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as a matter of fact be that they are not; but for the purposes of the demurrer it is admitted that they are.

Secondly, it is objected that the statement of claim is bad because it is not alleged therein that the imitation by the defendant of the plaintiff's trade-mark is a fraudulent imitation. That, it seems to me, is not necessary. Imitation involves knowledge; and if one by a mark attached to his goods knowingly imitates another's trade-mark, I do not see very well how he is to expect a court to find that the thing is done innocently. Of course a trader may happen, without knowledge of another's trade-mark, to adopt the same mark, but it cannot in such a case be said with propriety that the mark so adopted is an imitation. But even in such a case the true owner is entitled to protection.

I am also of opinion that the third ground of demurrer cannot be sustained. It is objected that the statement of claim is bad because it is not alleged that the defendant used the mark with intent to deceive, and to induce a belief that the goods on which his mark was used were made by the plaintiff. But that again is not necessary, for the fraud that entitles the owner of the trade-mark to redress need not consist in an intention to deceive on the part of the defendant, but may consist in an actual deception, or in the creation of a probability of deception independently of any fraudulent intention. (*Sebastian's Law of Trade-Marks* (1)).

Then it is also argued that the statement of claim is bad because it appears from it that the mark used by the defendant is its corporate name. That will no doubt be an important fact in the defendant's favour when the case comes to be heard upon the merits; but it will not, it seems to me, constitute a good defence to the action if the facts that are admitted by the

(1) 4th Ed. 169.

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demurrer, as hereinbefore stated, are found to be the true facts of the case.

The demurrer is overruled. The defendant may, within twenty days, file a statement in defence, upon paying the plaintiff company its costs of the demurrer.

*Judgment accordingly.*

Solicitor for plaintiff: *R. V. Sinclair.*

Solicitors for defendant: *McGoun & England.*

BETWEEN

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

1900
Nov. 15.

AND

ELLEN O'BRYAN; THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY (LIMITED); MOIR, SON & CO.; HUGH D. McKENZIE; CHARLES COCHRAN, AND J. NORMAN RITCHIE, ADMINISTRATORS OF THE ESTATE OF JAMES S. COCHRAN AND WILLIAM F. PICKERING, AND JOHN WHITE ..... } DEFENDANTS.

*Subrogation—Essentials of—Volunteer—Evidence.*

The doctrine of subrogation is part of the law of the Province of Nova Scotia.

2. Subrogation arises either upon convention or by law, but in the Province of Nova Scotia the creditor must be a party to the convention. It is not sufficient that it be with the debtor only.

3. Subrogation by operation of law is recognized not only by the civil law, but it has been adopted and followed by courts administering the law of England.

4. It is an incident of the doctrine of subrogation that an obligation extinguished by a payment made by a third party is treated as still subsisting for his benefit.

5. Where one is entitled to be subrogated to the rights of a judgment-creditor he is to be subrogated to all and not to part only of the latter's rights in such judgment.

6. In a proceeding in the Exchequer Court of Canada, if a conflict arises between the rules of evidence established by a provincial statute and those subsisting by virtue of a Dominion statute, the latter will prevail.

*Semble*, a mere stranger, or volunteer, who pays the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and with-

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out being compelled to do so for the preservation of any rights or property of his own, cannot invoke the benefit of the doctrine of subrogation.

Argument of Counsel.

THIS case arose upon an information filed by the Crown for the purpose of expropriating certain lands in Halifax, N.S., for the use of the Intercolonial Railway.

The Crown tendered the parties entitled to the same the sum of $1,000 in full of compensation and damages, and this sum was agreed upon by the defendants as sufficient, but a dispute arose between them as to those really entitled to the compensation.

The facts are stated in the reasons for judgment.

November 1st, 1899.

*H. Mellish* for plaintiff;

*W. W. Walsh*, *H. McInnes*, and *J. A. Chisholm* for the defendants.

The trial of the case was begun at Halifax, N.S.; after hearing several witnesses the Judge of the Exchequer Court referred the case to a special referee for enquiry and report. The referee's report was filed on the 5th March, 1900. The effect of the report is stated in the reasons for judgment.

March 12th, 1900.

*R. L. Borden*, Q.C., on behalf of the defendants appealing, contended that the defendant White was not entitled to be subrogated to the rights of the defendant McKenzie by merely paying off the latter's judgment. There was no agreement between McKenzie and White for that purpose, and White was merely a volunteer. *Sheldon on Subrogation* (1); *Shinn* v. *Budd* (2); *Sanford* v. *McLean* (3); *Hoover* v. *Epler* (4).

(1) Pars. 2, 3, 240.
(2) 14 N.J. Eq. 234.
(3) 3 Paige 117.
(4) 52 Penn. 522.

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Argument of Counsel.

Under the law of Nova Scotia, subrogation cannot be effected by an agreement between the judgment-debtor and a third person discharging the judgment. The judgment-creditor must be a party to such agreement. (24 *Am. & Eng. Ency. of Law* 291).

When McKenzie gave a satisfaction piece to Horley, one of the judgment-debtors under his judgment, the judgment was thereby discharged against all the defendants, and no one could have any rights as creditor under it.

Then, again, White's evidence as to conversations with the deceased husband of the defendant O'Bryan is inadmissible. (*R. S N. S. 5th Ser. c.* 107.) The referee erred in admitting this evidence, which was offered to show that the deceased assented to an arrangement whereby White was to be subrogated to McKenzie's interests when he paid off the latter's judgment.

*R. G. Code*, for the defendants McKenzie and White, *contra*, contended that there was no discharge of all the judgment-debtors by reason of McKenzie signing a satisfaction piece to one of the judgment-debtors. It is a part of the doctrine of subrogation that an obligation extinguished by the payment of the third party is treated as still subsisting for his benefit. *Sheldon on Subrogation*, par. 1; *Brown* v. *McLean* (1); *Abell* v. *Morrison.* (2).

June 19th, 1900.

Judgment by consent allowing defendant O'Bryan $192.92 as her share of the compensation money, together with $35 as her costs.

THE JUDGE OF THE EXCHEQUER COURT now (November 15th, 1900) delivered judgment.

(1) 18 Ont. R. 533.

(2) 19 Ont. R. 669.

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The Crown in this case offers to pay to the defendants, or to such of them as are entitled thereto, the sum of one thousand dollars as compensation for the lands described in the information, and it is conceded by all parties that the amount is sufficient. The claim of the defendant, Ellen O'Bryan, to a first charge upon the same in respect of her right of dower in the lands in question is not disputed by any one; and a declaration has already been made that she is entitled to be paid the sum of one hundred and ninety-two dollars and ninety-seven cents in satisfaction of her right of dower.

For the balance of eight hundred and seven dollars and three cents there are on the present appeal from the report of the learned referee two claimants; the defendant John White, and the defendant company The British and Foreign Marine Insurance Company, Limited. If the latter should succeed against White, a question would arise between them and the defendants Moir, Son & Co., which by arrangement between themselves has been deferred and is not now in controversy.

The Crown acquired title to the lands in question on the 19th of August, 1898. The allegation in the fifth paragraph of the information that it was acquired on the 3rd of November, 1894, is an error that has been corrected by an admission of the parties interested, filed in this court on the 5th of July last.

The question, then, is as to the respective rights or interests of the defendant White, and The British and Foreign Marine Insurance Company, Limited, in the lands mentioned in the information on the 19th day of August, 1898.

One Edward O'Bryan, who died some years prior to 1898, had in his lifetime been seized in fee of these and other lands in the City and County of Halifax, subject to a number of judgments that had been

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recorded against them. At present we are concerned with two only of these charges upon the lands of the deceased, one a judgment in favour of Hugh D. McKenzie for $1,019.61, duly registered on the 20th of June, 1891; and the other in favour of The British and Foreign Marine Insurance Company, Limited, for $755.48, duly registered on the 3rd of May, 1892. The judgment that McKenzie held against O'Bryan was obtained upon a promissory note of which one Horley was the maker for O'Bryan's accommodation, and upon which McKenzie had also obtained a judgment against Horley. The debt due by O'Bryan and Horley to McKenzie was discharged by the defendant White, under circumstances to be referred to, and he claims to be subrogated to McKenzie's rights at the time in the judgment registered against O'Bryan's lands. On the 1st day of June, 1891, the City of Halifax, in consideration of $20,200, conveyed to O'Bryan the property and premises at Halifax known as "The City Market Property." On the 20th of the same month O'Bryan mortgaged the property to one Corbett to secure the repayment of the sum of $20,000. The deed, the mortgage, and McKenzie's judgment were all registered on the same day, the 20th of June, 1891. On the same day also an indenture by way of agreement under seal was made and executed between O'Bryan and Corbett by which the interest of O'Bryan in any money he might be entitled, on the sale of the said property, to receive after Corbett's claims were satisfied, was assigned to Corbett to pay the sum of $4,000, with interest, to the defendant White. This indenture was duly recorded on the 29th of June, 1891. White finding that the McKenzie judgment constituted a prior charge to the agreement by which he became interested in "The City Market Property" paid or discharged the judgment, under, he alleges, an agreement

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with O'Bryan that he, White, should in respect of such judgment stand in McKenzie's shoes. McKenzie was not a party to the agreement and at the time knew nothing of it. Being paid, he signed on the 11th of June, 1891, a satisfaction piece in respect of the judgment against Horley, whose goods were at the time under seizure. By an indenture bearing date of the 4th of May, 1898, but in fact executed and registered after the Crown had acquired title to the lands, the compensation for which is in question here, McKenzie assigned any interest that he had in the said judgment to the defendant White.

Now it is, I think, clear that White's position as to the compensation money, and his claim thereto, is not in any way assisted by this assignment. In determining who is entitled one must look at the state of the title and the condition of things as they existed on the 19th day of August, 1898, when the lands became vested in the Crown. If at that date White was not entitled, the subsequent assignment will not assist, though of course it does not prejudice, his claim.

With reference to the arrangement between White and O'Bryan, to which McKenzie was not a party, by which it was intended that White should have McKenzie's rights in the judgment against O'Bryan, it is contended that such an agreement made with the judgment-debtor only is sufficient. In support of that view reference is made to the *American and English Encyclopedia of Law*, (Volume 24, page 291,) where it is stated that such a convention or agreement may be made either with the debtor or creditor. But it will be observed that the cases, on the authority of which that proposition is made, were decided by the Supreme Court of Louisiana, and in that State as in the Province of Quebec, the rules of law as to subrogation form part of the Civil Code. (Civil Code, Lower

Canada, Arts. 1154-1157; Revised Code Louisiana (1870) Arts. 2159-2162). By the laws both of the Province and State mentioned subrogation is either conventional or legal, and the convention may be either with the creditor or the debtor, under the circumstances mentioned in the Code. But in the latter case certain prescribed incidents are necessary to the validity of the proceeding. There is no similar law in force in the Province of Nova Scotia; and the requisites of a valid subrogation in such a case are wholly wanting here.

There is, however, a subrogation which takes place by operation of law, which is recognized not only by the Civil Law on which the Codes referred to are founded, but which has been adopted and followed by courts administering the common law of England.

With reference to this doctrine I cannot, I think, do better than to give at length an extract from the opinion of the Supreme Court of the United States delivered by Mr. Justice Miller in the case of *The Aetna Life Insurance Company* v. *Middleport* : (1)

"One of the principles lying at the foundation of "subrogation in equity, in addition to the one already "stated, that the person seeking this subrogation must "have paid the debt, is that he must have done this "under some necessity, to save himself from loss "which might arise or accrue to him by the enforce- "ment of the debt in the hands of the original cred- "itor; that, being forced under such circumstances to "pay off the debt of a creditor who had some superior "lien or right to his own, he could for that reason be "subrogated to such rights as the creditor, whose debt "he had paid, had against the original debtor * *
* * * * * *

(1) 124 U. S. R. at p. 547.

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"These propositions are very clearly stated in a use-
"ful monograph on the *Law of Subrogation*, by Henry
"N. Sheldon, and are well established by the author-
"ities which he cites. The doctrine of subrogation is
"derived from the civil law, and 'it is said to be a
"legal fiction, by force of which an obligation extin-
"guished by a payment made by a third person is
"treated as still subsisting for the benefit of this third
"person, so that by means of it one creditor is sub-
"stituted to the rights, remedies and securities of an-
"other..... It takes place for the benefit of a person
"who, being himself a creditor, pays another creditor
"whose debt is preferred to his by reason of privileges
"or mortgages, being obliged to make the payment,
"either as standing in the situation of a surety, or that
"he may remove a prior incumbrance from the prop-
"erty on which he relies to secure his payment. Sub-
"rogation as a matter of right, independently of agree-
"ment, takes place only for the benefit of insurers;
"or of one, who, being himself a creditor, has satisfied
"the lien of a prior creditor; or for the benefit of a
"purchaser who has extinguished an incumbrance
"upon the estate which he has purchased; or of a
"co-obligor or surety who has paid the debt which
"ought, in whole or in part, to have been met by
"another.'" *Sheldon on Subrogation.* (1)

"In par. 240 it is said: 'The doctrine of subrogation
"is not applied for the mere stranger or volunteer,
"who has paid the debt of another, without any
"assignment, or agreement for subrogation, without
"being under any legal obligation to make the pay-
"ment, and without being compelled to do so for
"the preservation of any rights or property of his
"own.'"

(1) Pars. 2, 3.

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"This is sustained by a reference to the cases of "*Shinn v. Budd* (1): *Sandford v. McLean* (2): *Hoover v.* "*Epler* (3). In *Gadsden v. Brown* (4), Chancellor John- "son says:—'The doctrine of subrogation is a pure "unmixed equity having its foundation in the prin- "ciples of natural justice, and from its very nature 'never could have been intended for the relief of those "who were in any condition in which they were at "liberty to elect whether they would or would not "be bound; and, as far as I have been able to learn its "history, it never has been so applied. If one with "the perfect knowledge of the facts will part with his "money, or bind himself by his contract in a sufficient "consideration, any rule of law which would restore "him his money or absolve him from his contract "would subvert the rules of social order. It has been "directed in its application exclusively to the relief of 'those that were already bound who could not but "choose to abide the penalty.'"

"This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere."

"Chancellor Walworth, in the case of *Sandford v. McLean* (5); said:—'It is only in cases where the "person advancing money to pay the debt of a third "party stands in the situation of a surety, or is com- "pelled to pay it to protect his own rights, that a court "of equity substitutes him in the place of the creditor, "as a matter of course, without any agreement to that "effect. In other cases the demand of a creditor which "is paid with the money of a third person, and without "any agreement that the security shall be assigned or "kept on foot for the benefit of such third person, is "absolutely extinguished.'"

(1) 14 N. J. Eq. (1 McCarter) 234.
(2) 3 Paige, 117.
(3) 52 Penn. 522.
(4) Speer's Eq. (So. Car.) 37, 41.
(5) 3 Paige, 122.

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"In *Memphis & Little Rock Railroad v. Dow* (1), "this court said ;—'The right of subrogation is not "founded on contract. It is a creation of equity ; is "enforced solely for the purpose of accomplishing the "ends of substantial justice, and is independent of any "contractual relations between the parties.'"

"In the case of *Shinn v. Budd*, (2) the New Jersey "Chancellor said : (3)

"'Subrogation as a matter of right, as it exists in "the civil law, from which the term has been borrowed "and adopted in our own, is never applied in aid of a "mere volunteer. Legal substitution into the rights "of a creditor, for the benefit of a third person, takes "place only for his benefit who, being himself a credit- "or, satisfies the lien of a prior creditor, or for the "benefit of a purchaser who extinguishes the encum- "brances upon his estate, or of a co-obligor or surety "who discharges the debt, or of an heir who pays the "debts of the succession." (Code Napoléon, book 3, "tit. 3 art. 1251 ; Civil Code of Louisiana, art. 2157 ; 1 "Pothier on Oblig. part 3, c. 1, art. 6, sec. 2.) 'We are "ignorant, say the Supreme Court of Louisiana, of "any law which gives to the party who furnishes "money for the payment of a debt the rights of the "creditor who is thus paid. The legal claim alone "belongs not to all who pay a debt, but only to him "who, being bound for it, discharges it.' *Nolte & Co.* "*v. Their Creditors* (4) ; *Curtis v. Kitchen* (5) ; *Cox v.* "*Baldwin* (6). The principle of legal substitution, as "adopted and applied in our system of equity, has, it "is believed, been rigidly restrained within these "limits.'"

(1) 120 U. S. 287.
(2) 14 N. J. Eq. (1 McCarter) 234.
(3) At pp. 236, 237.
(4) 9 Martin 602 ;
(5) 8 Martin 706 ;
(6) 1 Miller's Louis. R. 147.

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"The cases here referred to as having been decided "in the Supreme Court of Louisiana are especially "applicable, as the Code of that State is in the main "founded on the civil law from which this right of "subrogation has been adopted by the chancery courts "of this country. The latest case upon this subject is "one from the appellate court of the State of Illinois, "*Suppiger* v. *Garrels* (1); the substance of which is "thus stated in the syllabus:—

"'Subrogation in equity is confined to the relation "of principal and surety and guarantors, to cases "where a person to protect his own junior lien is com-"pelled to remove one which is superior, and to cases "of insurance. * * * Any one who is under no "legal obligation or liability to pay the debt is a "stranger, and, if he pays the debt, a mere volunteer.'"

The doctrine of subrogation by operation of law has also been adopted and acted upon by courts of the Province of Ontario. *Brown* v. *McLean* (2); *Abell* v. *Morrison* (3).

It is objected, however, to White's claim that McKenzie's judgment was paid; and that the discharge of Horley discharged O'Bryan. That must, I think, be conceded; but it is not conclusive against White, for it is an incident of the doctrine of subrogation that an obligation extinguished by a payment made by a third party is treated as still subsisting for his benefit. Then it is further objected to White's claim that he did not pay O'Bryan's debt to protect an interest in the property from the expropriation of which the right to compensation arises. He paid it to protect his interest in other lands of O'Bryan. But if he ought, under the circumstances disclosed in this case, to be subrogated by operation of law to McKenzie's rights under the

(1) 20 Bradwell Ill. App. 625. (2) 18 Ont. R. 533.
(3) 19 Ont. R. 669.

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judgment (and I think he ought to be) then he is, it seems to me, entitled to be subrogated to all and not to part only of the latter's rights and interests therein.

There is a question of evidence to which some reference ought perhaps to be made. All of White's testimony relative to the arrangement whereby McKenzie's rights and interests in the judgment against O'Bryan were to be reserved to White, was objected to as inadmissible in view of the provisions of Chapter 107 of *The Revised Statutes of Nova Scotia*, 5th Series, "Of Witnesses and Evidence". After consideration the learned referee admitted the evidence, and I think rightly. By the 21st section of *The Canada Evidence Act*, 1893 (1), it is provided that in all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, shall, subject to the provisions of that and other Acts of the Parliament of Canada, apply to such proceedings. By the 3rd section of the Act it is provided that a person shall not be incompetent to give evidence by reason of interest or crime. *The Nova Scotia Evidence Act* contains a similar provision (2); but it also contains a proviso (3) that in any proceeding brought by or against the executor or administrator of a deceased person, it shall not be competent for any other of the parties to such proceeding to give evidence of dealings, agreements or conversations with the deceased. The present proceeding, however, is not one by or against the executor or administrator of O'Bryan. That is one answer to the objection. Then the Canadian statute expressly provides that a witness shall not be incompetent by reason of interest, and there is no qualification or proviso. In a proceeding in this court the Act of Parlia-

(1) 56 Vict. c. 31. (2) R.S.N.S. 5th ser. c. 107, s. 15.
(3) Section 16.

ment and not the proviso contained in the Nova Scotia statute must be followed. The question is, however, of no considerable importance in this case, if White's right to compensation depends upon legal and not upon conventional subrogation.

In the opinion of the learned referee, White's proof of the amount of his claim against O'Bryan was unsatisfactory. He seems, however, to think that the was at least as much due to him as would exhaust the sum with which the court has to deal, and in that view I am inclined to concur. I think, however, that it would not be unreasonable, if the other claimants desire it, to send the matter back to the referee to take further evidence as to the state of the accounts between White and O'Bryan, it being understood of course that in respect of any such further proceeding the costs must abide the event.

If the other claimants do not desire this, there will be a declaration that the defendant White is entitled to the balance of the compensation money, that is, to the sum of eight hundred and seven dollars and three cents; and (with the exception of the defendant Ellen O'Bryan, as to whose costs an order has already been made) there will be no costs to any of the defendants, either against the Crown, or as between themselves.

*Judgment accordingly.*

Solicitors for plaintiff:—*W. B. Ross.*

Solicitors for defendants:—

Moir Son & Co.—*J. A. Chisholm,*
do do The British and Foreign Marine Insurance Co.—*W. H. Fulton,*
do do Hugh D. McKenzie:—*W. A. Henry,*
do do Ellen O'Bryan:—*W. W. Walsh,*
do added defendant John White:—*Drysdale & McInnes.*

1900
Dec. 10.

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

AND

N. K. CONNOLLY, MICHAEL CONNOLLY AND JOHN CONNOR DEFENDANTS.

*Garnishee process, Crown seeking same—English Order 45, Rule 1—Practice.*

Order 45 of the English Rules respecting garnishee process is not applicable to a proceeding by Information by the Crown. The Crown's remedy is by Writ of Extent.

THIS was an application, in Chambers, by the Crown, for a summons to show cause why a garnishee order should not be made against the Hobbs Hardware Company of London, Ontario, alleged to be indebted to the defendant John Connor, a judgment-debtor of the Crown, in the sum of $1,000 and upwards.

December, 10th, 1900.

*Glyn Osler*, in support of the application, cited *The Exchequer Court Act* sec. 21. This invokes the provisions of English Order 45. Under the practice established by that Order, garnishee process may be issued to attach a debt due to the Crown.

The Crown is a 'person' within the meaning of the English order referred to.

It cannot be said that Rule 46 of the Exchequer Court Rules cuts out the operation of the English rules invoked by Rule 2 of November 13th, 1891 (1); for Rule 46 only provides for a writ of immediate extent against the Crown's debtor. It leaves untouched the remedy sought here.

(1) Audette's Exch. Prac., p. 222.

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THE JUDGE OF THE EXCHEQUER COURT:—The proceedings in this suit were begun by information, and so far as no special provision as to the practice is made by the rules of this court, it is governed by the practice on the Revenue side of the Queen's Bench Division of the High Court of Justice in England.

By English Order 68, subject to certain exceptions not affecting this application, it is provided that nothing in the rules, of which that Order is one, shall apply to proceedings on the Revenue side of the Queen's Bench Division. By clause 2 of Order 68 certain specified Orders are made applicable to proceedings on the Revenue side of the Queen's Bench Division, but Order 45 which provides for garnishee process is not enumerated amongst them.

Even if Order 45 of the English Rules were applicable, a further difficulty would arise as to whether the Crown was included in the expression 'person' used in the Order.

The Crown is not without an appropriate remedy by Writ of Extent.

The application will be refused.

*Application refused.*

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Jan. 23.

TORONTO ADMIRALTY DISTRICT.

THE ROCHESTER & PITTSBURG COAL AND IRON COMPANY..... | PLAINTIFFS;

AGAINST

THE SHIP "*THE GARDEN CITY*."

(THOMAS NIHAN—REGISTERED OWNER.)

*Action for necessaries—Meaning of word 'owner'—'Domicile.'*

An action *in rem* for necessaries will not lie against a ship if supplied to a charterer, who also engages the crew, in a port other than her home port, if it is shown at the time the writ issued an owner or part owner was domiciled in Canada.

The Admiralty Act of 1861, sec. 5 (Imp.) enacts: "That the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." By the *Colonial Courts of Admiralty Act*, 1890, and the Canada Admiralty Act, 1891, the Admiralty Act of 1861 (Imp.) is brought into force in Canada.

*Held*, That the word 'owner' used in sec. 5 of the Admiralty Act of 1861, means 'registered owner' or a person entitled to be registered as owner, and not a *pro hâc vice* owner. The word 'Canada' is to be read in the place of 'England and Wales.' The word 'domicile' must be understood in the ordinary legal sense.

*Semble*, That wherever a maritime lien is created in favour of any one against the ship, it is not essential to further establish personal liability against the owner.

THIS was a motion made by the owner of the ship to set aside the Writ of Summons and all proceedings herein, on the ground of want of jurisdiction, this being an action for necessaries, and an owner of the ship resident in the Province of Ontario.

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Argument of Counsel.

The motion came on for argument on the 6th day of July, 1900.

*H. J. Wright*, for owner of ship, cited the following cases in support of motion: *Dean* v. *Hogg* (1); *Fletcher* v. *Braddick* (2); *Cox* v. *Reid* (3); *Harder* v. *Brotherstone* (4); *The Aneroid* (5); *Lucas* v. *Nockells* (6); *The Pacific* (7); *The Two Ellens* (8); *The Druid* (9).

*T. Mulvey* for plaintiffs:

The only point in question on the pending motion is the interpretation of sec. 5 of 25 Vict. c. 10 (Imp.), worded as follows:

"The High Court of Admiralty shall have jurisdiction for any claims for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

The defendant contends that the words 'any owner or part owner of the ship' relate to the immediately preceding words 'at the time of institution of the cause,' and the interpretation to be placed on the section is that irrespective of the ownership of the ship at the time the necessaries are purchased, that if any owner is resident within the jurisdiction at the time the action is commenced the court has no jurisdiction.

On the other hand the plaintiff contends that the words 'any owner or part owner of the ship' refer to the owner at the time the necessaries were purchased and if no owner or part owner was resident within jurisdiction at the time the action was instituted, then the court has jurisdiction.

(1) 10 Bing. 345.
(2) 2 B. & P. (N. R.) 182.
(3) 1 C. & P. 602.
(4) 4 Campb. 254.
(5) 2 P. D. 189.
(6) 4 Bing. 729.
(7) Br. & Lush 243.
(8) L. R. 4 P. C. 161.
(9) 1 Wm. Rob. 391.

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Argument of Counsel.

It is not contended by the plaintiff here that they have a maritime lien upon the vessel. They claim merely a right *in rem* under sec. 35 of the Act of 1861.

First: In support of the plaintiff's contention that the words 'owner or part owner of the ship' relate to the ownership at the time the necessaries were supplied, it is submitted that this interpretation must be placed upon the section, otherwise one of the most important objects of the section would be frustrated. At common law no action can be maintained except under contract or one made through their agents authorized for that purpose. The master is, of course, such an agent, and if the master orders, the owners are liable. If the vessel should be sold there would be no claim against the purchaser because it is assumed that the master who made the purchase was not the master employed by the owner at the time the necessaries were supplied. In this case there can be no claim against Nihan, because under the charterparty it is expressly provided that the master was not his servant but the servant of the charterer. The object of the section is to give a right *in rem* where on account of the bankruptcy or absence from the jurisdiction of the owner no effective remedy can be given at common law. In support of this contention the following cases are submitted: *The Ella A. Clark* (1); *The Pacific* (2).

In the case last cited, Dr. Lushington, in short (considering 25 Vict. c. 10, s. 5) says that the remedy against the ship is given only when a personal action against the owner would be fruitless, and not even then where the supply is to be assumed to have been made on his personal credit.

The next point for consideration is the meaning of the phrase 'owner or part owner' where it appears in

(1) B. & Lush 32. (2) B. & Lush. 243.

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the section. It is submitted that this is a case of *locatio navis*. It is true that the owner under the charterparty had the right to select and appoint the captain and chief engineer. See clause 2 of charterparty. But by clause 5 it was provided that notwithstanding the right of the owner to appoint the captain and chief engineer, they, with the crew, were to be under the order and control solely of the charterer and not deemed the employees or servants of the owner. Lord Tenterden in the 5th ed. of *Abbott on Shipping*, laid down the following rules for ascertaining in whose possession a vessel may properly be said to be. They are:

"1. That although by the language of the charterparty it may be expressed that the owner or master lets the ship to freight, this phrase does not necessarily import that the possession of the ship is given up to and taken by the charterer.

"2. That it must depend on the terms of the instrument taken altogether, and

"3. Upon the purpose and objects of it. (1)

These rules are laid down in considering claims of the owner for a lien for freight. There is no lien where the possession of the ship passed to the charterer. *Hutton* v. *Bragg* (2) was decided upon consideration of the nature of a lien, as being a right to detain something of which the party claiming the right has already the possession; and as the entire ship was left to freight, the merchant charterer (who became bankrupt) was considered to be the owner *pro tempore* and the goods on board to be in his possession, not in the possession of the owner who had let out the ship.

This case was considered in *Dean* v. *Hogg* (3), and the above rules 2 and 3 are the proper means of ascertain-

(1) See *Abbott on Shipping*, 13th ed. p. 246.

(2) 7 Taunt. 14.

(3) 10 Bing. 345.

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ing the law. (See also *Belcher* v. *Capper* (1); *Trinity House* v. *Clark* (2); *Saville* v. *Campion* (3).

The charterparty in the latter case expressly gives the full control of the vessel to the charterer, and it is submitted that this case so far as the possession is concerned is on all fours. *Baumwoll Manufactur* v. *Furness* (4); *The Tasmania* (5).

Referring to the case, cited on behalf of the defendant, of *Dean* v. *Hogg* (6), it is submitted that this case is not in point. The owner's captain was not the owner's servant here. The captain was expressly declared to be the servant of the charterer. *Fletcher* v. *Braddick* (7).

*The Tasmania* (8) is a more recent and more satisfactory authority upon the questions raised in this case. *Cox* v. *Reid* (9); and *Harder* v. *Brotherstone* (10) raises questions of contract which are not raised in this motion, and add no light whatever to the discussion of the subject in hand.

*The Aneroid* (11). It is not contended that the plaintiff has a maritime lien. They have a right *in rem* under sec. 35 of the Act of 1861. As to *Lucas* v. *Nockells* (12), this case creates no difficulty.

In *Baumwoll Manufactur* v. *Furness* (13), Lord Herschell, says as follows: "The person who has the absolute right of the ship, who is the registered owner, the owner, (to borrow an expression from real property law) in fee simple, may properly be spoken of, no doubt, as the owner, but, at the same time, he may have so dealt with the vessel as to have given all

(1) 11 L. J. C. P. (N. S.) 274.
(2) 4 M. & S. 288.
(3) 2 B. & Ald. 503.
(4) [1893] A. C. 8.
(5) 13 P. D. 110.
(6) 10 Bing. 345.
(7) 2 B. & P. (N.R.) 182.
(8) 13 P. D. 110.
(9) 1 C. & P. 602.
(10) 4 Camp. 254.
(11) 2 P. D. 189.
(12) 4 Bing. 729.
(13) [1893] A. C. at p. 17.

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right of ownership for a limited time to some other person who may equally be spoken of as the owner. Similarly under real property law, the lessee as well as the lessor has the right to maintain an action for trespass.

As to *The Pacific* (1) and *The Two Ellens* (2), these cases merely decide that a claim for necessaries does not give a maritime lien, and it is not contended here that they do. *Reeve* v. *Davis* (3). The charterer in this case was also the master.

Littledale, J. said: "The rule is that upon a general order for repairs given by the captain, the party executing them has the security of the ship, of the captain and of the owners; but in an action against parties as owners, the question is who are so for this purpose? The persons registered are not necessarily so; the Register Acts were not passed for this purpose, and the question of ownership, as it regards the liability for repairs, must be considered as it would have been before those Acts passed."

This case is considered in *Abbott on Shipping* (4) as a case of *locatio navis*.

As to *The Druid* (5) this case does not give a complete statement of the law as decided in subsequent cases. It is considered, and this point is developed, in *The Tasmania* (6). See also *Colvin* v. *Newberry* (7).

*H. J. Wright*, in reply:

The words of the statute 24 Vict. chap. 10, (Imp.) sec. 5, (on which the defendant relies) are so explicit that no room whatever is left for argument as to their meaning. My learned friend has failed to cite any cases bearing on that section, while he tries to dismiss

(1) B. & Lush. 243.
(2) L. R. 4 P. C. 161.
(3) 1 A. & E. at p. 315.
(4) P. 59, 13 ed
(5) 1. Wm. Rob. 391.
(6) 13 P. D. 110.
(7) 7 Bing. 190; 33 Rev. Reports 437.

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the cases cited on behalf of the defendant by the broad contention that they do not apply, giving no sufficient reason for such contention. I submit that the point resolves itself into the meaning of the word 'owner,' and my learned friend is seeking to give it a meaning which it cannot possibly bear within the contemplation of the statute, otherwise the words of the statute would have been extended. The word 'owner' means either the 'registered owner' or the 'real owner.' Thomas Nihan, owner of *The Garden City* is both. The charterer, who, it is contended on behalf of the plaintiffs, was some sort of an owner, is not and never was either registered or beneficial owner, and it would, I submit, be extending the meaning beyond all precedence to hold that the charterer was included in the word 'owner' within the meaning of the statute. Apart altogether from this it is expressly contrary to the terms of the charterparty agreement for the charterer to render the boat in any way liable for the coal supplied; and I ask that the plaintiffs' action be dismissed with costs as being without the jurisdiction of this court.

McDOUGALL, L. J. now (January 23rd, 1901) delivered judgment:

This is an action *in rem* brought by the plaintiffs to recover the price of certain coal supplied to *The Garden City*, at Buffalo, in June and August, 1896.

*The Garden City* is a British ship, and during the summer of 1896 was chartered to one William P. Goodenough, of Buffalo, to ply between Buffalo and Crystal Beach, or Victoria, in Canada; the charterer to pay $5,000 for the season, and also to pay all expenses or outlay of every kind, including the wages of the crew, master and engineer, during the period of the charter. The charterer was to appoint and employ

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the crew, except the master and engineer, who were to be appointed by the owner but paid by the charterer, in other words the vessel, with all her appointments, was handed over at the beginning of the season to the charterer, and was to be re-delivered by him to the owner, at Port Dalhousie, at its conclusion, free from any liens, charges, or claims whatsoever incurred during the period unless the same had been incurred by the owner. It was also expressly stipulated that the master and engineer, though appointed by the owner of the ship, were not to be deemed in any sense the servants of the owner.

During the season, and to enable the steamer to make her trips, the coal in question was supplied by the plaintiffs upon either the charterer's or the master's orders. The charterer did not pay; and the plaintiffs now seek to make the ship liable for the same, claiming the right to an action *in rem* under 24 Vict. chap. 10 (Imp.) sec. 5 (*Admiralty Act of* 1861) which enacts, "that the High Court of Admiralty shall have "jurisdiction over any claim for necessaries supplied "to any ship elsewhere than in the port to which the "ship belongs, unless it is shown to the satisfaction of "the court that at the time of the institution of the "cause any owner or part owner of the ship is domi-"ciled in England or Wales."

The owner of *The Garden City* is domiciled at St. Catharines, in Ontario, within the Dominion of Canada, and was so domiciled at the institution of the present action, the 8th June, 1900. A great number of cases were cited upon the argument of this motion to set aside the writ of summons and service with a view to indicate the application of this section of the statute to the facts of this case and also as to the meaning of the word 'owner.' It was admitted for the plaintiffs that they did not possess a maritime lien; and that

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any right they did possess which would enable them to bring the present action must depend upon the construction to be placed on the above-cited section of the Act of 1861. It was not seriously contended that the registered owner, Mr. Nihan, was in any sense personally liable for the claim sued for.

I find that the latest decision which deals with the whole matter, the judgment referring to nearly every case theretofore decided, is *The Ripon City* (1).

That case determined that the master of the vessel appointed by persons who were not the real owners of the ship, but who had been allowed by the real owners to remain in possession and to have control of the vessel for the purpose of using her in an ordinary way, in the particular case, had a maritime lien on the ship for his disbursements and for liabilities properly incurred by him on account of the ship, although the owners of the ship may not have been personally liable for the disbursements or the matters in respect to which the liabilities had been incurred. The master was held entitled to recover against the ship the amount of certain bills which he had drawn upon the persons who had the control of the ship in favour of certain foreign coal merchants who had supplied the ship with coal to enable her to pursue her voyages. By force of this determination the coal merchants recovered their claims, for the master, obtaining judgment against the ship for the amount of the drafts drawn by him upon his employers—which drafts had been dishonoured by them, they having become bankrupt—was enabled to pay the coal merchants and thus discharge himself from his personal liability to them on the drafts.

The court held that the master had acquired a maritime lien upon the ship for these liabilities, notwith-

(1) [1897] P. 226.

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standing the fact that the real owners were free from any personal liability whatever in respect of the claims. In other words the court held that wherever a maritime lien was created in favour of any one against the property—the ship—it was not necessary to further establish personal liability against the real owner. The doctrine that there must, in conjunction with the maritime lien be established the personal liability of the owner though apparently suggested in several earlier cases the learned judge after careful consideration of those cases held that the liability against the ship might be created without establishing the personal liability of the owner. *The Ripon City* was not a chartered vessel, but a vessel in the possession of persons to whom the owners had made a provisional sale. The owners had not been paid the purchase money, and had not consequently transferred the legal title to the purchasers, but had chosen to hand the possession of the vessel over to them to be employed by the purchasers as they might see fit in the meanwhile. Gorell Barnes, J., in his very able and elaborate judgment, points out this important limitation of a master to create a maritime lien for disbursements in the case of a charterparty, and, citing *The Castlegate* (1), and *The Turgot* (2), says: (3) "A master who with knowledge of a charterparty under which the charterers are to provide and pay for coals, orders coals on their credit, and draws on them for the value, and had, and knew he had, no authority, expressed or implied, to pledge the owner's credit for the coals, has not a maritime lien for the amount of his liability on the bills drawn for the price of the coals," and cites from Lord Watson's judgment in the House of Lords in *The Castlegate* the following passage: "I can find no reasons, either of equity or policy, for enabling the

(1) [1893] A. C. 38. (2) 11 P. D. 21.
(3) [1897] P. at p. 238.

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master of a vessel who is not bound to incur liability to relieve himself when he does choose to incur it out of the property of his owners, although they may derive no benefit from it, and by the terms of his employment he is debarred from incurring it on their personal account." So that in this case if the master had drawn bills on the charterers for their coal bills, and the same had not been paid, he could not, as such master, with a knowledge of the terms of his charter-party, have created a maritime lien against *The Garden City* for the value of this coal, although he had rendered himself personally liable therefor by drawing bills.

The word 'owner' used in the statutes of 1861, in my opinion, means 'registered owner,' or a person entitled to be registered as owner, not a *pro hâc vice* owner; and the word 'domicile' must be understood in its ordinary legal sense. Now, the statute expressly gives the court jurisdiction to entertain an action *in rem* for necessaries supplied a ship in any port other than her home port, but that jurisdiction is liable to be displaced if it be shown that at the time the writ issued an owner or port owner was domiciled in Canada.

In collision cases, where the collision occurs between a chartered vessel and another, the maritime lien which the injured vessel may have against the chartered vessel arises only because, as Gorell Barnes, J. says in *The Ripon City*, "It is a right acquired by one over a thing belonging to another, *a jus in re alienâ*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. The person

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who has acquired the right cannot be deprived of it by alienation of the thing by the owner." (1)

The result of his very able review of the authorities is to point out that it is only maritime liens that a ship may become liable for when in the possession and control of charterers, because the lien-holder is entitled to treat the vessel as owned by the person in possession. But other claims which may arise, such as are illustrated in *The Druid* (2); *The Orient* (3), and *The Ida* (4), cannot be enforced against the vessel because they arise out of unlawful acts done without any authority and beyond anything which ought to be contemplated in the ordinary use of the vessel.

In cases like *The Turgot* (5), and *The Castlegate* (6), persons dealing with the charterers have been held not to be entitled to treat the vessel as owned by the charterers, but have dealt with them on their credit and not upon the faith of having the security of the vessel. In the present case, there being no maritime lien, no act of the master in purchasing supplies for the ship, with a full knowledge of the terms of the charterparty, could bind either the vessel, or the owners, or any person except the charterers or himself personally. The question as to whether an action *in rem* may be instituted against a vessel for necessaries supplied to her in any port other than her home port depends solely upon the fact at the time of the institution of the action. Was an owner or part owner domiciled in Canada? If any such owner was domiciled in Canada, or in other words, within the jurisdiction of the Admiralty Court, then no action *in rem* for necessaries will lie. I am of opinion, therefore,

(1) [1897] P. D. 242.
(2) 1 Wm. Rob. 391.
(3) L. R. 3 P. C. 696.
(4) Lush. 6.
(5) 11 P. D. 21.
(6) [1893] A. C. 38.

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that the plaintiffs' writ and the service thereof must be set aside with costs.

*Judgment accordingly.**

Solicitors for plaintiff: *Thom, German & Pettit.*

Solicitor for the ship: *M. J. McCarron.*

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* REPORTER'S NOTE: An appeal was taken by the plaintiffs to the JUDGE OF THE EXCHEQUER COURT, who affirmed this judgment. See the report of the case on appeal, *post.*

THE BOSTON RUBBER SHOE COMPANY..... } PLAINTIFF;

AND

THE BOSTON RUBBER COMPANY OF MONTREAL (LTD.) ..... } DEFENDANT.

1901
Jan. 30.

*Security for costs—Order for—Practice.*

Under the present practice of the court an order for security for costs may be given at any stage of the proceedings in a cause. *Wood* v. *The Queen* (7 S. C. R. 634) referred to.

THIS was an application on behalf of the defendant for an order for security for costs.

January 25th, 1901.

*C. J. R. Bethune* in support of application:

There is not the slightest doubt that the facts warrant the granting of the order asked for, provided the application is made in time. The plaintiff is resident out of the jurisdiction. The statement of claim was served on the 3rd of October, 1900, and on the 15th of that month a demurrer was filed. After the demurrer was disposed of, the plaintiff lost no time in filing and serving his statement of defence within two weeks after the reply was filed. A summons for the order for security was taken out.

No doubt *Wood* v. *The Queen* (1) will be cited against us, but in answer to that we submit that the English practice has completely changed since that case was decided. The former practice would not allow security to be ordered after defence filed. That was the old Chancery practice. The new practice is established by Rule 981, Order 65. (See *Annual Prac.*

(1) 7 S. C. R. 634.

1901

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Argument of Counsel

*tice* p. 928). Under the new rule an order for security may be made at any stage of the proceedings. (See *Annual Practice* p. 932.)

To prevent the order going, the other side must show prejudice. There is none here. We are entitled to the order asked. (See *Holm. & Lang. Ont. Jud. Prac.* p. 1333.)

*R. V. Sinclair*, contra:

The defendant is barred from getting the order by lapse of time and steps in the cause. *Wood* v. *The Queen* is good law to-day. It is not necessary for the plaintiff to show that it has been prejudiced by the delay.

While it is to be said that there is no special rule of The Exchequer Court in this matter, yet there is a practice of the court in respect of it based upon *Wood* v. *The Queen*. The new English rules are to prevail only where there is no settled practice of the court.

*C. J. R. Bethune* in reply cited *Small* v. *Henderson* (1).

THE JUDGE OF THE EXCHEQUER COURT now (January 30th, 1901) delivered judgment.

This is an application by the defendant for an order that the plaintiff give security for costs. The facts are such that the application should be granted, unless because of the delay in making it and the steps taken in the action, the defendant is not now entitled to security. The statement of claim was served on the 3rd of October last, and on the 15th of that month a demurrer was filed to the statement of claim which was argued on the 25th of October, and judgment overruling the demurrer given on the 15th of November last. The statement in defence was filed on the 5th of December last, on which issue was joined on

(1) 18 Ont. P. R. 314.

1900

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the 28th day of the same month. The summons for an order for security was taken out on the 12th of January, 1901.

There can, I think, be no doubt that under the former practice of the court, as illustrated by *Wood* v. *The Queen* (1), the application would be refused; but the matter is now governed (*The Exchequer Court Act*, s. 21; *Exchequer Court Rules*, I.) by the English rules, by which it is provided (Ord. 65, R. 6), that:

"In any cause or matter in which security for costs "is required, the security shall be of such amount, "and be given at such times, and in such manner and "form, as the court or a judge shall direct."

In a case decided in 1896, the Court of Appeal (consisting of Lindley, Lopes and Rigby, L.JJ.) overruling Kekewich, J., held that under this rule there is a judicial discretion to direct security for costs to be given at any stage of the proceedings. (*In re Smith* (2)

There will be an order in this case that the plaintiff company give security in the sum of four hundred dollars for any costs that may hereafter be incurred in the action; the costs of this application to be costs in the cause.

*Ordered accordingly.*

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(1) 7 S. C. R. 634.

(2) 75 L. T. N. S. 46.

1901

Feby. 7.

IN THE MATTER OF THE PETITION OF RIGHT OF

THOMAS PAGET .....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT

*Action for return of moneys paid by mistake—Legal process—Recovery—Demurrer.*

The suppliant brought his petition of right to recover from the Crown the sum of $190 which he alleged he had paid under mistake to the Crown in settlement of an information of intrusion in respect of certain lands occupied by him. He also claimed $500.00 for damages for the loss he alleged resulted to him on the sale of said lands by reason of the proceedings taken against him by the Crown. Upon demurrer to the petition,

*Held*, that the suppliant's petition disclosed no right of action against the Crown, and that the demurrer should be allowed. *Moore* v. *The Vestry of Fulham* ([1895] 1 Q. B. 399) followed.

PETITION OF RIGHT for the return of moneys alleged to have been paid to the Crown under mistake of title, and for the recovery of damages for the loss of money upon a sale of lands by reason of proceedings being taken against the occupancy of them by the Crown.

By the suppliant's petition, after setting out the boundaries of the lands in question, he alleged, in substance, as follows:

"In the year 1876, and whilst the said lot No. 4 was in the possession of your suppliant's predecessors in title, the Crown, through the officers of Her Majesty's Ordnance, wrongly asserted title to that part of said lot set forth in said information, and by mutual mistake of the Crown and its officers and the several owners of said lot, and through ignorance and mistake

on the part of owners of the said lot, a lease of a portion thereof claimed in said information was issued by the Crown to the respective owners of said lot.

"When the said information was served upon your suppliant on or about the 24th day of April, 1898, suppliant paid to the Crown through its solicitor D. O'Connor, Esq., Q.C., the sum of $180 being the amount claimed in said information, and also the sum of $10 for costs.

"Suppliant says, that when he paid the sum of $190 all parties to the said action were in ignorance as to the true state of the title to the land claimed by the Crown, and that the same was paid as a result of the mutual mistake of the Crown and the owners of said land when the said lease was executed.

"Your suppliant further says, that at the time he paid the said sum the Crown had no right, title or interest in the said land and wrongfully compelled him to pay the said moneys, and that the same were paid through ignorance and a mutual mistake on the part of the Crown and himself.

"Your suppliant further says, that at the time he paid the said sum of $190 he sold the said land to one Dunn, and by reason of the claim set up by the Crown to a portion of the said land which comprised some fifteen or twenty acres of valuable farm land, he was thereby prevented from obtaining any consideration therefor and was compelled to sell the said land at a loss of at least $500.

"Your suppliant further says, that by the judgment of the Exchequer Court of Canada dated the 30th day of May, 1898, in the case of *The Queen* v. *Hall* (1), it was determined that the lease had been entered into through the mutual mistake of the Crown and the

(1) 6 Ex. C. R. 145.

1901

PAGET
v.
THE KING.

Statement of Facts.

respective owners of said lot, and that the same was null and void.

"Your suppliant respectfully submits that he is entitled to be repaid the sum of $190.00 with interest thereon at the rate of six per cent. per annum to the payment thereof, and the sum of $500.00 damages."

The Crown demurred to the petition upon the following grounds:

"The amount claimed in paragraph 8 of the suppliant's petition was the amount of the money demand claimed in the information by Her Majesty's Attorney-General for the Dominion of Canada, as stated in paragraphs 1 and 2 of the petition and the costs of the said information, and was, therefore, paid by compulsion of law and to settle and compromise a demand then being litigated, and cannot be recovered as money paid voluntary under a mistake of fact.

"The amount claimed in paragraph 10 of the suppliant's petition cannot be recovered from the respondent because no breach of duty is setforth giving rise to any claim by way of petition of right against the Crown.

"Paragraph 10 does not state any wrongful act which would entitle the suppliant to recover in an action as between subject and subject.

"No claim is stated in the said petition of right to which effect ought to be given by judgment upon a petition of right against Her Majesty the Queen."

January, 14th, 1901.

The demurrer was now argued.

*F. H. Chrysler, Q.C.*, in support of the demurrer: The suppliant asks by his petition of right to have money paid under legal process restored to him. It is submitted that he cannot so recover. The principle has been recognised since the decision in *Marriot*

v. *Hampton* (1), over one hundred years ago, that money paid under compulsion of legal process cannot be recovered back. The latest case on the point to which I desire to direct the court's attention is: *Moore* v. *Vestry of Fulham* (2).

As to the second ground of demurrer, no action will lie against the Crown for the loss of profits derivable from a sale of land. As between subject and subject, the action in such a state of facts would be on the case, for slander of title. Such an action sounds in tort, and is not maintainable against the Crown.

Again, the petition is demurrable in this behalf because it is not stated how the money was lost.

Again, between subject and subject malice should be averred in an action on the case for slander of title. *Baker* v. *Carrick* (3); *Smith* v. *Spooner* (4).

No action for tort can be brought against the Crown, except by statutory invasion upon the ancient safeguards of the prerogative.

*A. E. Fripp*, *contra*, contended that as the money was paid under the mutual mistake of the parties as to the title, the money was recoverable back.

Again, it was not paid upon a judgment as was the case in *Marriot* v. *Hampton*, but was paid upon the summons being served. Therefore the cases cited in support of the demurrer do not apply.

He cited *Kelly* v. *Solari* (5); *Durrant* v. *Ecclesiastical Commissioners* (6); *Duke de Cadaval* v *Collins* (7).

*F. H. Chrysler*, *Q. C.*, in reply: The rule is not that money paid under a judgment may not be recovered back, but that money paid under compulsion of legal process cannot be recovered back.

(1) 2 Sm. L. C. 409.
(2) [1895] 1 Q. B. D. 399.
(3) [1894] 1 Q. B. 838.
(4) 3 Taun. 246.
(5) 9 M. & W. 54.
(6) 6 Q. B. D. 234.
(7) 4 A. & E. 858.

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PAGET v. THE KING.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (February 7th, 1901) delivered judgment:

This is a demurrer to the petition of right, by which the suppliant claims from the Crown the sum of $751.00. Apart from interest, this amount consists of a sum of $190.00 which the suppliant alleges he paid, by mistake, to the Crown upon being served with an information of intrusion; and a sum of $500.00 for damages which he claims represents the loss that resulted to him on the sale of the lands mentioned in the information of intrusion.

The suppliant concedes that in respect of the latter amount the demurrer must be allowed, and it seems clear that it must also be allowed in respect of the moneys alleged to have been paid under mistake.

The principle governing the case was stated by Lord Halsbury in *Moore* v. *The Vestry of Fulham* (1) as follows:

" The principle of law has not been quite accurately stated by counsel for the appellant, because the principle of law is not that money paid under a judgment, but that money paid under the pressure of legal process, cannot be recovered. The principle is based upon this, that when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in defence to the original action."

There will be judgment for the Crown upon the demurrer.

*Judgment accordingly.*

Solicitor for the suppliant: *A. E. Fripp.*

Solicitors for the Crown: *Chrysler & Bethune.*

(1) [1895] 1 Q. B. 399.

IN THE MATTER OF THE PETITION OF RIGHT OF

ARCHIBALD STEWART.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1900
Dec. 15.
1901
Feb. 26.

*Contract for public work—Delay in executing same—Notice by engineer—Withdrawing work from contractor—Damages—Plant—Interest.*

1. There may be some question as to whether *Walker* v. *The London and North Western Railway Company* (L. R. 1 C. P. D. 518) should be accepted as establishing a general proposition that if in contracts creating a forfeiture for not proceeding with work at the rate required, a time is fixed for its completion, the forfeiture cannot be enforced on the ground of delay after that date.

But at all events any notice given after such date to determine the contract and enforce the forfeiture must give the contractor a reasonable time in which to complete the work, and the contractor must, with reference to such reasonable time for completion, make default or delay in diligently continuing to execute or advance the work to the satisfaction of the engineer. The engineer is to decide, having regard to a time that in the opinion of the court is reasonable, and the contractor is to have notice of his decision.

2. Where there is a breach of contract the damages are to be measured as near as may be by the profits the contractor would have made by completing the contract in a reasonable time.

3. In this case the contractor claimed for loss of profits in respect of certain extra work not covered by the contract.

*Held*, that inasmuch as it was not possible to say either that the engineer would have directed it to be done by him had the work remained in the suppliant's hands, or that in case the engineer had done so, that he would have fixed a price for it from which a profit would have been derived, it could not be taken into consideration.

4. Where in such a case the Crown dispossessed the contractor of his plant and used it for the purposes of the completion of the work, the contractor was held entitled to recover the value of such plant as a going concern, that is, its value to anyone situated as the contractor himself was at the time of the taking of the plant.

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STEWART v. THE KING.

5. Where the contractor was not allowed interest upon the value of such plant, it was held that he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid.

Argument of Counsel.

PETITION OF RIGHT for damages arising out of a breach of contract for the construction of part of a public work, by reason of the Crown withdrawing the works from the contractor, before completion, for alleged delay in prosecuting such works.

The facts are stated in the reasons for judgment.

The case came on for trial on the 6th of September, 1899, and was continued on the following dates:—September 7th, 8th and 9th, 1899; January 25th, 26th, 27th, 29th, 30th, 31st, 1900; February 1st, 1900; March 3rd, 5th, 6th, 7th, 8th, 12th, 1900; April 16th, 17th, 18th, 19th, 20th and 21st, 1900.

The following counsel appeared for the respective parties:

*B. B. Osler, Q.C., W. D. Hogg, Q.C.* and *Glyn Osler* for the suppliant;

*S. H. Blake, Q.C., W. H. Lawlor* and *W. A. H. Kerr* for the respondent.

At the request of counsel the arguments for both parties were submitted in writing.

The following is an abridgement of the argument on behalf of the suppliant:

The suppliant submits three grounds in support of his contention that a breach of the contract was committed by Her Majesty, and these grounds are as follows:

1. That the notice the 13th of October, 1897, was invalid inasmuch as it gave no intimation to the suppliant as to what he was required to do to satisfy the chief engineer.

2. That even if the notice was sufficient in substance and information, it could not be effectual to put an end

to the contract, as the time had expired within which an effectual notice could be given, and no contract then existed within or under which an effectual notice for the said purposes could be given.

3 Even assuming the first and second objections to be untenable, the notice was not effectual to end the contract, as the default in diligently prosecuting the work, which the Crown complains of, was not that of the suppliant; but was the result of neglect on the part of the engineers in charge in not laying out the work, giving plans and detailed drawings, &c., and the engineer is not the conclusive judge where the default is occasioned by himself.

With reference to the first point, assuming that the original contract was still in force at the time when the notice of the 13th of October was given, it is submitted that the notice was not in itself sufficient to entitle the Government to act, in pursuance of that notice, by taking the contract out of the contractor's hands. The notice, in order to be effectual, should have indicated what the matters of delay and default were, in order that the contractor might have remedied them; it contained no indication in respect to what the contractor should do as regards expedition, material and workmanship, so that during the six days mentioned in the notice, the contractor might have opportunity in removing the engineer's objection, or satisfying his requirements (*Smith* v. *Gordon* (1). If, therefore, this notice had been given while the original contract was in force, and action had been taken upon it by the chief engineer by the removal of the contractor, it is quite plain upon the case above cited that the Government would have been in error, and that a breach of the contract would have taken place entitling the contractor to sue and recover damages for the

(1) 30 U. C. C. P. at. p. 562.

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Argument of Counsel.

breach The reasonableness of this requirement is justified by the actual facts in this case, assuming, for the moment, that a notice dismissing the contractor could be given at all.

2. It is therefore submitted upon the second ground, that even if the notice were sufficient in substance and information, it could not be effectual to put an end to the contract, as the time of the original contract had expired, and no contract existed within which or under which an effectual notice for the said purpose could be given.

At the date of the notice the original contract as to time of completion was entirely abandoned by the parties. The work was still proceeding in a much altered form, changes in structures had been decided upon and were being constructed, new prices had been arranged for masonry and concrete. The contract, therefore, which existed between the Government and the suppliant in November, 1897, was a new contract for the performance and completion of the work within a reasonable time, and the Government were not entitled at that time to give the notice of the 13th of October, 1897, purporting to be within the requirements and stipulations of the contract of the 24th September, 1892. (*Walker* v. *The London & North Western Railway Co.* (1); *Wood v. Rural Sanitary Authority of Tendring* (2); *The Mayor of Essendon* v. *Ninnis* (3); *Smith* v. *Gordon* (4); *Law Quarterly Review* (5).

All that can be said with reference to the contract existing at the time the notices were given in October and November of 1897, is that both parties having permitted the work to be proceeded with after the time

(1) L. R. 1. C. P. D. 518.
(2) 3 T. L. R. 272.
(3) 5 Victorian L. R. 236.
(4) 30 U. C. C. P. at p. 562.
(5) Vol. 16, No. 62, p. 117.

originally specified had expired, a new contract arose so far as time was concerned, under which the contractor would be entitled to perform the work within a reasonable time. As to what that reasonable time might be, it was not, it is submitted, within the province of the Government to finally indicate. It is entirely a question for the court to say whether the time specified in the notice of the 20th of March, 1897, whereby it was notified to the contractor, in effect, that the work should be completed by the 31st of October, 1898, was or was not a reasonable time within the meaning of the cases bearing upon that subject. But it is submitted upon the evidence that the court cannot say that the suppliant was allowed a reasonable time to complete the work remaining to be done.

Where a contract exists in which the time for the completion of the work is not specified, or where the time mentioned in a contract for the completion of the work has been waived, either contracting party may give notice to make time of the essence of the contract, which of course must be a reasonable time. *Taylor* v. *Brown* (1); *Green* v. *Sevin* (2).

If the work is taken away without a reasonable time to complete it being allowed, the contractor is entitled to damages. (*Startup* v. *MacDonald* (3); *Hudson on Building Contracts* (4); *Roberts* v. *Bury Commissioners* (5); *Comyn's Digest*, vo. "Condition" L. [6]; *Holme* v. *Guppy* (6); *Westwood* v. *Secretary of State for India* (7); *Russell* v. *da Bandeira* (8).

Then, as to the measure of damages. The measure of damages when there is a wrongful forfeiture of a

(1) 2 Beav. 180.
(2) 13 Ch. D. 589.
(3) 6 M. & G. 593.
(4) 2nd ed. (1895) pp. 212, 213.
(5) L. R. 5 C. P. 310.
(6) 3 M. & W. 387.
(7) 7 L. T. N. S. 736.
(8) 13 C. B. N. S. 149.

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contract is stated by Lord Cranworth in the case of *Ranger* v. *The Great Western Railway Co.* (1):

"The right of the appellant [the contractor] would be to recover such amount of damages as would put him as nearly as possible in the same position as if no such wrong had been committed, that is, not as if there had been no contract, but as if he had been allowed to complete the contract without interference."

It is submitted that the suppliant is entitled to whatever profit he would have made upon the extra work, no less than to the profit which he would have made upon the work actually specified or ordered before the 5th of November, 1897, when the works were taken out of his hands. That is the plain meaning of the rule laid down by Lord Cranworth, as above cited.

In cases where the contract price is a bulk sum and the contract provides that extra work must be done without any additional compensation, the measure of damages to the contractor is the difference between the contract price and the cost of performing the work, including the extra work. *Ranger* v. *The Great Western Railway Co.* (2).

With regard to the backing, that was the subject of an independent contract between the Minister of Railways and Canals and the suppliant. It is a well established rule of law that oral evidence is admissible for the purpose of showing that the writing between the parties does not in fact contain the agreement in respect of which the dispute has arisen, and that evidence is always admissible for the purpose of showing that the real contract between the parties is not in writing, and that the subsequent written contract does not contain, and was not intended to contain, the whole agreement between them. (*Harris* v. *Rickett* (3); *Rogers* v. *Hadley* (4).

(1) 5 H. L. C. 72.
(2) 5 H. L. C. 72.
(3) 4 H. & N. 1.
(4) 2 H. & C. 227.

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The following is a synopsis of the written agreement submitted on behalf of the respondent:

As to the question of the contractor's delay in proceeding with the works, and the withdrawal from him, on that account, of the completion of the contract, it is submitted that the only answer that can be given from the evidence as to why the work which was to have been done in 1894 was not finished in 1897 is that the contractor was incompetent and did not desire to get on with his work, and that his means, force and plant were entirely inadequate. Such cases as *Roberts* v. *Bury Commissioners* (1) can have no application here. There the complaint was that no extension of time had been given, whereas here it is evident that the time was extended for a period greatly in excess of any delays caused by the respondent. Making a summary of the delays as accurately as they can be taken from the statements made by the suppliant and his witnesses, it would appear that to the end of 1896 the number of months of delay complained of was five; that the additional time given was two years and one month. So that even if the delay were chargeable to the Crown, there has been given to the suppliant some twenty months of time for the five months of delay by the Government of which he complains. Long prior to the notice of March 20th, the suppliant had been frequently urged by the Department of Railways and Canals, beginning in July, 1893, to proceed more vigorously with his work. It cannot be said, therefore, that there was anything unreasonable in giving the notice of March, 1897.

The contract between the suppliant and the Crown is contained in the original agreement of the 24th September, 1892, with the modification in prices

(1) L. R. 5 C. P. D. 310.

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effected by the agreement of the 20th August, 1895, and by order in council of 21st September, 1895. The acceptance was upon the express terms that there should be no deviation in the contract prices or any extra charge. At this date, therefore, the original agreement stood with the only alterations as to time of completion and as to certain rates. In November, 1897, when the breach of contract complained of by the suppliant is said to have taken place, these documents were in force between the parties and contained the whole contract between them. The breach complained of must therefore, be a breach of some term contained in these instruments, or a breach of an implied contract arising apart from them. Let us examine the suppliant's contentions. He says the action of the Crown in taking the work out of his hands and dismissing him therefrom was a breach of the contract existing between him and the Crown in November, 1897. He complains that taking the work out of his hands is the breach of contract. The contract he relies on as having been broken is therefore a contract to allow him to perform the work. It is beyond question that no such express contract appears on the written documents. A perusal of the thirty-four clauses of the contract and of the one hundred and forty-five paragraphs of the specification will not reveal a single word of obligation on the part of the Crown to permit the doing of the work; neither will any such obligation be found in the agreement above referred to of August and September, 1895, introducing the three-lock system. Therefore, the contract which the suppliant says has been broken must be an implied contract. (*Hudson on Building Contracts* (1)). But there can be no implied contract here, because section 34 of the written contract between the parties expressly

(1) 2nd ed. p. 228.

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declares that no implied contract shall arise between the parties in respect of any of the works thereby contracted for. (*The Queen* v. *Starrs* (1)).

As to the generality of the terms of notice withdrawing the works from the control of the contractor, it is submitted that, where the objection is that the whole work is being neglected and not prosecuted with the vigour called for by the contract, the engineer is entitled to give a general notice. (*Pauling* v. *Mayor of Dover* (2)).

It is argued by the suppliant that the Crown had no power to give a notice under clause 14 of the contract and to follow it up by taking the work out of the contractor's hands, because it is contended that the penalty clauses of the contract were not in force in 1897. The answer of the respondent is that such penalty clauses were in full force and effect then. After an extension of time, the contractor must still complete the work within a reasonable time. (*McDonell* v. *Canada Southern Railway Company* (3)).

*Walker* v. *London and North Western Railway Company* (4) is the leading case upon which the suppliant relies to establish that the Crown was not entitled to give the notice of 13th October, 1897, and to follow it up by taking the contract out of the suppliant's hands. Now, that case is entirely different from the present. There was no provision for an extension of time, and what was there sought to be done was to avoid the contract and to forfeit all plant, materials and money due to the contractors. Here there is a provision for extending the contract, and, moreover, the Crown did not seek to avoid the suppliant's contract; what has been done is simply to carry out the provisions of the contract. Neither has the contractor's plant and

(1) 17 S. C. R. at p. 129.
(2) 24 L. J. Ex. 128.
(3) 33 U. C. Q. B. 313.
(4) L. R. 1. C. P. D. 518.

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material been confiscated or seized as was done in the *Walker* case; nor is it sought here to forfeit any moneys due to the contractor. On the contrary, the moneys payable under the estimate for October, 1897 were paid for the benefit of the contractor after the work was taken out of his hands, and at that time the contractor was largely overpaid. (*Berlinguet* v. *The Queen* (1).

When a party has by his own act or default put it out of his power to fulfil his contract, the other party may at once treat this as a breach of contract without waiting for the time of performance to arrive; so the Crown was justified in treating the contract as broken by the suppliant in 1897. The Crown was also within its rights in retaining the plant, &c., for, under the terms of the original contract, the plant, &c., remained the property of the Crown until the completion of the contract.

It is argued for the suppliant that having fixed a reasonable time for the completion of the work the respondent was bound to allow the suppliant the whole of that time to do it. The only authority cited for this proposition is *Startup* v *Macdonald* (2), which is a case involving the delivery of oil at night. The plaintiff had until the 31st of March to deliver the oil which he had sold to the defendant. He delivered it in the evening, and the jury found that thereafter the defendant would have had time to examine and store the oil on that day. It was, therefore, held that the plaintiff had fulfilled his contract.

The suppliant contends that if the respondent is liable to him for having taken the contract out of his hands, the action of the respondent in taking possession of the suppliant's plant was also wrongful, and that the suppliant is entitled to recover the value

(1) 13 S. C. R. at pp. 125, 126. (2) 6 M. & G. 593.

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thereof. The cause of action with regard to the plant is not clearly stated in the argument for the suppliant. But it would seem that a wrongful act is complained of, and so the argument amounts to this, that if the Crown was not justified in taking the plant under the contract, the taking was a tort. Now, it is not necessary to argue in this court that the Crown cannot be made liable for a tort in the absence of statutory provision therefor. *Julien* v. *The Queen* (1).

As to the counter-claim, the suppliant is liable to make good to the respondent all moneys that he has been paid in excess of the value of the work done by him. Again, the suppliant having failed in his contract, he is liable to make good all loss and damage suffered by the Crown by reason of the non-completion by him of the works. (*Hudson on Building Contracts* (2). It was owing to the suppliant's default that it, became necessary to relet the contract, and he cannot complain if the works were carried out at reasonable cost. (*Ranger* v. *Great Western Railway Company* (3); *Fulton* v. *Donwell* (4).

By the written reply to the respondent's argument counsel for suppliant submitted, amongst others, the following contentions:

When the works were taken from the suppliant the time for performance was no longer of the essence of the contract. The Crown, by allowing the time to run beyond the original fixed time, had abandoned, as a matter of law, the right to enforce the penal clauses of the contract. *Mayor of Essendon* v. *Ninnis* (5).

The suppliant contends that clause 34 of the contract, forbidding any contract by implication between the parties, does not apply to the position of affairs

(1) 3 Ex. C. R. at p. 242.
(2) 2nd Ed. 390.
(3) 5 H. L. C. 72.
(4) 5 N. Zeal. L. R. S. C. 207.
(5) 5 Vict. L. R. (Law) 236.

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between them here because, first, the contract, in respect of which breach by the Crown is alleged, is not an implied contract; and, secondly, that clause 34 has application only within the original contract time.

As to the right of the suppliant to recover the value of the plant in the hands of the Crown, suppliant relies on *Tobin* v. *The Queen* (1); *Feather* v. *The Queen* (2); *Clode on Petition of Right* (3). It is not a matter of trover or conversion; but we seek here a remedy simply for a breach of contract. Therefore the case of *Julien* v. *The Queen* does not apply.

THE JUDGE OF THE EXCHEQUER COURT now (December 15th, 1900) delivered judgment.

The suppliant, by an indenture made on the 24th of September, 1892, entered into a contract with Her Majesty the Queen, represented by the Minister of Railways and Canals of Canada, to construct sections one and two of the Soulanges Canal and to deliver the same complete to Her Majesty on or before the 31st day of October, 1894. By the 18th clause time was declared to be of the essence of the contract. By the 16th clause it was agreed that the suppliant should not make any claim or demand, or bring any action, suit or petition against Her Majesty for any damage which he might sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; but that in the event of any such delay the contractor should have such further time for the completion of the works as might be fixed in that behalf by the Minister for the time being. There was a good deal of delay of that kind, but the authority to extend the time was never in terms exercised by the Minister. There was no request to him to exercise it, and it was

(1) 16 C. B. N. S. at p. 358. (2) 6 B. & S. 257.
(3) Pp. 88, 89.

not exercised. The provision, like that contained in the 29th clause, whereby also the Minister had power, under the circumstances therein stated, to extend the time for the completion of the contract, has no present importance beyond showing that such power was vested in the Minister. By the 13th clause of the contract the Chief Engineer of Railways and Canals was given authority at any time, and at the contractor's expense, to increase the plant or materials, or force employed upon the work in case he considered them "insufficient for the advancement" of the works "towards completion within the limited times", or if such works were not being carried on with due diligence. This authority was not exercised and the only bearing the clause has on the present controversy is that, differing in that respect from the 14th clause, on the true construction of which the case depends, it contains an express reference to the times limited for the completion of the contract. The 14th clause of the contract is in these terms: —

"In case the contractor shall make default or delay in diligently continuing to execute or advance the works to the satisfaction of the engineer, and such default or delay shall continue for six days after notice in writing shall have been given by the engineer to the contractor requiring him to put an end to such default or delay, or in case the contractor shall become insolvent, or make an assignment for the benefit of creditors or neglect either personally or by a skilful and competent agent to superintend the works, then in any of such cases Her Majesty may take the work out of the contractor's hands and employ such means as She may see fit to complete the work, and in such cases the contractor shall have no claim for any further payment in respect of the works performed, but shall nevertheless remain liable for all loss and damage

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which may be suffered by Her Majesty by reason of the non-completion by the contractor of the works, and all materials and things whatsoever, and all horses, machinery and other plant provided by him for the purposes of the works shall remain and be considered as the property of Her Majesty for the purposes and according to the provisions and conditions contained in the twelfth clause hereof."

There were undoubtedly great delays in the execution of these works and there is a large mass of evidence in respect thereto, and to the controversies that have arisen between the parties because of such delays. The fault was not all on one side, but there is, I think, no occasion to weigh the fault on this side or on that, or to attempt to apportion the blame. One thing, however, is very clear, and that is that the suppliant has no ground of complaint with respect to the financial support and assistance that the Crown afforded him during the progress of the work.

At an early date in the execution of the work the Crown commenced to make to him large advances that it was, so far as I can see, under no obligation to make. On undressed stone at Rockland quarry, that as things turned out was never needed for the work, advances amounting in all to forty eight thousand five hundred dollars were made. On potsdam sandstone excavated during the progress of the work—the stone being the property of the Crown subject only to the right of the contractor to use what he needed of it in making concrete—one dollar a cubic yard was advanced. When the work was taken out of his hands the amount of the advance stood at fifty-seven thousand dollars, while the value of work then done on it, in preparing it for use in concrete, was only some three thousand dollars. These two items of forty-eight thousand

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five hundred dollars and fifty-seven thousand dollars now form part of the Crown's counter-claim.

In 1897, when the next incident, to which, in this statement of facts, it is necessary to refer, occurred, half of the work, approximately, remained to be done. In March of that year (1897) the following notice was given to the suppliant:—

"Ottawa, 20th March, 1897.

"Dear Sir,

"As you are now approaching the season when the resumption of active work under your contract upon the Soulanges Canal may be looked for, I am instructed by the Minister to say that he cannot permit the work upon the Canal to be further delayed. The intention of the Government is to push forward the completion of the undertaking as rapidly as possible; and I am to further notify you that if the Chief Engineer has any reason to fear that your contract will not be fully executed by the 31st October, 1898, the work will be taken off your hands, and the conditions of the existing contract as to penalties rigidly enforced.

"Yours &c.,

(Sgd.) C. SCHREIBER,

"*Deputy Min. and Chief Eng.*

A. STEWART, Esq.,
Contractor Sec. 1 and 2,
Ottawa, Ont."

On the 17th of May, Mr. Schreiber, the chief engineer, gave the contractor notice that, if he did not at once proceed to prosecute the work vigorously, steps would be taken under the contract to put an end to the delay. Early in June a further notice, on which, however, no action was taken, was given to him that if the delay continued beyond six days Her Majesty might "proceed under the powers conferred upon Her "by clause No. 14 of the said contract." The notice

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was in terms similar to the following, which was given in October of the same year:—

"To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:—

"Take notice that as you have made default and delay in diligently continuing to execute or advance to my satisfaction the works contracted to be performed by you under your contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals of Canada, dated the twenty-fourth day of September A. D. 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of sections numbers one and two, Cascade Entrance of the Soulanges Canal, you are hereby notified to put an end to such default or delay.

"You are also notified that, if such default or delay shall continue for six days after the giving of this notice, Her Majesty may proceed under the powers conferred upon Her by clause No. 14 of the said contract.

"Dated at Ottawa, this thirteenth day of October A. D. 1897.

(Sgd.) COLLINGWOOD SCHREIBER,
*Chief Engineer of Railways and Canals.*

This notice was followed by another whereby the work was taken out of the contractor's hands The latter notice was in these terms:—

"To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:—

"Whereas you have made and are making default and delay in diligently continuing to execute and advance to the satisfaction of the Engineer the works contracted to be performed by you under your contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals of Canada, dated the

twenty-fourth day of September A.D. 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of section numbers one and two Cascade Entrance of the Soulanges Canal, and such default and delay has continued for more than six days after notice has been given by the Engineer to you requiring you to put an end to such default and delay, and such default and delay still continues:

"Now take notice that Her Majesty, represented by me, the Minister of Railways and Canals of Canada, does hereby, under the provisions of the fourteenth clause of your aforesaid contract, terminate the said contract from this date, and take the work out of your hands, and will employ such means as She may see fit to complete the work;

"And further take notice that you shall have no claim for any further payment in respect of the works performed, and that you will nevertheless remain liable and be held responsible for all loss and damage suffered or which may be suffered by Her Majesty by reason of the non-completion by you of the said work, or by reason of your breaches of the said contract.

"Dated at Ottawa, this Fourth day of November A.D. 1897.

(Sgd) ANDREW G. BLAIR,
*Minister of Railways & Canals,*
*On behalf of Her Majesty.*

Witness,

(Sgd.) Collingwood Schreiber.

Now, if the contention which, on the authority of *Walker* v. *The London and North Western Railway Company*, (1) the suppliant makes that in October, 1897, the 14th clause of the contract under which the Crown took action was not in force and did

(1) L. R. 1 C. P. D. 518.

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not form part of any contract then existing between the parties, is a good contention, it is clear that there has been a breach of the contract, and that the suppliant is entitled to such damages as he has ustained by reason thereof. The contract under consideration in *Walker's* case contained a provision by which the defendants were entitled to take the work out of the plaintiff's hands if he did not complete it within the time limited for the purpose, or if he became bankrupt, or if from any cause whatever, not occasioned by the defendants, he was delayed or prevented in the completion of the work according to the specification. It was also a term of that contract that the engineer might, if he were dissatisfied with the rate of progress made, procure labour and materials to advance it, and pay therefor out of any money due or to become due to the contractor. The case turns, however, upon a provision of the contract which was in these words:—

"Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer..... or to maintain the said works, as hereinafter mentioned, to the satisfaction of the engineer, his contract shall at the option of the company, but not otherwise, be considered void, as far as relates to the works or maintenance remaining to be done, and all sums of money that may be due to the contractor, together with all materials and implements in his possession, and all sums named as penalties for the non-fulfilment of the contract shall be forfeited to the company and the amount shall be considered as ascertained damages for the breach of the contract."

Referring to this clause, Mr. Justice Archibald, delivering the judgment of the court (Brett and Archibald, JJ.) said (1):—

(1) L. R. 1 C. P. D. at p. 531.

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"The clause in our opinion can only be acted on and enforced within the time fixed for the completion of the works, for time is clearly of the essence of the contract; and it is only with reference to the time so agreed that the rate of progress can be determined. If, as has happened, the time has been exceeded, there may be a new contract to complete in a reasonable time; but to give the clause in question any application to a reasonable time, after the time originally fixed has expired, would be without any express provision to make the company judge in their own case of what was a reasonable time, and to enable them in their own favour to avail themselves of a most stringent and penal clause."

The case has, it appears, been accepted as establishing the proposition that in contracts creating a forfeiture for not proceeding with work at the rate required, if there is a time fixed for completion, it is only by reference to the time so agreed that the rate of progress can be determined, and that the clause can only be acted on and enforced on the ground of delay within the time fixed for the completion of the works, and confers no power of forfeiture after that date. (*Hudson on Building Contracts*, (1): *Wood v. Rural Sanitary Authority of Tendring* (2): *The Mayor of Essendon v. Ninnis* (3). But after all, each contract must be considered in the light of its own terms and conditions, and however satisfactory the decision in *Walker's* case may be with reference to the contract therein under consideration, in which there were other clauses clearly applicable after the time of completion had expired, it may, I think, be a very debatable question whether the same conclusion should be come to in respect of the 14th clause of the contract now under considera-

(1) 2nd ed. 447.

(2) 3 T. L. R. 272.

(3) 5 Victoria L. R. 236.

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tion. It will be observed that the provisions of the 13th clause expressly refer to the time limited for the completion of the contract, while in the 14th clause there is no such reference or limitation. Then by the terms of the 14th clause it will be seen that the power to take the works out of the contractor's hands was not confined to the case of want of diligence to execute or advance the work to the satisfaction of the engineer. It might also be exercised in case (*a*) the contractor became insolvent; or (*b*) made an assignment for the benefit of his creditors; (*c*) neglected either personally or by a skilful and competent agent to superintend the works. These appear to me to be circumstances under which as well after as before the time limited for the completion of the contract the power of taking the work out of the contractor's hands might be exercised. But if it may be exercised in these cases after the time agreed upon for the completion of the contract has expired, why may it not be exercised in case the contractor makes default or delay in diligently continuing to execute or advance the works to the satisfaction of the engineer? What is the difficulty? I can see none, except that the engineer's judgment as to the rate of progress and the advancement of the work must be exercised with reference to some date, some time when the work as a whole is to be completed; and the time agreed upon having expired there is no time to which reference can be made. But why may not his judgment as to the rate of progress being made be exercised with reference to a reasonable time for the completion of the whole work? Not that the Minister or the engineer could without the contractor's concurrence or consent (and there is in this case no such concurrence or consent) determine conclusively what such reasonable time

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was. To do that would be to permit them to impose upon the contractor a condition to which he had never given his assent; and as was said in *Walker's* case (1)to make them, as representing the Crown, judges in their own case. But suppose in such a case as this the Minister or engineer fixes a time—one that the court finds is reasonable—within which the works are to be completed, why should not the contractor continue to be within the engineer's judgment as to the rate of progress being made? Is it not reasonable that he should be? Is it not unreasonable that, short of acts amounting in themselves to an abandonment of the works, the contractor should practically have the matter of progress in his own hands once the time for the completion of the contract has passed and been waived, and that, in respect of a great public work involving the highest interests, the Crown should thereafter be at the mercy of the contractor? Of course the question is not whether the thing is reasonable or unreasonable, but whether the parties have agreed to it. By the express agreement of the parties the engineer is, during the time limited for the completion of the work, as much the judge of the progress made by the contractor with the work as by another clause he is of the quantity and quality of that work; and when, after that time has expired, the parties go on with the work and a new term or condition of the contract arises by implication, and by the acts of the parties, that the work will be completed in a reasonable time, then it seems to me that one does no violence to the contract as a whole to hold that having reference to such reasonable time the engineer may, if he is dissatisfied with the progress of the work, give the notice provided for in the 14th clause of the contract. It is not necessary, however, for me

(1) L. R. 1 C. P. D. 518.

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in the view I take of the case to solve the difficulties that I have ventured to suggest, or to support the judgment for the suppliant that I think he is entitled to, by the proposition that the 14th clause of the contract, or that provision of it directly in issue, could only be acted upon and enforced on the ground of delay within the time fixed by the contract for the completion of the works.

Assuming for the moment that the 14th clause of the contract was in 1897 in force between the parties, and could be acted on, it seems clear that the rate of progress must be determined by reference to a reasonable time for the completion of the whole work. The contractor must with reference to some specific time that is in the opinion of the court reasonable, make default or delay in diligently continuing to execute or advance the works to the satisfaction of the engineer. The engineer is to decide, having regard to a time that is reasonable, and the contractor is to have notice of his decision. Was the time fixed by the Minister in the present case reasonable? Were it proper for me to look at the matter from a standpoint other than that of the legal rights of the parties, and to express an opinion as to whether or not, as a matter of public policy or interest the Minister was justified in taking the work in question out of the contractor's hands, I should have no hesitation in saying that I think his apprehension and that of the chief engineer that the work on the two sections mentioned would be unduly delayed was well founded, and that he was on grounds of public policy fully justified in the action he took. I think, too, that in March 1897, one might have come to the conclusion that the remainder of the work could be completed by the 31st day of October, 1898. There is undoubtedly in this case a great deal of expert evidence from witnesses

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whose opinions are entitled to the greatest consideration (given with a full knowledge of the facts that compel me to an opposite conclusion) that the time given by the Minister for the completion of the work was a reasonable time. I cannot say how far, if at all, the witnesses referred to have, in giving their opinions, been influenced by the fact that in September, 1892, the contractor agreed to complete the whole work by the end of October, 1894. If the question were whether the time given by the Minister was reasonable in relation to the time limited in the contract, I should have no hesitation in answering in the affirmative. But there can, I think, be no doubt that the time mentioned in the contract was, from a business or practical standpoint, wholly inadequate, and neither party ever treated the limitation seriously, or acted as if it formed one of the terms of the contract, notwithstanding that they had agreed that "time should be deemed to be of the essence of the contract." Not that any such consideration would have availed the contractor if the powers given to the Crown to put an end to the contract had been exercised within the stipulated time. But the court is not now to impose upon him a condition as to time that it does not think to be reasonable because he, in signing the contract, agreed to one equally or more unreasonable. It is easy to be wise after the event, and judging by the event, by what has happened in respect to the completion of the work by contractors of whose financial standing, capacity and energy there is no question, I am compelled, against the opinions to which I have referred, to come to the conclusion that the time fixed by the Minister in March, 1897, for the completion of the works in question was not a reasonable time within which to complete them. That is the conclusion to which I am led by the facts that appear in evidence in this case. It

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is not disputed that the chief engineer's judgment as to the progress of the work was exercised with reference to the date so fixed, and that being the case, it appears to me that the proceedings taken by the Minister and chief engineer cannot as a matter of law be justified, that there has been a breach by the Crown of the contract on which this petition is brought, and that the suppliant is entitled to damages, to be measured, as near as may be, by the profits that he would have made by completing the contract in a reasonable time.

It was also contended for the suppliant that the notice of the 13th of October, 1897 was insufficient for the purposes for which it was intended; and that in any event the Crown was precluded from giving any such notice because the delay complained of was occasioned by the fault of the resident engineer and his staff—by their lack of initiative and energy. Having come to a conclusion on other grounds to enter judgment for the suppliant on the main issue in controversy, it is unnecessary for me to discuss these contentions.

On the question as to whether the contract in question was one on which the contractor finishing the work in a reasonable time would have made a profit or not, the parties are very far apart. Taking for illustration the quantities and prices given in Exhibit "AN" we find the work remaining to be done at the time the contract was taken out of the suppliant's hands stated at $570,967.08. On items amounting to $14,811 08 no profit is claimed. On the balance of $556,156 00 a profit (including the $57,000 advanced on potsdam sandstone) of $165,744.74 is claimed. That is of the amount of $556,156,00, $390,411.26 would represent the contractor's expenditure, and the sum of $165,744.74 his profit. In other words, he would make something over forty-two per cent. on his outlay on

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the items on which he claimed a profit, and nearly forty-one per cent. on his whole outlay. Now I am very sure that finishing his work in a reasonable time he would have made no such profit as that. The only sure test in such a case is to be found in the doing of the work. No statement, calculation or estimate of how the thing would have turned out is likely to provide for all contingencies, and the contingencies not provided for go, I think, according to common experience to eat up a large portion of anticipated or estimated profits. And when you add to this that other contingency, that the expert witness whose estimate or calculation is tendered for the court's assistance is likely to make the best showing he can for the party who calls him, such an estimate or calculation may, if not carefully examined, mislead, instead of aid the court.

I am equally unable to accept the view put forward for the Crown that the work to be done under the contract, when it was taken out of the suppliant's hands, would have been finished at a loss. On the item of concrete alone it seems to me clear that there would have been a profit of at least $60,000. The advance on potsdam sandstone, while nominally made upon the stone, was in reality made upon the profit to be earned on concrete. The chief engineer and the resident engineer concurred in recommending this advance, and no one was in a better position than they to form an opinion as to whether or not there was on this item the margin of profit of one dollar per cubic yard that was so advanced. I have no hesitation in coming to the conclusion that there was at least that margin of profit on the work of this class. The argument for the Crown is that the profit on concrete would have fallen short of the amount advanced on potsdam sandstone by a sum of

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$14,863; while the suppliant contends that it would have exceeded such advance by $21,203.60, a difference between the parties on this item alone of 36,000 odd dollars. This is but an illustration of the different conclusions to which the parties come by their respective calculations and estimates.

Now in this state of the case it seemed to me, when I came to consider it, that it would be a reasonable and safe thing for the court to have as to this question of profit, or no profit, or, if profit, how much profit, the assistance of competent, independent and impartial expert engineers to be named by the court and to be wholly independent of the parties. There are two ways in which this could be done: First, to direct a rehearing of the question mentioned and to sit with experts as assessors; and, secondly, to refer the question to experts as referees. Either course might have been adopted and the necessary direction given without the consent of either party; but at the present stage of proceedings I did not care to put the parties to the further delay and expense unless both were willing. The suppliant consented to the adoption of either course; the Crown was not prepared to agree to either. I had of course formed an opinion on the question, but it would have been a matter of great satisfaction to me either to have reconsidered it with the assistance of engineers in whose competence and impartiality I had confidence, or to have referred it to them for inquiry and report. But as the parties are not both agreed I have come to the conclusion to give effect to my own views.

Of the $582,000 (I use round figures), which the suppliant would have received for the finishing of the work, I would take $87,000 as representing profit; that is, that on an expenditure of $495,000 the contractor would make $87,000, approximately seventeen

and one-half per cent. on his outlay. That, I think, is a fair contractor's profit, and I have no idea that the work in question, as a whole, would, if finished, have yielded the suppliant any greater profit than that. On the other hand I am convinced that it is not excessive. If one allows $60,000 profit on the concrete—and on the evidence one should, I think, allow that much at least—there remains only $27,000 of profit on an expenditure of some 386,000 odd dollars, or approximately seven per cent.

I have named as damages a round figure based approximately upon what I think is a fair percentage of profit on the work as a whole; but I have also gone into the details as to each item on which a profit is claimed as best I could on the evidence before me, with the result that I am confirmed in the view that the sum I have named is a fair one. I do not fancy that in respect of these details any two persons would as to all or the most of the items be altogether of one mind, and therefore no useful purpose can be served by giving my impressions as to what profits, if any, should be attributed to each item. Being myself satisfied that the amount named is, under all the circumtances, a fair one, I assess the damages for the breach of the contract in this case at eighty-seven thousand dollars. This includes the fifty-seven thousand dollars advanced on potsdam sandstone, for which the Crown will be given credit in striking the balance between the parties.

In the sum mentioned I have not included any profit on the extra work done by Ryan & McDonald in filling behind the piers, on which the suppliant claims that he should be allowed a profit of six thousand five hundred and seventy-nine dollars. This was work outside the contract, and I am not able to say either that the chief engineer would have

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directed it to be done, had the work remained in the suppliant's hands, or that in case he had done so that he would have fixed a price for it from which a profit would have been derived. I do not, therefore, take it into consideration.

In addition to the profit mentioned the suppliant would no doubt, if he had finished the contract, have had a considerable quantity of undressed stone at his quarry at Rockland. In getting out the dimension stone a good deal would have been quarried that would not have been available for that purpose, or for any purpose connected with the works in question, and would have been on hand at the conclusion of the work. But in view of the very large quantity of this class of stone (spoken of as backing) that the suppliant had on hand when the work was taken from him, and seeing that the market is so limited and slow, I have not thought that I should find any present money value in it. Its value in money would have been so speculative and remote that I think it should not be taken into account.

The suppliant is also entitled to the value of the plant taken over by the Crown. This matter of the plant was dealt with in part by the 10th paragraph of the judgment by consent of the 2nd December, 1899, whereby it was declared that the suppliant should receive from Her Majesty $10,000 worth of the plant referred to in the 11th and 12th paragraphs of the petition of right herein, to be selected by him, the value of the said plant to be computed upon the valuation as of a going concern upon the ninth day of November, 1897, set upon the articles to be selected and taken by the suppliant by the valuators named by him, as set forth in their schedule of valuation dated the 21st day of September, 1899, and filed on the day of the delivery of the said judgment; and

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that Her Majesty should be released from all claims in respect of the said $10,000 worth of plant, except the suppliant's claim, if any, to be paid a rental for said plant during the time which Her Majesty had been in possession thereof, if it should be found that Her Majesty was not entitled to use the said plant during the said period, free of all charge or claim under the contract in the second paragraph of the petition of right mentioned.

The main question now to be decided with regard to this matter is as to whether or not the value of this plant should be taken to be the value placed upon it by agreement as its market value or its value as a going concern. I adopt the latter view, which would put its value at the sum of $53,497.14. From this sum is to be deducted the $10,000 mentioned in the 10th paragraph of the judgment by consent before referred to.

I observe that the suppliant claims that the full amount of $10,000 ought not to be deducted, but a proportionate part of it only. As the case has, for reasons that appeared to be good, been submitted to me upon written arguments, and I have not had the benefit of an oral argument, I am not certain of the position which the Crown takes with regard to this matter. I am not sure that the Crown concedes the suppliant's contention that only a proportionate part of the $10,000 should be deducted. I shall, therefore, for the present, take the amount to be credited to the suppliant to be $43,497.14, reserving leave to him before the minutes of judgment are settled to move to have this sum increased.

I should not be disposed to allow the suppliant anything for the use of this plant or for interest upon its value. It seems to me that upon any taking of accounts between the parties the balance of account,

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apart from the question of damages for the breach of the contract, would, after giving credit for the plant, be against the suppliant. But this matter, too, may be spoken to, if the suppliant wishes, before the minutes of judgment are settled.

Then the suppliant is also entitled to the drawback retained. As to the amount ($16,638.75) there does not appear to be any dispute.

On the other hand, the suppliant is to be charged with the sum of $57,000 advance on the potsdam sandstone. I have mentioned the fact that the suppliant had done work upon this stone to the value of some $3,000; but that matter has been already taken into account in assessing the damages at $87,000, leaving the full advance to be deducted.

I am also of opinion that the suppliant should be charged with $48,500 advanced on backing at the Rockland quarry. This sum being taken into account the stone will be the property of the suppliant, free from any charge or lien in favour of the Crown in respect of this advance.

The suppliant is also to be charged with the sum of $7,500 mentioned in the 4th paragraph of the judgment referred to.

There is also a charge of a small sum of $56.10 overpaid on the last estimate, which the suppliant admits. The suppliant is also to be charged with the sum paid by the Crown to Ryan & Co. upon his order. There is a dispute between the parties as to whether this sum should be $7,577.00 or $7,862.17. The matter is referred to at page 193 of the first volume of the notes of evidence, but I am not able to determine the controversy between the parties without reference to the order that was given by the suppliant, and to the order in council mentioned in the notes. I have asked for these to be furnished to me, and in the mean-

time I will take the item as being that first mentioned, viz: $7,577.00, giving leave to the Crown to apply, before the minutes are settled, to increase the sum to $7,862.17.

I shall also reserve leave to either party, within the time mentioned, to move to add any item which, because of the way in which the argument has been presented to me, I may have overlooked, or to correct any error in matters of calculation, if any should have occurred.

The sum of the amounts for which in my opinion the suppliant ought to have credit is $147,135.89; and the sum of the amounts with which he is to be charged is $120,633.10, leaving a balance in his favour of $26,502.79. For this sum, subject to the reservations I have mentioned, there will be judgment for the suppliant with costs.

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The questions reserved under the foregoing judgment were spoken to by counsel on behalf of both parties on the 4th February, 1901.

*W. D. Hogg*, *K.C.* and *Glyn Osler* for the suppliant contended, in respect of the plant, that instead of $10,000 being deducted from the valuation of the plant as a going concern, the proper amount to be deducted would be $8,951.97. The reason for this is that if the $10,000 is to be deducted from that valuation it would be in order that the amount should be reduced in the same proportion as the total or compromised valuation has been reduced. The amount of the valuation of the plant agreed on is $53,497.14 and the proportion which $10,000 would bear to this amount is $8,951 97. As to the question of interest on the amount paid by the Crown for certain plant purchased from Hugh Ryan & Co. by the suppliant, we submit that the facts are that the suppliant gave an order, dated 10th June,

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1898, authorizing the Crown to pay a certain amount to Hugh Ryan & Co. Had the Crown complied with this order and paid the money, there would have been no interest. Not having done so, we should not be held liable for the consequences of the delay of the officers of the Crown. It is sought not only to charge us with this interest, but rental upon the plant as well. Now clearly we are not responsible for rental when we were not in possession of the plant.

*S. H. Blake, K.C.* and *W. H. Lawlor* contended that no less than $10,000 could in any case be deducted because the parties had agreed to that amount.

With reference to interest and rental upon the plant, we are entitled to interest from the day we paid over the money to Hugh Ryan & Co. We are not entitled to charge the rental, of course, after the suppliant gave the order of 10th June, 1898.

The following judgment upon the questions reserved was delivered by THE JUDGE OF THE EXCHEQUER COURT on the 26th February, 1901:

In giving judgment in this matter leave was reserved to the parties to speak to the item of plant, for which the suppliant was credited with a sum of $43,497.14, and the item of $7,577.00 which was debited against him for money paid by the Crown to Hugh Ryan & Co. These two questions were discussed by counsel on the 4th instant, when it was found that the amount to be credited for plant could not be definitely ascertained until the suppliant had, under the judgment by consent of the 2nd December, 1899, to be referred to, selected a certain portion of this plant; and time was given to him to make his selection. That has been now done, as will appear by a paper signed by the solicitors of the parties, dated the 7th instant, and filed in the court on the 12th instant. The suppliant on the 18th instant also filed a memorandum showing that the

value of the remainder of the plant as a going concern on the 9th of November, 1897, was $45,422.14. To this document I am informed the Crown does not intend to make any answer or reply. It does not, however, concede that the amount mentioned is correct, and it will perhaps be convenient that I should briefly state why I think he should be credited therewith.

By the 12th clause of the contract, for breach of which the petition was brought, it was provided that all machinery and other plant, materials and things provided by the contractor should, from the time of their being provided, become, and until the final completion of the work should be, the property of Her Majesty for the purposes of the said works; that the same should on no account be taken away or used or disposed of, except for the purposes of the works, without the consent in writing of the engineer; and that Her Majesty should not be answerable for any loss or damage whatsoever which might happen to such machinery or other plant, materials or things; provided always that upon completion of the works, and upon payment by the contractor of all such moneys, if any, as should be due from him to Her Majesty, such of the machinery and other plant, materials, and things as should not have been used and converted in the work and should remain undisposed of, should upon demand, be delivered up to the contractor.

By the 14th clause of the contract, set out in full in the reasons for judgment given herein, it was provided that where the contract was taken out of the contractor's hands, under the circumstances therein stated, all materials and things whatsoever, and all horses, machinery and other plant provided by the contractor for the purposes of the works, should remain and be considered the property of Her Majesty for the purposes

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and according to the conditions contained in the 12th clause of the contract.

By the 10th paragraph of a judgment by consent made herein on the 2nd day of December, 1899, by which a number of matters then in controversy between the parties were determined, it was ordered, as had been agreed between the parties, that the suppliant should receive from Her Majesty the Queen $10,000 worth of the plant referred to in the 11th and 12th paragraphs of the petition of right, to be selected by him. The value of said plant was to be computed upon the valuation as of a going concern on the 9th day of November, 1897, set upon the articles to be selected and taken by the suppliant, by the valuators named by him as set forth in their schedule of valuation dated the 21st day of September, 1899, and filed on the day of the said judgment. And that Her Majesty the Queen should be released from all claims in respect of the said $10,000 worth of plant, except the suppliant's claim, if any, to be paid a rental for said plant during the time which Her Majesty the Queen had been in possession thereof, if it should be found that Her Majesty was not entitled to use the said plant during the said period free of all charge or claim under the contract.

A further agreement between counsel in respect to this matter of the plant was come to on the 31st of January, 1900, in the terms following:—

"Counsel for both parties agree that the total value of the suppliant's plant referred to in the 11th and 12th paragraphs of the petition of right herein, and taken from the suppliant by Her Majesty at the time of the cancellation of the contract in the 2nd paragraph of the said petition of right herein, valued as the plant of a going concern on the 10th day of November, 1897, was the sum of $53,497.14, this amount being ascertained by

splitting the difference between the valuation of the valuators appointed by the suppliant and the valuation of the valuators appointed by the Crown, as appears by their schedule of valuation dated the 21st September, 1899, filed.

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"And counsel for both parties further agree that the total market value of the said plant on the said 10th day of November, 1897, was the sum of $34,631.78, which is ascertained in the same way as the value of the plant as a going concern above set out.

"And counsel for both parties further agree that the value, as the plant of a going concern, or the market value of any individual article or piece of the said plant upon which the said valuators have not agreed in the said schedule of valuation, shall be arrived at by splitting the difference."

Now it is obvious that very different considerations would be applicable to this question of the plant if one came to the conclusion that there had been no breach of the contract. In that case the plant would be dealt with as therein provided. But if the finding that there was a breach of the contract by the Crown, and that it was not justified in law in taking the works out of the contractor's hand is right, then it seems clear that the Crown was not entitled to hold or keep the plant in the manner and on the conditions provided in the 12th and 14th paragraphs of the contract, already referred to. On the contrary, the suppliant is, it seems to me, entitled to recover the value of the plant at the time when he was turned out of possession thereof—that is, its value in November, 1897. That, I should have thought, to be the correct view of the respective rights of the parties as to the plant, irrespective of the agreements they have subsequently entered into, and from which I drew the inference that there was no serious controversy on this point,

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but that the main dispute between the parties on this branch of the case was as to whether or not such value should be ascertained by taking the value of the plant as a going concern, or at its market value, that is, as I understand it, its value to any one in the position the contractor was then in, or its value removed from the works in which it was being employed, and sold in the market. Under the circumstances found to exist in this case the suppliant is, I think, entitled to be credited with the value of the plant as a going concern in November, 1897.

It is argued, however, for the Crown that the contractor would have had to use this plant to make the profit of $87,000.00 which has been credited to him as damages, and that it would have been greatly depreciated in value; and that for that reason he ought not to be allowed its value in 1897. No doubt, to make the profit allowed he would have had to use the plant in question, as well as other plant and materials that he would have had to provide for the prosecution of the work; but all that is taken into account in determining the profits allowed at $87,000.00, which are net, and not gross, profits. Before arriving at such net profits it is necessary that the undertaking be charged with, and that there be deducted from the moneys earned, among other things, the loss arising from wear and tear and depreciation of plant; and the balance showing net profits, such as the $87,000.00 were intended to be, is ascertained after making all such allowances.

The amount of $53,497.14, which according to the agreement of the parties, is to be taken as the value on the 10th November, 1897, of the plant in question as a going concern, was arrived at in the manner following: The valuators for the suppliant and for the Crown, concurred in putting a value of $33,380.14 on on a portion of such plant as a going concern. The

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remainder of the plant so valued, the suppliant's valuators put at $26,380.00, and the Crown's valuators at $13,854.00, and the parties agreed to add the half of the sum of these two amounts to the $33,380.14 as to which the valuators were agreed. That gives the sum of $53,497 14.

Of the plant, the value of which went to make up the sum of $33,380.14, the suppliant has selected plant of the value of $2,000.00 thus reducing that amount to $31,380.14. Of the remainder of the plant, valued by his valuators at $26,380.00, the suppliant has selected plant so valued of the value of $8,000.00, thus reducing the amount to $18,380.00. The articles so selected to make up this $8,000.00 were valued by the Crown's valuators at $4,150.00. Deducting this sum from the $13,854.00 at which they valued as a going concern this portion of the plant, we have for the value of what is left of this portion the sum of $9,704.00. Taking then, according to the rule the parties have agreed to, the half of the sum of the two amounts of $18,380.00 and $9,704.00, that is $14,042.00, and adding this to the $31,380.14 mentioned above, we find the value of the plant as a going concern, other than that selected by the suppliant, to be, according to the agreement of the parties, $45,422.14. Deducting therefrom $12.00 for some additional plant taken by him, as appears from the paper of February 7th, 1901, before mentioned, there will be left the sum of $45,410.14 with which amount the suppliant is to be credited in lieu of the sum of $43,497.14 mentioned in the reasons for judgment.

Part of the plant which the suppliant had in his possession in November, 1897, and which was taken over by the Crown, had been purchased by the suppliant from Hugh Ryan & Co., conditionally that it was to become his property upon being paid for. The

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purchase price of this plant, consisting of derricks, scows and other machinery, was $8,650,00, of which the suppliant paid $2,383.33, leaving a balance due from him to Hugh Ryan & Co., of $6,266,67. It was a term of the agreement between the suppliant and Hugh Ryan & Co, that the suppliant should pay interest at the rate of six per centum per annum upon any balance existing at any time, and also a nominal rental of $3.00 per month. In November, 1897, when the Crown took possession of the suppliant's plant, the sum of $7,287.55 was due to Hugh Ryan & Co., from the suppliant on that portion of the plant he purchased from them. On the 10th of June, 1898, the suppliant gave the Minister of Railways and Canals a letter in which he stated that the scows, chains, castings and derricks on his Soulanges contract works were only purchased by him from Hugh Ryan & Co., conditionally that they were to become his property upon being paid for; and that there was due therefor to Hugh Ryan & Co., the sum of $7,577.00, and he authorized the Minister to pay this amount and to charge the same to him. This letter does not appear in terms to have been acted upon; but later, in March, 1899, the Minister of Railways and Canals, acting upon the advice of the Minister of Justice and under the authority of an order in council bearing date the 27th of that month, paid to Hugh Ryan & Co., the sum of $7,862.17, being the amount then due to Hugh Ryan & Co., in accordance with the terms of the suppliant's conditional purchase before referred to, and on behalf of the Crown it is now contended that the suppliant should be charged in the accounts with the sum of $7,862.17 and not with the sum of 7,577.00 which he had authorized the Minister to pay. It will be observed that in the sum of $7,577.00 is included interest on the price of the plant in question, and rent therefor subse-

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quent to November 1897; but the suppliant, having given the letter, makes no objection to being charged with that amount. He objects, however, to being charged with interest and rent subsequent to the date of the letter. On the whole, I am of opinion to give effect to his contention. The rent being nominal, the interest on the balance of the purchase price and such rent constituted in substance a rental for the use of the plant. That use, the Crown, and not the suppliant had the benefit of. If the suppliant were being allowed interest upon the value of the plant taken from him, the matter ought, I think, to be treated differently; but as he is not being allowed any interest upon the value of his plant, he ought not, I think, to be charged with any interest or rent in respect of the plant in question, other than that which he has himself consented by his letter that the Crown should pay.

The only change, therefore, that becomes necessary in my reasons for judgment is that which relates to the plant in respect of which the suppliant is to be credited with a sum of $45,410.14, instead of $43,497.14, the difference being $1,913.00, which being added to $26,502.79 will give the sum of $28,415.79, for which, with costs there will be judgment for the suppliant.

*Judgment accordingly.*

Solicitors for the suppliant: *O'Gara, Wyld & Osler.*

Solicitor for the respondent: *W. H. Lawlor.*

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April 2.

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

THE ROCHESTER AND PITTSBURG COAL AND IRON COMPANY (PLAINTIFFS)..... ..... } APPELLANTS;

AND

THE SHIP GARDEN CITY, (DEFENDANT)

RESPONDENT.

(THOMAS NIHAN, REGISTERED OWNER,)

*Admiralty law—Necessaries—Owner domiciled in Canada—Jurisdiction.*

*Held*, (affirming the judgment appealed from) that no action will lie on the Admiralty side of the Exchequer Court against a ship for necessaries when the owner of the ship at the time of the institution of the action is domiciled in Canada.

APPEAL from a judgment of the Local Judge in Admiralty for the Toronto Admiralty District.

The facts of the case are stated in the report of the case below (1), and in the reasons for judgment herein.

March 16th, 1901.

*W. M. German, K.C.* for appellants:

We submit that the action was properly taken against the ship. The 'owner' within the meaning of the fifth section of *The Admiralty Act*, 1861, (24 Vict. c 10) is the person who has control of the ship and the crew under the charterparty. (Cites the *Ella A. Clark*) (2). No personal action would lie against Nihan, although one may lie against the charterers; but undoubtedly there is an action *in rem* against the boat. The ship was *de jure* owned by the charterers. (Cites *Lloyd* v. *Guibert* (3); *The Tasmania* (4); *Baumwoll Manufactur* v. *Furness* (5); *Hutton* v. *Bragg* (6).

(1) See *ante* p. 34
(2) Br. & Lush. 32.
(3) L. R. 1 Q. B. 115.
(4) 13 Prob. D. 110.
(5) [1893] A. C. 8.
(6) 7 Taun. 14.

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*J. A. Wright* for the respondents, citing the *Ella A. Clark* (1); *The Pacific* (2).

*A. L. Colville* followed for the respondents;

If the appellants had sued the master who ordered the coal, the master in turn could not have maintained an action *in rem* for necessaries, because the legal owner of the ship was at the time domiciled in Canada. Clearly, the court has no jurisdiction in this case, under the facts and circumstances. *Fletcher* v. *Braddick* (3).

*W. M. German K.C.* replied.

THE JUDGE OF THE EXCHEQUER COURT now (April 2nd, 1901) delivered judgment.

I think that the judgment appealed from is right. It is well settled law that independently of statute no action will lie against a ship for necessaries supplied to it. By *The Colonial Courts of Admiralty Act*, 1890, (53-54 Victoria (U.K.) c. 27) a Colonial Court of Admiralty has, subject to the Act, jurisdiction over the like places, persons, matters and things, as the High Court in England has (4); and any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were substituted for England and Wales (5). There are two Acts of the Imperial Parliament under which the High Court in England has jurisdiction to decide claims for necessaries supplied to ships. The earlier of the two Acts. 3 & 4 Vict. c. 65, s. 6, applies only to foreign vessels, and need not be referred to more particularly. The second is *The Admiralty*

(1) Br. & Lush. 32.
(2) Br. & Lush. 243.
(3) 2 B. & P. (N.R.) 182.
(4) Sec. 2 (2).
(5) Sec. 2 (3) *a*.

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*Act*, 1861, (24 Vict. c. 10), the fifth section of which, so far as it is necessary to refer to it, reads as follows:

"The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

This court, therefore, has no jurisdiction over the claim in question here if it appears that at the time of the institution of the cause any owner or part owner of the ship was domiciled in Canada. This cause was instituted in June, 1900, and at that time the defendant Thomas Nihan was the owner of the ship, and was domiciled in Canada. It is said, however, that in 1896, when the debt for which the ship was arrested was incurred, the charterers of the ship, and not Nihan, were the owners of the ship; and it is contended that they must, in respect of such debt, be taken to be the owners within the meaning of the statute. In support of the contention the case of *The Ella A. Clark* (1) is relied on. Dr. Lushington's reasons in that case have been the subject of some unfavourable comment in the Court of Appeal in the case of *The Mecca* (2); but taking the decision as it stands it will be seen that in that case the court had jurisdiction under 3 & 4 Vict. c. 6, s. 6, in respect of necessaries supplied to the ship when it was a foreign ship, and it was held that this jurisdiction was not defeated by 24 Vict. c. 10, s. 5, although before the institution of the action the ship had been transferred to a British owner domiciled in England. Here, however, the jurisdiction depends wholly upon the latter Act, and the statutes making it applicable to this court; and it is obvious that in

(1) Brown & Lush. 32. (2) [1895] Prob. D. at p. 116.

1900, at the time of the institution of this cause, the charterers for the season of 1896, who had parted with the possession and all control over the ship were not the owners thereof. It is not even necessary to consider how far and in what sense they were in 1896 the owners. There being at the time of the institution of the cause an owner of the ship domiciled in Canada, it is clear that the court has no jurisdiction.

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*Appeal dismissed with costs.*

Solicitor for appellants: *W. M. German.*

Solicitor for respondents: *M. J. McCarron.*

1901

April 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

WILLIAM TRAIL AND MARGARET TRAIL ..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

*Expropriation—Will—Construction—Gift over in the event of death—Life estate—Interest on compensation money.*

A testatrix made the following disposition of a certain portion of her estate:—"I give, devise, and bequeath unto my niece M. W. of H., spinster, daughter of my eldest sister M., all that dwelling-house and lot of land now occupied by me (describing it) together with all and singular the appurtenances thereunto belonging, and all fixtures, furniture, bedding and clothing, and all sum and sums of money and other things that may be remaining and found in my said dwelling-house at the time of my decease, and all debts due me, save except as hereinafter mentioned, to have and to hold the said dwelling-house, lot of land and premises aforesaid unto her my said niece M. W., her heirs, executors, administrators and assigns, forever. But in case she should die without leaving lawful issue, then to my nieces hereinafter mentioned, and their children being females." Following this there was a residuary gift or bequest to "the daughters of my sisters M. and H., and to the daughters or daughter of my late brother J., and to their children if any being daughters."

*Held*, that there was nothing in the will to indicate any intention on the part of the testatrix that the gift over should not take effect unless in her lifetime her niece M. W. died without leaving lawful issue; but on the contrary it was to be inferred from the terms of the will that it was the intention of the testatrix that in the case of the death at any time of the said M. W. without leaving lawful issue, the other nieces to whom she left the residue of her estate should take the property. *Cowen* v. *Allen* (25 S.C.R. 292); *Fraser* v. *Fraser* (26 S. C. R. 316); *Olivant* v. *Wright* (1 Chan. Div. 348) referred to.

2. The property in question had been expropriated by the Crown for the purposes of a public work.

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*Held* that the suppliant M. T., the devisee under the will, *sub nomine* M. W., was in any event entitled to a life interest in the compensation money, and that she might be paid the interest thereon during the pendency of proceedings to determine the respective rights of all parties interested therein.

Argument of Counsel.

PETITION OF RIGHT for a declaration of title to certain compensation money tendered by the Crown in respect of lands taken at Halifax, N.S., for the purposes of a public work.

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

June 19th, 1900.

The case was now heard at Halifax, N.S.

*C. H. Cahan*, for the suppliants, contended that Margaret Trail was entitled to the compensation in respect of the lands taken as the owner thereof in fee simple under the will of Margaret Brown. The devise was to the suppliant Margaret Trail, née Wilson, in fee upon the condition that "in case she should die without leaving lawful issue" the property should vest in certain other persons in tail. Now the words " in case she should die," &c., must, we submit, be taken to refer to death in the lifetime of the testatrix; and the devise was by way of substitute. Now the will was dated the 13th January, 1858, and by *The Revised Statutes of Nova Scotia*, first series (1851), we find that all estates tail are abolished, and every estate which would have therefore been adjudged a fee-tail should thereafter be adjuged a fee-simple. (And see R. S. N. S., second series, (1859) c. 112; R. S. N. S., third series, c. 111; 28 Vict. c. 2 (1865) R. S. N. S., fourth series, c. 78; R S. N. S., fifth series, c. 88.) The will in this case was proved in the year 1867. He cites *Clayton* v. *Lowe* (1); *Gee* v. *Mayor of Manchester*

(1) 5 B. & Ald. 636.

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(1); *Woodburne* v. *Woodburne* (2); *Cooper* v. *Cooper* (3); *Apsey* v. *Apsey* (4); *Theobald on Wills* (5); *Jarman on Wills* (6); *Hawkins on Wills* (7); 29 *Am & Eng. Ency. of Law* (8).

Argument of Counsel.

If the suppliant Margaret Trail took anything under the will she took a fee-simple. The subsequent words provide for the contingency of her not taking. This condition is void for repugnancy. He cites *In re Parry* v. *Daggs* (9); *Corbett* v. *Corbett* (10); *Jarman on Wills* (11).

But if the words used by testatrix do not refer to the death of the devisee in the lifetime of the testatrix then the devisee took an estate tail. He cites *Roberts on Wills* (12); *Theobald on Wills*(13); *Woodhouse* v. *Herrick* (14); *Slater* v. *Dangerfield* (15); *Ernst* v. *Zwicker* (16); *Re Anstice* (17).

*H. Mellish* for the plaintiff;

The words used by the testatrix imply a gift to the nieces in fee subject to a limitation in the event of Margaret Wilson (Trail) dying with issue. A gift to A, and in case of A's death to B means the death of A in the lifetime of the testatrix. The expression "my nieces" must be interpreted to mean nieces other than Margaret Trail. He cites *Cowan* v. *Allan* (18); *Fraser* v. *Fraser* (19); *Duggan* v. *Duggan* (20); *Dugdale* v. *Dugdale* (21); *Wright* v. *Wright* (22).

(1) 17 Q. B. 737.
(2) 23 L. J. Ch. 336.
(3) 1 K. & J. at p. 662.
(4) 36 L. T. N. S. 941.
(5) 4th ed. 534.
(6) 5th ed. Vol. 1, p. 442; Vol. 2, p. 1600.
(7) P. 257.
(8) P. 370.
(9) 31 Chan. D. 130.
(10) 13 P. D. 136; 14 P. D. 7.
(11) 5th ed. vol. 2, p. 855.
(12) Vol. I., p. 481.
(13) P. 337.
(14) 1 K. & J. at p. 361.
(15) 15 M. & W. 263.
(16) 27 S. C. R. 594.
(17) 23 Beav. 135.
(18) 26 S. C. R. 292.
(19) 26 S. C. R. 316.
(20) 17 S. C. R. 343.
(21) 38 Ch. D. at p. 181.
(22) 1 Ves. Snr. 408.

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*C. H. Cahan* replied, citing *Olivant* v. *Wright* (1); *Besant* v. *Cox* (2).

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (April 2nd, 1901) delivered judgment.

The petition is brought for a declaration that the suppliant Margaret Trail, whose maiden name was Margaret Wilson, is entitled to the sum of three thousand dollars as compensation for certain lands in the City and County of Halifax, taken by the Crown for the use of the Intercolonial Railway. The claim, made in the petition as filed, is based upon the allegation that at the time of the taking of the lands Margaret Trail was the owner thereof in fee-simple, as devisee under the will of one Margaret Brown. By an amendment to the petition the sum is, in the alternative, claimed by her as surviving executrix of the last will and testament of Margaret Brown. It is very clear, I think, that Margaret Trail is not entitled to the compensation money as executrix. Margaret Brown having died in 1867, and the lands not being expropriated until 1898.

Whether or not she is entitled as owner in fee-simple of the lands at the time they were taken by the Crown depends upon the construction of Margaret Brown's will, in which occur the following gifts and devises:

"I give, devise and bequeath unto my niece Margaret Wilson, of Halifax, spinster, daughter of my eldest sister, Margery, all that dwelling-house and lot of land now occupied by me, situate, lying and being in the north suburbs of Halifax, commonly called Dutch Town, abutted and bounded as follows: On the east by Water Street, on the south by the late Jacob Hurd's lot, now or lately the property of Samuel Marshall, and on the north and west by the property now

(1) 1 Ch. D. 346. (2) 6 Ch. D. 604.

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or lately of Michael Leonard, measuring on Water Street forty-two feet, and backwards towards Lockman Street, one hundred and fifty feet, being lot number seven, letter C, in said north suburbs, together with all and singular the appurtenances thereunto belonging, and all fixtures, furniture, bedding and clothing, and all sum and sums of money and other things that may be remaining and found in my said dwelling-house at the time of my decease, and all debts due to me, save except as hereinafter mentioned, to have and to hold the said dwelling-house, lot of land and premises aforesaid unto her my said niece, Margaret Wilson, her heirs, executors, administrators and assigns forever: But in case she should die without leaving lawful issue, then to my nieces hereinafter mentioned and their children being females."

* * * * * * * *

"I give and bequeath unto the daughters of my sisters Margery and Helen, and to the daughters or daughter of my late brother John, or their children, if any, being daughters, all the rest, residue and remainder of my estate, property and moneys, particularly my shares in the Bank of British North America, to hold the same to the said daughters of my said two sisters, and the daughters or daughter of my said brother John and their children, being females, share and share alike, but free from the debts, control or engagements of any husband or husbands they or any or either of them now or may hereafter have. And I do hereby declare that the separate receipts of my said several nieces or their daughters—provided said nieces or daughters be duly identified as such—signed by them, respectively, in presence of two credible witnesses shall be sufficient discharges to my said executrix and executor for such sum or sums of money as shall be expressed in such receipts."

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And the question is whether the words "in case she should die without leaving lawful issue" have reference to her death during the lifetime of the testatrix, or to her death at any time. Unless a contrary intention appears by the will, a gift over in the event of death without issue is held to mean death without issue at any time. *Cowan* v. *Allen* (1); *Fraser* v. *Fraser* (2), and cases cited in the reasons for judgment therein. See also *Olivant* v. *Wright* (3).

There is nothing, in my opinion, in the will in question to indicate an intention on the part of the testatrix that the gift over should not take effect unless in her lifetime her niece, Margaret Wilson, died without leaving lawful issue. On the contrary, I infer from its terms that it was her intention that in the case of the death at any time of the latter without leaving lawful issue, the other nieces, to whom she left the residue of her estate, should take the property.

If I had come to a contrary conclusion I should not have stated it without having made the other persons mentioned parties to the action, and affording them an opportunity of being heard. Whether that could be more conveniently done in an information by the Crown than on the present proceeding need not be now considered. It is clear, however, that the suppliant, Margaret Trail, is entitled to a life interest in the fund or sum of money mentioned; and there can be no objection to the interest thereon being paid to her during the pendency of proceedings to determine the respective rights of the parties. But I give no direction at present as to that. It is a matter that may possibly be arranged by counsel. For the present I give leave to either party to speak to the form of the

(1) 26 S. C. R. 292. (2) 26 S. C. R. 316.
(3) 1 Chan. D. at p. 348.

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judgment that should be entered up, or to obtain further directions.

*Judgment accordingly.*

Solicitor for suppliants: *W. A. Henry.*

Solicitor for respondent: *W. B. Ross.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1901
April 2.

THE QU'APPELLE LONG LAKE AND SASKATCHEWAN RAILROAD AND STEAMBOAT COMPANY, THE QU'APPELLE LONG LAKE AND SASKATCHEWAN LAND COMPANY (LIMITED), THE HONOURABLE DONALD McINNIS, OSLER AND HAMMOND, AND THE HONOURABLE WILLIAM PUGSLEY ..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

*Contract for grant of part of public domain—Breach of—Remedy—Jurisdiction—Declaration of right.*

The Exchequer Court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain made under the authority of an Act of Parliament.

2. Such a claim may be prosecuted by a Petition of Right.

3. Where the court has jurisdiction in respect of the subject-matter of a Petition of Right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. If on the other hand, there is no jurisdiction, no such declaration should be made. *Clark* v. *The Queen* (1 Ex. C. R. 182) considered.

PETITION OF RIGHT for relief in respect of an alleged breach of contract for a grant by the Crown of certain lands in the public domain.

The effect of the statutes, orders in council, and other matters of fact involved herein are stated in the reasons for judgment.

The limitations of the questions at issue, as decided by the present judgment herein, are also stated in the reasons for judgment.

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Argument of Counsel

1901, January 22nd.

The case came on to be heard at Ottawa.

*Christopher Robinson*, *K.C.* for the suppliants:

What the court is now asked to do is to decide whether there is a contract binding upon the government, and if so what that contract is. If the court should decide in favour of the suppliants' contention, then it must decide that the contract is that the Crown should give a certain quantity of land of a certain description, and that the suppliants have performed the consideration entitling them to that grant. This court is the only tribunal that can decide whether there is a binding contract entered into between the parties, in respect of which the court has jurisdiction to decide the rights of the parties.

He then proceeded to cite and discuss the statutes and orders in council upon which the suppliants rely to make out their contract. He contended that inasmuch as the subsidy Act of 1887 was assented to three days after the order in council undertaking to make the grant was passed, it must be taken to be a legislative confirmation of the act of the Governor-in-Council.

*S. H. Blake*, *K.C.* for the respondent:

We submit that there is no bargain or contract as between the parties to this action. The court cannot order specific performance against the Crown. The legislation simply enables the Crown to make a grant of the lands if it saw fit. Even if there were a valid contract, the court could not make a decree for specific performance against the Crown. Nor will the court make a mere declaration unless as a matter of law there is a right on the part of the suppliants as against the Crown.

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Argument of Counsel.

Now there was no consideration for any contract between the suppliants and the Crown. The legislation was simply permissive, enabling the Crown to make a "free grant" of lands.

Again, the subject-matter of the contract is so uncertain, the description of the lands is so vague and indefinite, that the transaction is impossible of enforcement in law. Unless there is a sufficient description of the land there is no binding agreement, and so the court will not make a declaration of right where the right itself cannot be ascertained and defined.

A grant of the Crown cannot be construed more favourably to the grantee. The suppliants are bound to take the lands as we define them. The legislation was passed upon the assumption, as the fact is, that the Crown is to make the selection of the lands. The suppliants must depend upon the honour of the Crown to deal fairly by them. The suppliants are bound to take what the Crown, in its discretion, allots to them.

Then, the Minister of the Interior has the right to approve of the selection, and his action is final. There is no appeal. The power must remain with some person, and when it is placed in his hands and he has examined it, there can be no gainsaying what he has concluded in regard to it. No order in council, or no statement of the minister can enlarge the statutory provision to simply grant 'lands of the Crown.' The order in council could not have said 'coal lands,' or 'mineral lands,' or 'best agricultural lands.' The plain words of the statute cannot be enlarged one way or the other. It is 'lands as they run,' and as the order in council states 'townships, or parts of townships,' it is perfectly evident that it could not mean any particular or specified land, but it must be the general run of lands as they go in that part of the public domain.

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Argument of Counsel.

That being so, and the lands having been set apart and tendered by the Crown to the suppliants, what default has the Crown been guilty of?

Upon the point that the grant is void for uncertainty, the following authorities are relied upon: *Sheppard's Touchstone* (1); *Cruise's Digest* (2); *Hungerford's Case* (3); *Brand* v. *Todd* (4); *Bacon's Elements* (5); *Doe d. Devine* v. *Wilson* (6); *Stockdale's Case* (7); *Luther* v. *Wood* (8).

Here the proceedings were adjourned, to be resumed, at Toronto, at a date to be fixed.

1901, February 11th.

Argument resumed at Toronto.

*E. L. Newcombe, K.C.* followed for the respondent:

The order in council of 20th June, 1887 is, I submit, in excess of the powers conferred upon the Government by Parliament. The contract, if there be any contract in the dealings between the suppliants and the Government, is *ultra vires*. All that the Crown was authorized to do was to make a free grant of lands. So that if the territory failed, or the land failed, out of which the selection was to be made, there would be no cause of action; or if there was a failure to carry out the undertaking of the Government for any cause which might be deemed sufficient in the minds of His Majesty's advisers, there would be no obligation entered into which could be enforced in any court.

If it is necessary to have express statutory authority to enable the Government to make an agreement to grant a money subsidy, then it must be equally necessary to have such authority to enable the Government to make an agreement to grant a land subsidy.

(1) Atherley's ed. p. 251.
(2) Vol 5, p. 53.
(3) 1 Leon. 30.
(4) Noy 29.
(5) Rule 23.
(6) 10 Moo. P. C. 502.
(7) 12 Co. Rep. 86.
(8) 19 Gr. 348.

As to the contention that the subsidy Act of 1897 being a ratification by Parliament of the order in council upon which the suppliants rely, I submit that where section 5 of chapter 23 speaks of orders in council made, it is not intended to approve any existing order in council, but to authorize the Government to make orders in council in the future in respect of this matter. He cites *Pearce* v. *Watts* (1); *Re Burnitt and Burland's Contract* (2); *United States* v. *King* (3); *United States* v. *Delespine* (4); *United States* v. *Forbes* (5); *Buyck* v. *United States* (6); *United States* v. *Miranda* (7); *Shackleford* v. *Bailey* (8); *Chitty's Prerogatives* (9).

As to the point that there is no implied contract to give the lands, the following authorities are cited: *Broom's Legal Maxims* (10); *Chitty's Prerogatives* (11); *The Rebeckah* (12); *Eastern Archipelago Company* v. *The Queen* (13); *Feather* v. *The Queen* (14); *Todd's Parliamentary Government in England* (15); *Churchward* v. *The Queen* (16); *Wood* v *The Queen* (17); *Quebec Skating Club* v. *The Queen* (18); *Smith's Parliamentary Remembrancer* (19); *The Queen* v. *Clark* (20).

As to the court making a declaration of right, when there is no jurisdiction to entertain the claim, see the following authorities: *Langdale* v. *Briggs* (21); *Rooke* v. *Kensington* (22); *Bristowe* v. *Whitmore* (23); *Bell* v. *Cade* (24); *Barraclough* v. *Brown* (25).

(1) L. R. 20 Eq. 492.
(2) [1882] W. N. 152.
(3) 3 How. at p. 786.
(4) 15 Pet. at p. 335.
(5) 15 Pet. at pp. 182, 184.
(6) 15 Pet. 215.
(7) 16 Pet. 153.
(8) 35 Ill. 387; See Plow. p. 243.
(9) Pp. 394-397.
(10) 7th ed. p. 451.
(11) P. 393.
(12) 1 C. Rob. at p. 230.
(13) 2 E. & B. at p 906, 907.
(14) 6 B. & S. 283, 284.
(15) 2nd ed. vol. 1, p. 724.
(16) L. R. 1 Q. B. at pp. 198, 199, 209, 210.
(17) 7 S. C. R. 648.
(18) 3 Ex. C. R. at p. 397.
(19) [1860] p. 75.
(20) 7 Moor. P. C. 77.
(21) 8 DeG. McN. & G. at p. 428.
(22) 2 K. & J. at p. 760.
(23) 4 K. & J. at p. 745.
(24) 2 J. & H. 123.
(25) [1897] A. C. at p. 623.

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Argument of Counsel.

*Mr. Robinson, K.C.* in reply:

If there is no contract between the Government and the suppliants here where would you get one? We have to begin with an order in council making a contract, we have Parliament three days afterwards saying that the Government may contract on the terms mentioned in the order in council, we have a formal contract subsequently made giving these suppliants a large sum of money. To say that we have no contract is simply to say that the Crown can never be held to have made a valid contract. He cites *Mowat* v. *McFee* (1); *Labrador Company* v. *The Queen* (2); *Winona & St. Peter Railway Co.* v. *Barney* (3); *Wisconsin Central Railroad Co.* v. *Forsythe* (4); *United States* v. *Denver &c. Railway Co.* (5); *Lord* v. *Commissioners of Sydney* (6); *Elliott on Railroads* (7); *Hyatt* v. *Mills* (8); *The Queen* v. *Mayor of Wellington* (9); *Earl of Warwick* v. *Duchess Dowager of Clarence* (10); *Clode on Petition of Right* (11); *Peterson* v. *The Queen* (12); *Clarke* v. *The Queen* (13); *Attorney General* v. *Ettershank* (14)

THE JUDGE OF THE EXCHEQUER COURT now (April 2nd, 1901) delivered judgment.

The suppliants bring their petition for relief in respect of a land grant that the Parliament of Canada authorized the Governor-in-council to make in aid of the railway mentioned in their petition; and the matter has, by an arrangement between counsel, come on for hearing on a presentation of the case that leaves untouched the substantial controversy between the

(1) 5 S. C. R. 66.
(2) [1893] A. C. 104.
(3) 113 U. S. 618.
(4) 159 U. S. 46.
(5) 150 U. S. at p. 14.
(6) 12 Moo. P. C. 473.
(7) Vol. 2, p. 1117.
(8) 20 Ont. R. 351.
(9) 15 N. Zeal. 72.
(10) Y. B. 9 Hen. VI.
(11) P. 112.
(12) 2 Ex. C. R. at p. 77.
(13) 1 Ex. C. R. 182.
(14) L. R. 6 P. C. 354.

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parties. The Crown is, and has been, ready to make good the grant; but there is, and has been, a dispute which the parties have not been able to determine, as to whether or not in the lands set apart to satisfy the grant, there is a sufficient quantity of lands fairly fit for settlement, out of which the grant may be made good. Then there is another question that in the view of the suppliants may arise, in respect of which the parties are not agreed, and that is whether in case it should happen that neither in the lands so set apart, nor in other available lands in the North West Territories, a sufficient quantity of land fairly fit for settlement can be found to satisfy the grant, the Crown must for the deficiency answer in damages. But neither of these questions are to be answered or dealt with at present. The first cannot be considered because the evidence touching the matter is not before the court, and the second will not arise until the first question has been determined.

There being a difference between them on the two questions mentioned, the matter has come before the court and the parties being at arm's length other questions have arisen, a solution of which is desired.

The principal question at present is, it seems to me, as to the jurisdiction of the court; but that of course in its turn depends upon the nature and character of the suppliants' claim; and then if it is found that the suppliants have a claim over which the court has jurisdiction, a third question will arise as to whether or not the Crown is in default.

By an Act of the Parliament of Canada, 46 Victoria, chapter 72, the company suppliant was given authority to construct the railway referred to in the petition of right. By the Acts 48-49 Victoria, chapter 60, and 50-51 Victoria, chapter 23, the Governor-in-Council was given authority to make a grant of Dominion

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lands in aid of the said railway, not to exceed six thousand four hundred acres for each mile of the company's railway. The grant for which provision was made by the Act 48-49 Victoria, chapter 60, has been satisfied, and is not now in question. The Act 50-51 Victoria, chapter 23, was assented to on the 23rd of June, 1887. By an order in council of the 20th of June, 1887, the Governor-in-Council approved of a recommendation made by the Minister of the Interior that the grant mentioned be given to the company on the terms and conditions therein set out. The Act 50-51 Victoria, chapter 23, authorized grants of land to more than one company, and by the 5th section it was provided that "the said grants and each of them "may be so made in aid of the construction of the said "railways respectively in the proportions and upon "the conditions fixed by orders in council made in "respect thereof, each of the enterprises being respectively subject to any modification thereof which may "hereafter be made by the Governor-in-Council." It is objected that the words orders in council made in respect thereof have relation to orders in council to be thereafter made, and does not mean or include an order in council made before the passing of the Act. With that view I do not agree, and it is, I think, convenient to dispose of the objection now. I think the words may be taken—and I take them in this case—to refer to an order in council made before the passing of the Act, and receiving therefrom the approval and sanction of Parliament necessary for its validity.

The company was not, it seems, able to complete the railway with the aid of the land grant above mentioned, and Parliament and the Governor-in-Council gave it further assistance to enable it to do so.

By the Act 52 Victoria, chapter 5, assented to on the 2nd of May, 1889, it was provided as follows:

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"1. In order to enable the Qu'Appelle, Long Lake "and Saskatchewan Railroad and Steamboat Company "to complete their railway from Regina to some point "on the South Saskatchewan River, at or near Saska- "toon, and thence northward to Prince Albert, the "Governor-in-Council may enter into a contract with "such company for the transport of men, supplies, "materials and mails, for twenty years, and may pay "for such services, during the said term, eighty thou- "sand dollars per annum, in manner following, that "is to say: the sum of fifty thousand dollars to be "paid annually on the construction of the railway to "a point at or near Saskatoon, such payment to be "computed from the date of the completion of the "railway to such point; and the remaining thirty "thousand dollars annually on the extension of the "railway to Prince Albert, such payment to be com- "puted from the date of such last mentioned comple- "tion: Provided, that if the second portion of the said "railway is not built and operated to Prince Albert "within two years after the completion of the railway "to the South Saskatchewan as aforesaid, the payment "of fifty thousand dollars shall cease until the whole "railway is finished to Prince Albert."

On the fifth of August, 1889, the contract authorized by this Act was entered into by Her Majesty, represented by the Right Honourable Sir John A. Macdonald, Acting Minister of Railways and Canals of Canada, and by the suppliant company first above mentioned. It provided for the construction of the railway and the payment of the amounts mentioned. That contract or agreement is in full force today, and its validity is not in any way called in question. It deals, primarily, it is true, with the aid to be given to the company by the contract for the transport of men, supplies and mails; but it also

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contains provisions in respect of the land grant which the Governor-in-Council had authority to make under the earlier Acts referred to. Later in November of the same year another agreement was drawn up for the completion of the railway, having more especial reference to the land grant, but it was never completed, and need not be further referred to here. It is the more important, therefore, to go back to the agreement of the 5th of August, 1889, and see what is therein contained in respect of the land grant. First it is therein, among other things, recited that the company has become entitled to the grant mentioned (meaning of course upon completion of the railway according to the terms and conditions agreed upon), and then by the sixth clause of the contract it is provided, that, "by way of indemnity to the Government in case the "amount earned by the company for such service "should not amount to the sum paid by the Govern- "ment in any year, the Government, as the land grant "of the company is earned from year to year, shall "retain one third of the land grant so earned which "shall be held by the Government as a first charge or "lien securing the repayment of any such deficiency, "and shall issue to the company patents for the "remaining two thirds thereof."

The eighth clause of the contract makes provision for the administration of the one third of the land grant to be retained by the Government, but it is not necessary to set it out here, as it does not, so far as relates to the questions now to be determined, carry the matter any further than the sixth clause, in which as to two-thirds of the land grant there is direct agreement by the Crown to issue the patents therefor. This undertaking by the Crown, among other things, clearly

distinguishes this case from *The Hereford Railway Company* v. *The Queen* (1).

In this statement of the facts of the case I have avoided going into details, and I have not mentioned many matters to which counsel attribute more or less importance. There are a number of orders in council relating to the undertaking, to extensions of time for its completion, to the approval of the work when completed and to other matters; but there is no occasion at present, it seems to me, to refer to them more particularly.

Now, first, with regard to the jurisdiction of the court, it is to be observed that it has, among other things, exclusive original jurisdiction in all cases in which a claim arises out of a contract entered into by or on behalf of the Crown (2); or in which there is a claim against the Crown arising under any law of Canada, or any regulation made by the Governor-in-Council (3). Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the Head of the Department in connection with the administration of which the claim arises (4.) Where a claim against the Crown is so referred by the Head of the Department, a statement of claim is filed and served and subsequent pleadings and procedure are regulated by and conform as near as may be to a proceeding by petition of right (5). In matters not otherwise provided for, the practice and procedure at the time in force in similar suits, actions and matters in the High Court of Justice in England are to be followed (6). The form of judgment in a petition of right is that the

(1) 24 S. C. R. 1.
(2) *The Exchequer Court Act*, 50-51 Vict. c. 16, s. 15.
(3) Ib. s. 16 (d).
(4) Ib. s. 23.
(5) Rules of March 7th, 1888, Audette's Practice, Rule 17, p. 229.
(6) 50-51 Vict. c. 16, s. 21; and General Rule 1, Audette's Prac. 217.

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suppliant is not entitled to any portion, or that he is entitled to the whole or to some specified portion of the relief sought by his petition, or to such other relief and upon such terms and conditions, if any, as are just (1). This provision follows in substance the seventh section of *The English Petition of Right Act* (2). By the seventh section of that Act it is in substance provided that so far as the same may be applicable, and not inconsistent with the Act, the practice and course of procedure in the courts of law and equity, respectively, for the time being in reference to suits and personal actions between subject and subject shall, unless the court otherwise orders, apply and extend to such petition of right. But this was not intended to, and did not give the subject any remedy in any case in which before the passing of the Act he had no remedy. In *Clode on Petition of Right* (3) will be found a reference to several cases respecting gales in which a declaration of the suppliant's right was sought; and in which no objection was taken on behalf of the Crown to the suppliant's method of procedure. But as the cases referred to were respectively decided against the suppliants on the merits, they cannot be taken as conclusive of the suppliants' right so to proceed. By Order xxv, Rule 5, of the rules in force in the High Court of Justice in England it is provided that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not. This rule does not apply to proceedings on the Crown side or the revenue side of the Queen's Bench

(1) *The Petition of Right Act*, R. S. C. 136, s. 12.

(2) 23 and 24 Vict. (U. K.) c. 34.

(3) Pp. 75-76.

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Division (1). But a petition of right may be instituted in any division of the High Court, and it is not, I think, a proceeding on the Crown side or on the revenue side of the court, within the meaning of the exception mentioned. In my opinion a petition of right is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. In fact from the nature of the case no other judgment or order can be pronounced against the Crown in a proceeding by petition of right. The important question always is as to whether or not the court has jurisdiction. If there is no jurisdiction no declaration should be made. *Barraclough* v. *Brown* (2). But if there is jurisdiction there can be no possible objection to the judgment or order being in the form prescribed in *The Petition of Right Act*. The case of *Clark* v. *The Queen* (3) does not, I think, decide anything to the contrary, and even if it were thought to do so, the statute of 1887 (4) has greatly enlarged the jurisdiction of the court.

In the present case the suppliants' claim arises, it appears to me, under a law of Canada, that is, in this case, under certain statutes passed by the Parliament of Canada and also out of a contract entered into by and on behalf of the Crown in pursuance of such statutes.

I find that the suppliants are entitled to the grant of land claimed by them; but I also find that in respect of such claim the Crown is not in default, the Crown being ready and willing to make the grant.

There is one other question to which perhaps I should make some reference. The Act of June 23rd, 1887, authorized a grant of Dominion lands. The order in council of June 20th, 1887, provides for a

(1) Order lxviii.
(2) [1897] A. C. at p. 623.
(3) 1 Ex. C. R. 182.
(4) 50-51 Vict. c. 16.

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grant of Dominion lands of a particular description; those "fairly fit for settlement." It is said that the order in council is invalid so far as it goes in that respect beyond the Act. But that, like the questions first mentioned, does not arise at present. The Crown offers land that is said to be fairly fit for settlement, and it is alleged that there are available lands of that description with which to make good the grant. Until that matter is settled the other question will not arise.

*Judgment accordingly.*

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

Solicitor for respondent: *E. L. Newcombe.*

HIS MAJESTY THE KING.....PLAINTIFF; 1901

April 9.

AND

THE BRITISH AMERICAN BANK NOTE COMPANY..... } DEFENDANT.

*Contract for Inland Revenue stamps—Production by method different from that specified—Recovery of money paid—Quantum meruit—Set-off against Crown—"Fair cost of production."*

A contract between the Crown and the defendant company called for the production of certain inland revenue stamps printed from steel plates. The company delivered in lieu thereof stamps produced from steel transferred to stone. They were accepted, paid for and used by an officer of the Crown under the belief that they were produced by the process specified in the contract. The way in which the stamps were produced was subsequently ascertained, and the Crown sought to recover back the money paid therefor.

*Held*, that as the company had agreed to print the stamps from steel plates but printed them from stone, it did not produce the thing bargained for but another and different thing, and the Crown was entitled to recover back the money paid.

*Semble:* That in such a case the company could not recover from the Crown on a *quantum meruit* the fair value of the stamps produced from stone. *Wood* v. *The Queen* (7 S. C. R. 634); *Hall* v. *The Queen* (3 Ex. C. R. 373); *Henderson* v. *The Queen* (6 Ex. C. R. 39; 23 S. C. R. 425) referred to.

2. Revenue stamps are not articles of merchandise, and have no commercial value.

3. The company's right, if any, to an allowance for the stamps in question depended upon a right to set-off against the price paid for the stamps by the Crown the value thereof, ascertained, as they have no commercial value, by reference to the cost of production. But no such right of set-off exists against the Crown.

4. The Crown was not bound by the acceptance of the stamps by its officer. Whether in accepting them he knew or did not know how they were produced, was immaterial. In neither case could any request or authority for the production and delivery of the stamps be implied against the Crown.

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5. The Crown having consented to allow the company the fair cost of production of the stamps, without any profit to the company :

*Held*, that as the company had no right of set-off, it must accept the allowance proposed by the Crown or nothing, and that the "fair cost of production" was not necessarily the cost to the company or to any particular person ; but the fair cost to a competent person with the necessary capital, skill, means and appliances for producing such stamps.

Statement of Facts.

THIS was an information exhibited to recover from the defendant company moneys alleged to have been wrongfully received by it from the Crown, and for damages for breaches of certain contracts made between the parties for the production and supply of revenue stamps.

Upon the hearing of the case it appeared that certain stamps had been produced from stone instead of from steel as required by the contracts, and a reference was directed to the Registrar to enquire and report as to the quantity of stamps so produced, and as to the damages, if any, arising to the Crown therefrom. Upon the reference a dispute having arisen, between the parties, as to whether the question of the measure of damages upon the alleged breach of the contracts had been decided at the trial, the Registrar, under rule No. 17 of the General Order of December 12th, 1899, submitted such question for the decision of the court.

February 7th, 1901.

The argument of the question submitted by the Registrar was now proceeded with.

*F. H. Chrysler, K.C.* for the plaintiff, contends that all the Crown is obliged to do, under a view of the law most favourable to the defendant, is to allow it the cost of producing the stamps by the lithographic process. *Peruvian Guano Co.* v. *Dreyfus* (1). Perhaps the better way of putting it, would be this : The moneys paid for the lithographed stamps under the

(1) [1892] A. C. 166.

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assumption that they were what was called for by the contract, should be restored to the Crown, allowance being made to the defendant for the cost of production only. (*Bulli Coal Co.* v. *Osborne* (1). Of course the lapse of time does not bar the Crown's right to recover the money back—*Nullus tempus occurrit regi*; and, moreover, lapse of time is never available as a defence where there is fraud.

The price of engraved stamps can only be recovered upon delivery of the same according to contract. To recover the price of lithographed stamps, or retain the price of the same, the defendant must show somewhere, or in some way, an implied contract to supply lithographed stamps. An implied contract cannot be assigned upon the mere user by the Crown of the lithographed stamps, because the Crown was unaware of the fact that the stamps were other than those the contract called for. It is only when the circumstances are such that the purchaser has an opportunity to refuse or receive the goods contracted for that an implied contract can be invoked. *Appleby* v. *Myers* (2); *Sumpter* v. *Hedges* (3); *Sherlock* v. *Powell* (4); *Forman & Co.* v. *The "Liddesdale"* (5); *Metcalfe* v. *Britannia Iron Work Co.* (6); *Smith's L. C.* (7); *Clough* v. *L. & N. W. Ry. Co.* (8); *Morrison* v. *Universal Marine Ins. Co.* (9).

There was nothing we could do that we have not done. We only discovered the fraud after we had used the stamps. (*Aaron's Reefs* v. *Twiss* (10); *Heilbutt* v *Hickson* (11); *Urquhart* v. *McPherson* (12); *Clarke* v. *Dickson* (13); *Fraser* v. *McLean* (14); *Newbigging* v. *Adam* (15).

(1) [1899] App. Cas. 351 at p. 362.
(2) L. R. 2 C. P. at pp. 651-659.
(3) [1898] 1 Q. B. at pp. 673 676.
(4) 26 Ont. A. R. 407.
(5) [1900] A. C. at pp. 190-202.
(6) 2 Q. B. D. at pp. 423, 426, 428.
(7) Vol. 2, p. 31.
(8) L. R. 7 Ex. 26, 34.
(9) L. R. 8 Ex. 197.
(10) [1896] A. C. at pp. 273, 290, 294.
(11) L. R. 7 C. P. 438.
(12) 3 App. Cas. at pp. 831, 837.
(13) El. B. & El. 148.
(14) 46 U. C. Q. B. 302.
(15) 34 Ch. D. at pp. 582, 592; 13 App. Cas. at pp. 308, 322, 330.

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This is a case where there is no contract; a position we take here, because the goods delivered were not those contracted for. There is a total failure of consideration. (*Boulton* v. *Jones* (1); *Cundy* v. *Lindsay* (2); *Erlanger* v. *New Sombrero Phosphate Co.* (3).

We do not seek to rescind the contract for the delivery of engraved stamps; we simply want to get back the money we paid for the lithographed stamps, and we are willing to allow the actual cost of the same.

February 13th, 1901.

*F. H. Chrysler, K.C.*, resumed his argument, citing from the language of Blackburn, L.J., in *Erlanger* v. *New Sombrero Phosphate Co.* (4) as follows:

"It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put *in statu quo*. * * * * It is a doctrine which has often been acted upon both in law and equity." But we do not seek for rescission, and I merely refer to this case to show that the principles governing cases such as this are the same in law and equity. Later on in the case Lord Blackburn says:

"But as a court of law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost." I would refer also to *Lagunas Nitrate Company* v. *Lagunas Syndicate* (5); *Peek* v. *Derry* (6); *Redgrave* v. *Hurd* (7).

(1) 2 H. & N. 564.
(2) 3 App. Cas. 459.
(3) 3 App. Cas. at pp. 1218, 1277.
(4) 3 App. Cas. at p. 1278.
(5) [1899] 2 Ch. 392.
(6) 37 Ch. D. 541; 14 App. Cas. 337.
(7) 20 Ch. D. 1.

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We claim that the Crown is entitled to recover back the full amount paid for engraved stamps, and that no allowance should be made to the defendant company beyond the actual cost of producing the lithographed stamps, on the ground that there never was a contract entered into by any one on behalf of the Crown for the lithographed stamps, nor any acceptance by or on behalf of the Crown, binding it to pay for them.

We are willing that the defendant should have the cost of production of these stamps, but no profit should be allowed the company because there was no contract for the manufacture of them.

*The Solicitor General of Canada* followed for the plaintiff. The English law applicable to cases of this description does not differ materially from the civil law. *Kennedy* v. *Panama, &c. Mail Company* (1); *Broom's Legal Maxims* (2). Then the case may be viewed with advantage from the standpoint of the law of the Province of Quebec.

In the first place, I would direct the attention of the court to the peculiar fact that while the formal contracts subsisting between the Crown and the defendant has been repeatedly referred to as contracts of sale, I do not find the elements of a contract of sale in them at all. Under article 1486 *C. C. L. C* it is stated that "Everything may be sold which is not excluded from being an object of commerce by its nature or destination or by special provision of law." These stamps are not a saleable commodity, they are not articles of merchandise. *American Brewing Co.* v. *United States* (3).

As I have said it is not a contract of sale, but an innominate contract. (Article 1683, *C. C. L. C.*) But if it were a contract of sale, the contract would have failed entirely, under the law of the Province of

(1) L. R. 2 Q. B. at p. 587. (2) 7th ed. p. 568.
(3) 33 Ct. of Clms. 348.

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Quebec, for want of consideration. We have not received what we engaged to pay for.

Then, taking the most lenient view of the case, eliminating altogether the question of fraud, the position of the parties would be, that when the purchaser, assuming it to be a contract of sale, had discovered the defect in the thing sold, his obligation would have been to tender back the thing that he had in his possession, and to recover the price he had paid therefor. Under the English law that would be an example of *restitutio in integrum*. Now, then, if the Crown handed back the stamps to him what would it benefit him? They are not marketable; he could not dispose of them to anyone; they have no value in themselves. Under the *Inland Revenue Act* they must be destroyed. (See *Inland Revenue Act* secs. 280, 324 and 326; *Criminal Code*, sec. 435)

I would refer to Article 1527 C. C. L. C. for the law governing the effect of the dissolution of the contract even if there had been a mistake in good faith on the part of the contractor. The contractor would be entitled to get back his goods, and we would be entitled to get back our money; but the contractor would have to deliver up the stamps to be destroyed, if the authorities of the Inland Revenue Department so ordered. That is the exact legal position.

There is a Scotch case closely in point with this case, *Jaffe* v. *Ritchie* (1). That was a case in which a sale took place of flax yarn, and after the yarn had been delivered and accepted by the plaintiff and partly converted into cloth it was discovered that the yarn was tainted with jute. It was a sale by description; the plaintiff recovered back not only the price that he had paid for the yarn, but damages also.

(1) 23 C. of Sess. 2nd ser. 242.

I would also refer to *Larombière* (1); *Fuzier-Herman* (2); *Dalloz* vo. *Vente* (3); 2 *Pothier* (4); *Varley* v. *Whipp* (5). Arts. 1486, 1522, 1526, 1527 and 1683, C. C. L. C.

*W. D. Hogg, K.C.* for the defendant;

The position which the defendant takes in this action is that five separate contracts were made with the Crown, and that it has been alleged that there has been a breach of those contracts. That is the allegation. It is true that the defendant has admitted from the beginning that during the period that these contracts existed large quantities of stamps which were printed from steel transferred to stone were delivered, and were accepted and used by the Crown. But what we say is that we have produced stamps which, from the evidence of the Commissioner of Inland Revenue, were perfectly suitable and satisfactory for all the purposes of the Government. They were originally printed from steel but multiplied from stone. No consequential or special damage of any description has ever taken place according to the evidence. When there is no evidence of such damage the motives or intentions of the contractor have nothing to do with the enquiry. *Mayne on Damages* (6); *Thorpe* v. *Thorpe* (7).

In the *American and English Encyclopædia of Law* (8) the rule as to damages for breach of contract is stated to be, except in cases of breach of promise of marriage, the actual damage caused by the breach, and the damage is there defined to be the pecuniary loss which

(1) Tome I. No. 2, p. 522.
(2) *C. C. Annoté*, tome 3, No. 74, p. 28, and No. 36, p. 110.
(3) Tome 43, p. 671.
(4) Bugnet's ed. pp. 80, 81; Nos. 166 and 168.
(5) [1900] 1 Q. B. 513.
(6) P. 43.
(7) 3 B. & A. 580.
(8) 2nd ed. vol. 8, p. 639.

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the complaining party has suffered, and the law takes no notice of the motives of the party in default.

Whether it is a simple breach of contract, or whether it is a breach of contract resulting from deceit or fraud, the latest authorities upon the subject maintain that the duty of the court is to administer the rule in precisely the same way. In cases of fraud the rule of damages is the same as in the action on a warranty, namely, the difference between the actual value of the thing received, and the value of the article if it really were what it purported to be. *Mullett* v. *Mason* (1); *Benjamin on Sales* (2).

In *Church* v. *Abell* (3) the facts were much stronger against the contractor than here. That was a case in which a water-wheel that was contracted for was defectively made, and not according to specifications, something happened which made it utterly valueless, but the Supreme Court of Canada applied the rule I contend for here, namely, the difference between the value of the article delivered and the contract price.

I say that the measure of damages here should be the difference between the value of the stamps which were actually delivered and used, and the value of the stamps called for by the contract *Mondell* v. *Steel* (4); *Street* v. *Blay* (5); *Davis* v. *Hedges* (6); *Basten* v. *Butler* (7); *Cutter* v. *Powell* (8); *Hudson on Building Contracts* (9).

We gave the Crown something which the evidence shows was useful and satisfactory for the purposes to which it was applied. We are entitled to have that value deducted from the amount paid by the Crown

(1) L. R. 1 C. P. 559.
(2) 7th ed. (Bennett) p. 964.
(3) 1 S. C. R. 442.
(4) 8 M. & W. 858.
(5) 2 B. & Ad. at p. 462.
(6) L. R. 6 Q. B. 687.
(7) 7 East 479.
(8) 2 Smith's L. C. 1.
(9) 2nd ed. p. 395.

as for the article contracted for. *Dingle* v. *Hare* (1); *Jones* v. *Just* (2).

*T. C. Casgrain, K.C.* follows for the defendant. This case is not so much an action for breach of contract as it is one for the recovery of money paid without consideration being received therefor. Let us apply the law of the Province of Quebec, the civil law, to the questions arising in the case. We shall find that such law, so far as it is applicable to this case, conforms to the law of England.

It is contended, then, on behalf of the defendant, that the only sum recoverable by the Crown here is the actual pecuniary loss that the Government has sustained. What are damages? According to Article 1073 *C. C. L. C* the damages due to the creditor are in general the amount of the loss that he has sustained, and of the profit of which he has been deprived. See also articles 1074 and 1075 *C. C. L. C.* as to where the party has been guilty of fraud. *Pothier on Obligations* (3); *Fuzier-Herman, (Repertoire)* vo. *Dommages-Intérêts* (4); *Mayne on Damages* (5).

I submit that upon the evidence the defendant has not been guilty of fraud or deceit. This entirely displaces the theory of counsel for plaintiff that all that defendant is entitled to is the actual cost of producing the stamps, because if such a principle were acted upon it would amount to punishing the defendant company as if a crime or offence had been committed against the Government by it, and with such a matter this court has nothing to do in these proceedings. The actual net cost is not the value of the stamps, not the value of the thing which the Crown has received and by which it benefited and profited.

(1) 7 C. B. N. S. 145.
(2) L. R. 3 Q. B. 197.
(3) (Evans ed.) Vol. i, Nos. 159, 160, 161, 162, 163, 166, 167.
(4) No. 102.
(5) 5th ed. pp. 10, 44, 45, 196.

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The skill and experience of those who produced them must be taken into account in estimating their real value.

So far as the proper inference to draw from the mutual dealings of the parties is concerned, I submit it is just as fair to assume that the Government knew all along that the stamps in question were lithographed stamps, and that they accepted them as such, as it is to presume that a fraud was perpetrated upon the Government, and that it was through fraud, misrepresentation and deceit that the stamps were accepted and used by the Government. Fraud cannot be presumed under the law of the Province of Quebec or under the law of England.

The court ought simply to reduce the price of the stamps supplied by the process of lithography, and which were paid for at contract rates. *Stewart* v. *Atkinson* (1); *Sedgewick on Damages* (2); *Addison on Contracts* (3); *Sigafus* v. *Porter* (4); *Smith* v. *Bolles* (5).

*F. H. Chrysler, K.C.* replied.

THE JUDGE OF THE EXCHEQUER COURT now (April 9th, 1901,) delivered judgment.

The information is exhibited to recover from the defendant company moneys alleged to have been wrongfully received by it, and for damages for breaches of certain contracts made between the parties for the production and supply of revenue stamps. On the hearing of the case it appeared that the company had for many years been under contract with the Government to furnish, among other things, revenue stamps to be used in the collection of the revenue. There were five principal contracts. Under the first of these,

(1) 22 S. C. R. 315.
(2) Sec. 759, p. 466.
(3) 8 ed. pp. 952, 989, 998.
(4) 179 U. S. 116.
(5) 132 U. S. 125.

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made in 1868, the company in terms agreed to print the stamps therein mentioned from steel plates. There was a question as to whether or not revenue stamps were included in this contract, and that question has not been decided, but is still open. By the second contract made in 1873 the company again in terms undertook that the stamps therein mentioned, including revenue stamps, should be printed from steel plates. The later contracts, which in terms include revenue stamps, do not, so far as I can see, contain any express covenant to print such stamps from steel plates; but it was agreed that the stamps should be produced in the highest style of art current from time to time, and that not more than thirty thousand impressions should be taken from any plate without retouching the same. In all cases the plates were to be of steel, and the company was to engrave them. This the Crown contends is in each case a contract to furnish revenue stamps printed from steel plates. That question is also open, and may come up for decision on any motion for judgment that may hereafter be made in this case. It is not necessary to decide, or even to discuss it now. It further appeared that while some of the revenue stamps produced by the company and delivered to the officers of the Crown, were printed from steel plates, others so delivered were printed from stone, the stamps being produced by a transfer from the steel plate to stone. The latter were without doubt produced in a high style of art, and so far as appears from the evidence answered the purpose for which such stamps are intended as well as if they had been printed from steel. The reproduction or imitation was so good that an ordinary man could not, I think, without instruction detect the difference. In fact it appeared that even experts could be deceived; and the evidence given by one of the witnesses to that effect derived strong

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corroboration from the fact that in respect of one of the stamps produced in court there was a direct conflict of opinion between the expert witnesses examined as to whether it was printed from a steel-plate or from stone. The motives of the Government in contracting for stamps printed from steel plates, or the reasons that induced them to stipulate therefor, are not of course material. Whatever the motives or reasons were the Crown was entitled to get the thing it bargained for, and not something else. But it may not be amiss in passing to say that the reason why in such cases stamps printed from steel plates are desired is that they are thought in that way to be produced in the highest style of the art, and to be less liable to be counterfeited.

It also appeared that in certain cases the proper officer of the Crown had ordered revenue stamps, knowing and intending that they should be printed from stone. All such cases, counsel for the Crown not objecting, I excluded from the scope of the enquiry. There was also evidence to show that in some cases, and to some extent, the company had furnished revenue stamps printed from stone, when under the contract in existence at the time, it ought to have furnished stamps printed from steel plates; and I directed a reference, with the consent of the parties, to Mr. Dawson, the King's Printer and to Mr. Audette, the Registrar of the Court, to enquire and report as to the cases in which under all the contracts in question the contract calls for printing from steel plate and the work was done by transfer to stone; and also in respect of damages arising therefrom. Mr. Dawson declining to act, the order of reference directed the enquiry and report to be made by Mr. Audette. In the course of that enquiry, which I understand is nearly concluded, a question has arisen as to what allowance should be

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made to the defendant company for the stamps printed from stone that were, instead of stamps printed from steel, delivered to the Department of Inland Revenue and used for the purpose of collecting the revenue. For the Crown it is contended that only the fair cost of production should be allowed, it being, it is argued, against equity and good conscience that the company should make a profit out of its own wrong. The contention of the latter is that it should be allowed such fair cost plus a fair profit. That perhaps is not exactly the way in which the company puts its contention; but that, I think, we shall see is what it comes to. That question and difference between the parties, the earned referee has, in accordance with the rule applicable to such cases (Rules of December 12th, 1899, no. 17), submitted to the court for decision.

Now, before approaching the question more closely, t will, I think, be convenient to refer briefly to three matters that ought, in discussing it, to be kept in mind. First, as to the jurisdiction of the court: That, n this case depends upon clause (*d*) of the 17th section of *The Exchequer Court Act* (1) which, in substance provides that the court shall have and possess concurrent original jurisdiction in all actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. And where in any matter, not otherwise provided for, there is any conflict between the rules of equity and the rules of common law with reference to the same matter the rules of equity prevail (2).

Then it is to be borne in mind that the contract is made with the Crown, and that the Crown should not "suffer by the negligence of its officers, or," if that

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

(2) *The Exchequer Court Act*, s.21, Rule 1 (May 1st, 1895,) Audette's Practice, 217; and The Supreme Court of Judicature Act, 1873 (33 & 37 Vict. (U.K.) c. 66, s. 25 (11).

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should happen, "by their compacts or combination with the adverse party" (1). *The Queen* v. *Bank of Nova Scotia*, (2) *The Queen* v. *Black* (3), *Black* v. *The Queen* (4).

It will be observed, and that is an important consideration, that revenue stamps are not articles of merchandise. They are the means or instruments used in the collection of the revenue. No one has a right to print or produce them except under a contract with the Crown or by its authority. In the hands of one who, without such authority prints them, or has them printed for him, they are of no value, and if a contractor print revenue stamps that the Government is not bound to accept under some contract with him, and the Government refuses to accept them, it is n t possible for him in any way to indemnify himself for the labour, materials and money expended in their production. In his hands they are of no more value than so much waste paper. Perhaps not even of that value, for it seems reasonable that the Crown in such a case should for the protection of the revenue have a right to compel the contractor to destroy them.

Coming now to the issues to be determined, and confining the enquiry to cases in which the company contracted to deliver revenue stamps printed from steel plates, but delivered in lieu thereof stamps printed from stone, the first question one asks of himself is whether or not the thing delivered was the thing contracted for, or the thing contracted for with some defect or imperfection warranted against, or whether it was a different thing? And the answer to these questions, it seems to me, is that it was neither the thing that was bargained for, nor that thing with a defect or

(1) Chitty's Prerogative of the Crown, 379.
(2) 11 S. C. R. 11.
(3) 6 Ex. C. R. 253.
(4) 29 S. C. R. 699.

imperfection. A stamp printed from a steel plate is one thing, and a stamp produced by a transfer from the steel plate to a stone is another and different thing. Both may be revenue stamps, if the Government sees fit to use them for that purpose; but they are distinct and different things. The stamps printed from stone may be, and in the cases in question here, were reproductions of stamps printed from the steel plates; but they were not the same thing, or the same with a defect or fault. No one would, I fancy, with reference to pictures, say that a reproduction of a steel engraving was the same as the original engraving printed from the steel plate, and there is no difference in principle when the thing produced is a stamp and not a picture. The distinction may be further illustrated by reference to a clause in some of the contracts whereby the company undertook to print the stamps at Ottawa or at Montreal. Now if the contract were to print from steel plates at Ottawa and the company printed from steel plates at Montreal, it would produce what was bargained for, but there would be a breach of the contract to print at the place named. In that case the contract having been executed by delivery of the stamps, the Crown's action would be upon the breach of the contract. But when the company agrees to print stamps from steel plates and prints them from stone, it does not produce the thing bargained for but another and different thing, and the Crown's action in such a case is to recover the money paid for something it never bargained for and never received.

If I am correct in this it follows that the public money having been paid out to the contractor for a thing the Crown never bargained for, and which was never delivered to it, the Crown is entitled to recover back the money so paid, and, I think, in the first instance, the full price paid for such reproductions deliv-

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ered as revenue stamps printed from steel plates. *Jones* v. *Ryde* (1); *Chapel* v. *Hickes* (2); *Young* v. *Cole* (3); *Westropp* v. *Solomon* (4); *Gormertz* v. *Bartlett* (5); *Gurney* v. *Wormsley* (6); *Nichol* v. *Godts* (7); *Joslin* v. *Kingsford* (8); and *Kennedy* v. *The Panama &c. Mail Coy.* (9). The allowance to be made to the defendant company for such reproductions is another matter. But before discussing that it may perhaps be well to consider the position in which the company would have been if the fact that the revenue stamps in question were reproductions had been discovered before the Crown had accepted them, or before it had paid for them. In the first case the Crown could without doubt have refused to accept them, and the company could have recovered nothing for them. Neither would the stamps have been of any value to them, for they could not have disposed of them to any one or in any way. The loss would have been complete. In the same way the Crown could have thrown back on the company's hands any unused reproductions in its possession when the discovery that they were reproductions was made, and if the price had been paid it could have been recovered in an action by the Crown, and if not paid the defendant could not in an action against the Crown have recovered the price agreed upon. But if the stamps had been accepted and used but not paid for, what then? Could the contractor have recovered the price? It is clear that he could not have recovered in an action on the contract, for he had not delivered the thing bargained for, and it is not clear that he could have recovered against the Crown on an implied contract to pay a fair price for the stamps. The case

(1) 5 Taunt. 487.
(2) 2 Cr. & Mees. 214.
(3) 3 Bing. N. C. 724.
(4) 8 C. B. at p. 371.
(5) 2 El. & B. 849.
(6) 4 El. & B. 133.
(7) 10 Ex. 191.
(8) 13 C. B. N. S. 447.
(9) L. R. 2 Q. B. 580.

differs in that respect from one between subject and subject. It has been held in this court that a promise may be implied as well against the Crown as against the subject to pay the fair value of work done or materials supplied, or service rendered. *Wood* v. *The Queen* (1); *Hall* v. *The Queen* (2); *Henderson* v. *The Queen* (3); *The Queen* v. *Henderson* (4). But that had reference to work done or materials supplied, or service rendered honestly and fairly in the ordinary course of business. And I am not at present prepared to hold, though that question need not be decided now, that if one contracts to furnish a specified thing to the Crown, and delivers a reproduction or imitation of it, and thereby deceives the officer of the Crown whose duty it is to receive it, he can recover against the Crown on a *quantum meruit* the fair value of such reproduction or imitation.

We come then to another point. A great many cases and authorities have been cited and discussed on the argument; and here I may say that although I do not refer to them, I have been at the pains to examine them all. A large number of the cases discussed have to do with the rescission of contracts, and the putting of the parties in the position they were in before the contract was made. But this is not a case of the rescission of a contract; and though the principles to be derived from such cases are of great value as furnishing analogies, they are not directly in point. But even in cases relating to the rescission of contracts, it has been held that the obligation to return the article received is limited to cases in which it is of some value to the opposite party; and that where it is of no value to the vendor it is not necessary to return it. What object could there be in returning to a contractor

(1) 7 S. C. R. 631.
(2) 3 Ex. C. R. 373.
(3) 6 Ex. C. R. 39.
(4) 28 S. C. R. 425.

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stamps that were of no value to him, and which ought at once to be destroyed? Any equity that might be thought to exist in favour of the company would arise because, the stamps having been used, the Crown has had a benefit therefrom; but as the use of them by the Crown was the natural consequence of the company's deception, it would even in that view of the case be necessary to consider whether a court of equity would interfere to save the company from the results of its wrongful act.

In the view I take of this case the defendant company's claim to an allowance depends in law upon its right to recover from the Crown the value of the stamps printed from stone, and delivered to the Crown's officer, and accepted by him, and used in collecting the revenue. I have already mentioned that question, and have said that I need not now decide it. The reason for that is that I think there is another and a fatal objection to its right to recover. It is well settled that a substantive cause of action cannot be pleaded as a counter-claim to an information by the Crown, and that a subject cannot plead a set-off in an action by the Crown. *The Queen* v. *Whitehead* (1); *The Queen* v. *The Montreal Woollen Mills Co.* (2); *Chitty's Prerogatives of the Crown* (3). If the gist of the present action were to recover damages for the breach of a warranty to print from steel plates the stamps in question—a matter to which I shall have occasion to refer again—then of course both the question of the money paid under the contract, and the value of the stamps delivered under it, would arise under the contract and come in question here, and the court would have to decide what amount should be allowed for the stamps accepted and used, against the money paid

(1) 1 Ex. C. R. 135. (2) 4 Ex. C. R. 348.
(3) P. 366

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for them. But in the view which, on consideration, I take of the case, the stamps printed from stone in the cases to which the reference is limited, were not delivered under the contract, but outside of it and against its terms. As I have already stated they were not the thing bargained for; not even that thing with some defect warranted against, or lacking some quality stipulated for. So it seems to me that in law the defendant's right to an allowance depends upon its right to set off against the price of the stamps the value thereof, ascertained, as they have no commercial value, by reference to the cost of production. And no such right of set-off exists. It is a claim for which, if the Crown stood on its strict right, the company would have to bring its action against the Crown after having obtained a fiat for a petition of right, or a reference from the Head of the proper department.

On the hearing I expressed the view that the Government having taken the stamps printed from stone and used them, the company ought to be allowed for them what they were worth, but that it ought not to be allowed to retain the money paid for them in the belief that they were printed from steel plates. Taking the word "worth" to mean the fair cost of production, counsel for the Crown concur in that expression of opinion; and the Crown is willing and agrees that in the exercise of an equitable jurisdiction the court should ascertain and allow, in reduction of the amount that otherwise it would be entitled to recover, such fair cost of production without any profit to the company. So to that extent it is not necessary to determine whether the opinion expressed was well founded or not. If it were necessary to determine that question I should not, I fear, after having an opportunity for further considering the question, be able to maintain the opinion as applied to the present

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case. But on the other hand, it is clear that the stamps in question served the purpose for which those contracted for were intended. No special damages have been proved, and it is hardly suggested that any could have occurred. The Crown, and through it, the public, have had the benefit of the company's money, labour and materials in the production of the stamps, and no one can, I am sure, with reason be dissatisfied if the company is allowed the fair cost of producing such stamps. Not that the stamps so produced without authority were of value in themselves, or of value to the company, but because they have been of use to the Crown and public. But if an allowance is made to the company, not because it is in this proceeding entitled to it as a matter of law, but because the Crown consents, then the rule that the Crown proposes for ascertaining such allowance must of course be followed. If the company objects to that rule, then either the judgment should be entered for the full amount paid for the stamps in question, leaving the company to assert its rights in a cross-action against the Crown, or its right, if it have one, to sue for the difference between such allowance and a fair price for such stamps, should be expressly reserved.

In an ordinary action between subject and subject for a breach of warranty I should not have any difficulty in accepting the rule for the measure of damages proposed for my guidance by Mr. Hogg and Mr. Casgrain, namely, the difference between the value of the thing received and the value of such an article if it had been as represented to be. But here the stamps in themselves, as has been said, have no value. In the hands of the contractor, without the authority of the Crown to print them, they are worthless. If the Crown would buy them they would of

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course be worth what it would be willing to pay for them. But the Crown was not in this case bound to take them under the contract, and it need not buy them unless it chose to do so. It did not in fact buy them, for it is clear from the evidence of Mr. Miall, the Deputy Minister of the Department of Inland Revenue, that he thought the stamps were delivered under the contract and that they were printed from steel plates. In another sense one might say that the stamps were worth what it cost to produce them, adding a fair profit thereon to the person who engraved and printed them. But then in such a case the person who produced them ought to have a right to do so, and that is something which without the authority of the Crown no one has a right to do. Revenue stamps are not things which anyone may print and sell. Another view of the measure of damages that suggests itself is what the company gained by delivering stamps printed from stone for stamps that ought to have been printed from steel. It is easy to see that it gained the difference in the cost in producing them in the one way and in the other; and a case might be suggested in which such a rule would do justice. In the present case it would have the merit of preventing the defendant company from making any gain by the substitution of one kind of stamps for the other, and on the other hand it would leave it with such gain or loss as it would otherwise have made out of the contract if that had been adhered to. But the defendant's gain is not always, perhaps not usually, the same as the plaintiff's loss, and, in general, damages must be assessed with reference to the latter's loss, and not to the former's gain.

The enquiry and the question submitted by the referee is, as has been observed, limited to cases in which stamps printed from stone were delivered under

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contracts by which stamps printed from steel plates were stipulated for. I have no reason to suppose that these contracts at the prices fixed were onerous and that the company in what was done desired to escape from them. The reason suggested by the President of the company is, if I understand him, that the stamps were printed from stone to expedite the work when the demand was pressing. But that reason does not appear to me to be an adequate reason. I cannot conceive of anyone in his senses doing what was done here and taking the risks that were taken, except for some object that moved him strongly. I think it more probable that what the company did was done to make larger gains than would otherwise have been possible. But one sees how in a case of this kind if the law would permit a contractor failing to collect or retain the contract price, to recover on the *quantum meruit*, a fair price including a fair profit, he could by the very excellence of the imitation or reproduction secure acceptance by the Crown's officer, and in that way turn an onerous contract into a beneficial one greatly to his advantage. And it makes no difference whether the substitution of one class of stamps for the other should be made to escape a loss or to make a greater gain. But it is clear, I think, that the Crown would not be bound by the acceptance of its officer, and whether in accepting them he knew or did not know how they were produced would be immaterial. In neither case could any request or authority for the production and delivery of the stamps be implied against the Crown.

And even if the information in this case were thought, in substance, to be an action on a warranty to print the stamps from steel plates, no court would, I think, make any greater allowance to the company than that which the Crown offers to submit to, unless

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it were bound to do so by some rule of law from which there was no way of escape. The ground urged in this case for adopting by reason of the conduct of the company a rule differing from the ordinary rule in such cases, is variously stated. It is said that it is against equity that a wrong-doer should profit by his own wrong; that a court of equity will never assist him in effectuating his wrongful purpose; that it will not interfere to save him from the just consequences of his own misconduct, and that the rules of equity should prevail. But these are considerations that affect probably the company's right to retain or recover anything, and not its right to retain or recover a fair price including a fair profit if otherwise it were entitled to be compensated for the stamps in controversy. But the question is one that need not be now decided. The rule proposed by counsel for the Crown does justice, I think, in the present case, and I am satisfied with it, not because I am convinced that it could be accepted as a good general rule in cases in which the defendant was entitled to recover, or set up in reduction of the amount for which otherwise there would be judgment, the value of the thing delivered, but because I am of opinion that in this proceeding the company defendant is not in a position to insist upon any allowance or set-off, and that it must accept that which the Crown offers or none.

The direction to the learned referee will be that he ascertain and report, as directed, the cases in which under the several contracts mentioned in the information filed herein, printing from steel plates was called for and in which the work supplied by the defendant company was done by transfer to stone; also the amounts paid by the Crown under the contracts to the company in respect of such work; and also the fair cost of production of such work. I use the word "work"

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as it was used in the order of reference; but I understand that there is no question except as to certain revenue stamps printed from stone that ought under the said contracts to have been printed from steel plates.

Perhaps I should add that the fair cost of production is not necessarily the cost to the defendant company or to any particular person; but the fair cost to a competent person with the necessary capital, skill, means and appliances for producing such stamps. The cost to the defendant company would of course be evidence, and in this case possibly satisfactory, though not conclusive evidence, of the fair cost of production.

As the contracts are not all in the same terms, and, as already mentioned, the questions arising upon such differences are still open, and may come up for determination on the motion for judgment, it would be well, I think, for the learned referee to distinguish between the cases arising under the different contracts.

As some time may elapse before this case comes on for judgment on motion therefor, the right of either party to appeal from any direction or decision now given, as well as from the order of reference made at the hearing, will be extended to the expiry of thirty days from the day on which final judgment may be pronounced.

*Judgment accordingly.*

Solicitors for plaintiff: *Chrysler & Bethune.*

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

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

J. J. SMITH AND OTHERS, OWNERS OF THE AMERICAN BARQUE *ABBEY PALMER* ..... PLAINTIFFS;

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April 19.

AGAINST

THE SHIP "*EMPRESS OF JAPAN.*"

*Maritime law—Collision—Overtaken vessel.*

A collision occurred between a sailing vessel and a steamship in the open sea at night. At the time of the collision the sailing vessel was close-hauled on the starboard tack and was proceeding within six to seven points of the wind, the direction of the wind being north-east true. The course of the steamship when the ships first sighted each other was north 72 degrees west true, and her speed about 14 knots. The weather was comparatively clear, with the moon nearly full, but obscured by passing clouds. The sailing vessel was showing her regulation side lights, but no stern light.

*Held*, following *Inchmaree Steamship Company* v. *The Astrid* (6 Ex. C. R. 178, 218), that the steamship was an overtaking ship within the meaning of Art. 24 of the Rules for Preventing Collisions at Sea, and as such was obliged to keep clear of the overtaken vessel. *The Main* (11 P. D. 130) distinguished.

THIS was an action arising out of a collision on the high seas.

The case was heard before Mr. Justice Martin, Deputy Local Judge for the British Columbia Admiralty District, on the 11th, 12th, 13th and 15th days of April, 1901; Lieut. M. L. Hulton, R.N., and Lieut. J. D. D. Stewart, R.N., sitting as Nautical Assessors.

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

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Argument of Counsel.

*W. J. Taylor, K.C.* for the plaintiffs. He cited *Stoomvaart Maatschappy Nederland* v. *P. & O. Navigation Co.* (1); *The Barque Bougainville* (2).

*H. D. Helmcken, K.C., E. P. Davis, K.C.* and *A. P. Luxton* for the ship, contended that any breach of any of the regulations puts a ship in fault, and it is absolutely immaterial how much in fault the other ship is; it is also absolutely immaterial whether that breach of the regulations contributed to the collision or not. They cited *The Khedive* (3); *Tuff* v. *Warman* (4); *The Fenham* (5); *The Main* (6).

*The Hibernia* (7); *Fanny M. Carvell* (8). There was contributory negligence, see *The Tasmania* (9).

That the ship was an overtaking one, see *The Main* (10); *The Seaton* (11); *The Imbro* (12); *The Gannet* (13).

As to a party being bound by preliminary acts, see *The Inflexible* (14); *The Vortigern* (15); *The Godiva* (16).

As to infringment of a regulation, see *The Arratoon Apcar* (17); *Sans Pareil* (18).

*W. J. Taylor K.C.*, in reply: Where there is a difference between local and international rules in case of a foreign ship, the rule of the international law will prevail in favour of the foreign ship in local forum. *The Eclipse and Saxonia* (19); *The Englishman* (20).

MARTIN, D. L. J. now (April 19th, 1901), delivered judgment.

(1) 5 App. Ca. 876.
(2) L. R. 5 P. C. 316
(3) 5 App. Ca. 876.
(4) 2 C. B. N. S. 740; 5 C. B. N. S. 573.
(5) L. R. 3 P. C. 212.
(6) 11 P. D. 132.
(7) 2 Asp. 454.
(8) L. R. 4 A. & E. 417.
(9) 14 P. D. 53.
(10) 11 P. D. 132.
(11) 9 P. D. 1.
(12) 14 P. D. 73.
(13) [1900] A. C. at p. 238.
(14) Swab. 200.
(15) Swab. 518.
(16) 11 P. D. 20.
(17) 15 Ap. Ca. at p. 41.
(18) 16 T. L. R. 390.
(19) 31 L. J. Ad. N. S. 201.
(20) 3 P. D. 18.

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From the evidence I find the following to be the material facts of this case.

A few minutes after three o'clock on the morning of the 6th of November, 1900, a collision occurred, some ten miles from Cape Beale, between the barque *Abbey Palmer* and the steamship *Empress of Japan*. At that time the barque's course was close-hauled on the starboard tack sailing within six to seven points of the wind, and the direction of the wind was east north-east true. The course of the steamship when the ships first sighted each other was north 72° west true, and her speed about fourteen knots. The weather was comparatively clear, moon nearly full, but obscured by passing clouds. It is admitted that the barque was showing her side lights according to the regulations. But it is contended that she was an overtaken vessel, and consequently should have shown from her stern a white or flare-up light, as required by Article 10; and on the assumption that it was the duty of the barque to show a stern light (which admittedly she did not), it was strongly urged that the barque, by reason of that breach of the regulations, could not in any event recover. *The Khedive* (1); *The Main* (2).

The question as to what an overtaken ship is recently came before this court in the case of *The Inchmaree Steamship Co.* v. *The Astrid* (3); and the definition of Lord Esher in the *Franconia* (4) approved of, which definition has been adopted in terms in Article 24:

"Art. 24. Notwithstanding anything contained in "these rules, every vessel overtaking any other, shall "keep out of the way of the overtaken vessel.

"Every vessel coming up with another vessel from "any direction more than two points abaft her beam,

(1) 5 App. Cas. 876.
(2) 11 P. D. 132.
(3) 6 Ex. C. R. 178; and in appeal, 6 Ex. 218.
(4) 2 P. D. 8.

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"*i.e.* in such a position, in reference to the vessel "which she is overtaking, that at night she would be "unable to see either of that vessel's side-lights, shall "be deemed to be an overtaking vessel, and no subse- "quent alteration of the bearing between the two "vessels shall make the overtaking vessel a crossing "vessel within the meaning of these rules, or relieve "her of the duty of keeping clear of the overtaken "vessel until she is finally past and clear."

"As by day the overtaking vessel cannot always "know with certainty whether she is forward of or "abaft this direction from the other vessel, she should, "if in doubt, assume that she is an overtaking vessel "and keep out of the way."

Under this rule I must be satisfied that the *Empress of Japan* was in such a position in reference to the barque that the former was unable to see either of the side lights of the latter. The barque kept her course, as was her duty (*Brine* v. *The Tiber* (1); and so far from being satisfied that the steamer could not have seen either of the barque's side lights, I am convinced that the green light of the barque should have been visible to the *Empress of Japan*.

My attention has been called to what Lord Esher says in *The Main* (2): "We must lay down that where "the leading ship has the opportunity of seeing where "the other ship is, and ought to see that the hinder- "most vessel is going faster than she is, and is "approaching from any direction in such a position "that she (the hindermost ship) cannot see her lights, "the obligation arises to show a stern light." All I can say is that the facts herein do not bring this case within that language, despite the ingenious and able argument of the defendant's counsel. I may add, as a matter of precaution, in case it might be considered

(1) 6 Ex. C. R. at p. 410; Article 21. (2) 11 P. D. p. 132.

that the question of overtaken ship or not is one on which the views of the assessors should be stated, that they are of the same opinion as myself.

I am advised by the assessors that as a question of good seamanship there was no manœuvre which the barque should or could have executed to avoid the collision.

Under such circumstances it was the duty of the steamer to conform to the following articles:

"Art. 20. When a steam vessel and a sailing vessel "are proceeding in such directions as to involve risk "of collision, the steam vessel shall keep out of the "way of the sailing vessel."

"Art. 22. Every vessel which is directed by these "rules to keep out of the way of another vessel shall, "if the circumstances of the case admit, avoid crossing "ahead of the other."

"Art. 23. Every steam vessel which is directed by "these rules to keep out of the way of another vessel "shall, on approaching her, if necessary, slacken her "speed or stop or reverse"

But instead of so doing, a grave error in judgment was made by those in command of the steamer, and I am advised by the assessors that it was a wrong manœuvre on the part of the second officer to port his helm and seek to cross ahead of the barque; and assuming that he saw no lights he should have eased his speed to ascertain the nature of the object seen, and after having sighted the green light he ought then to have starboarded his helm, and if necessary reversed the port screw, and so passed under the barque's stern.

Further, assuming that the captain had only a minute in which to act after he came on the bridge, the risk of collision might even then have been very considerably diminished, if not avoided, had he

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reversed both engines instead of the starboard one only.

I may say that the advice of the assessors above given coincide with my own opinion of the matter.

Much was said, naturally, as to the look-out kept on the *Empress of Japan*, and it is impossible, in my opinion, to come to any other conclusion than that it was very far from being of that vigilant character one would expect to find on such a vessel. The evidence of Daly has been specially attacked, but at least the defendants cannot quarrel with his statement on his examination *de bene esse* at the time when he was their own witness, and his evidence then was that he sighted and reported the barque when she was about three and a quarter miles off.

I feel bound to say that so far as the captain and second and fourth officers of the *Empress of Japan* are concerned, their lack of exact knowledge in regard to the handling of their ship came as a surprise to the court, nor did their evidence as a whole in other respects impress us favourably, particularly that of the captain and second officer Davidson. The impression left on my mind is that something which would throw more light on this accident has not been forthcoming.

No useful object would be accomplished by here analysing the various more or less conflicting statements of number of witnesses, and I shall content myself with saying that I find no difficulty in accepting the barque's account of the cause of the collision as being straightforward and consistent, regarding that of the steamer as lacking those elements which carry conviction.

Taking the evidence as a whole I find that the barque was in no way to blame, and I attribute the cause of the accident to the lack of a proper look-

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out on the *Empress of Japan*, and to her executing the wrong manœuvre above mentioned.

It follows that judgment should be entered up in favour of the plaintiffs with costs, and the counter-claim dismissed with costs. There will be a reference to the registrar, assisted by merchants, to assess damages.

*Judgment accordingly.*

Solicitors for plaintiffs: *Eberts & Taylor.*

Solicitors for ship: *Drake, Jackson and Helmcken.*

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July 18.

IN THE MATTER OF THE PETITION OF RIGHT OF

THE HAMBURG AMERICAN PACKET COMPANY *et al*..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

*Accident on a public work—Non-repair—Money voted by Parliament—Discretion of Minister—Jurisdiction of court—Improvement of navigation.*

There is no law in Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failure to use in its repair money voted by Parliament for the purposes of such public work.

2. In such case whether the repair should be made or the money expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the courts.

*Semble*:—Although the channel of a river may be considered a public work under the management, charge and direction of the Minister of Public Works during the time that he is engaged in improving the navigation of such channel under the authority of section 7 of *The Public Works Act* (R. S. C. c. 36), it does not follow that once the Minister has expended public money for such purpose the Crown is for all time bound to keep such channel clear and safe for navigation, or that for any failure to do so it must answer in damages.

PETITION OF RIGHT to recover damages for injuries to the steamship *Arabia* alleged to have been received in a certain part of the channel of the River St. Lawrence.

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

*C. Robinson, K.C., W. B. Raymond* and *Leighton McCarthy* for the suppliants;

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*The Solicitor General of Canada, N. W. Trenholme, K.C.* and *J. E. O'Meara* for the respondent.

March 20th, 21st and 22nd, 1901.

This case came on for trial at Montreal.

April 30th and May 1st, 1901.

The case now came on for argument at Ottawa.

*C. Robinson K.C.* argued as follows: With regard to the liability of the Crown it is said to depend in such a case as this wholly upon the statute of 1887, 50 & 51 Vict., ch. 16, sec. 16. That is a section the provisions of which your lordship has had to consider in a very large number of cases. The cases to which I shall call attention are, first, *The City of Quebec* v. *The Queen* (1), of which we all know, and the case of *Martial* v. *The Queen* (2); but, it seems to me, that before we proceed to discuss the question as to the liability, and the question of the bearing of the evidence upon this claim, it is necessary to ascertain, if we can, exactly what statute is in force.

Your lordship will remember that the case of *The City of Quebec* v. *The Queen*, came up first on demurrer before your lordship, where the pleadings were defective, and the demurrer to the sufficiency of the petition of right succeeded. Then the pleadings were amended, and it came up before your lordship for trial, and a non-suit was granted. Then that was appealed to the Supreme Court of Canada, and, if I may venture to say so, the result there, merely as to those who are seeking for authority on the question, is unsatisfactory for this simple reason, that there was a very strong division of opinion in the court. While the result was that the petition of right was dismissed, and the suppliant did not recover compensation, the learned Chief Justice

(1) 3 Ex. C. R. 164; 24 S. C. R. 420. (2) 3 Ex. C. R. 118.

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delivered a judgment to which I shall have to call attention, and in which Mr. Justice Fournier concurred, in favour of the petitioner, while Taschereau, Gwynne and King JJ. were all of the contrary opinion, so that while the petition was dismissed unfortunately none of the learned judges who formed the majority of the court allude in any way to the ground taken by the learned Chief Justice, and do not decide the case upon any common ground at all. Taschereau J. went upon the ground that the work in question was not a public work. Gwynne J. went upon the ground that the injury suffered, which was there an injury to property, was not caused upon the work in question, but off and away from the same. Your lordship will remember that there was a landslide, and the injury was done to property in the street below. King J., as I understand it, agreed with Gwynne J. but gave no reasons. Well, these judgments are opposed to the judgment of your lordship in two respects, viz.: that I understand your lordship to have thought it was a public work, and that your lordship did not agree with the contention that the injury must be suffered upon the work in question. That is a matter which may come up again. If it does I venture to think that it will be held that it is a very narrow construction to give to the statute, because it would practically come to this, that if you have, say an explosion of an engine due to the negligence of some one in charge of a public work, and one man is killed on the public work, and another man across the street is injured, the representatives of the man who is on the property gets compensation, and the man on the other side of the street gets none. It is not necessary to go further into that question, because, of course, it does not arise here, and I do not know whether the question of whether it is a public work or not will arise here, although I noticed

in the pleadings it is denied, that this channel is a public work.

Now, in the first place, a public work is anything under the control of the Dominion Government, that is a definition given by statute, no matter who it belongs to so long as it is under their control. As to the harbour in question, the Government spends money on it year after year, treating it as a public work, and whether it is by any arrangement with the province that this money is expended is not our concern, for I take it that a public work means something artificially done at the public expense, for a public object. I suppose that is the intendment of the statute. That is the general definition of a public work. I do not understand that there is any objection to a public work being a well; it may be under water or above water.

The first question we have to ascertain with regard to the liability in this case, is whether a dictum by your lordship, perhaps more than a dictum, in the case of *McHugh* v. *The Queen* (1) is to be affirmed or not, and that is, that there can be no such thing as negligence on the part of the Minister. Perhaps I ought to say that if your lordship look upon that as a point upon which you have expressed a decided and final opinion, of course I have no desire whatever to spend time in attempting to discuss the question. On reading the *McHugh* case, it strikes one that there were other grounds upon which the case could have been decided, but it is quite clear your lordship did not decide upon such grounds. Your lordship expressed the opinion there was no negligence to be imputed to any one else, and that the Minister was not an officer or servant of the Crown to whom negligence could be imputed, and these are questions

(1) 6 Ex. C. R. 374.

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which I propose to discuss, but which, it seems to me right to say, I do not wish to discuss before your lordship, save subject to your lordship's approval.

[BY THE COURT: I came to the conclusion in the *McHugh* case that for what was alleged there to be the Minister's neglect, the Crown had not to answer in this court, although it might have to answer in Parliament. I never had any reason to change my mind as to that; but I would be very glad to hear argument, if you see fit to address argument to me on that point. I never thought the intention of the statute was to make the Crown answerable for the discretion of the Minister as to whether he would or would not spend money at a given place, and keep a given work in repair or not.]

Every case depends upon its own circumstances. What I say is this: That this is a case in which a navigable channel was opened as a public work by the Dominion; the Dominion invited ships to use it. There was certain work which it was necessary to do in order that navigation might be made safe; there was money ready for that purpose, if it had been thought proper so to use it, and which a regular officer in charge might have used for the purpose if he had chosen. If such an officer had been appointed, and was negligent, and it would have been negligence in any one else not to sweep that channel and keep it clear of these obstacles, then I say there is no excuse here because the Department, instead of appointing a person who neglected his duty, did not appoint anybody to perform a necessary duty. I do not go further than that.

[BY THE COURT: Of course one might distinguish the case of an accident in the channel of the St. Lawrence from one which happened in a canal, as in the case of the *Acadia* (1), by the fact that the Dominion

(1) See *McKay's Sons* v. *The Queen* 6 Ex. C. R. 1.

takes a toll in the case of a canal. And with regard to the Government railways, one at once sees the reasonableness of the Government being liable in the same way that a company would be liable, because it is in a sense a commercial undertaking. I do not know whether you could say, properly, that the Crown invites people to use this channel of the St. Lawrence. They improve it for the purpose of navigation, and it is there to use or not to use as they see fit. Of course the Crown does invite a person to use the canal, it takes a toll for such use.]

As I understand the law there is practically no difference in regard to the taking of a fee. I think the case of *Mersey Docks Trustees* v. *Gibbs* (1), says that practically makes no difference. If there is the charge of the work in question, there is the obligation to use reasonable care.

Our contention is in the first place that they never made the channel of the depth which they asserted it to be; in the next place, that they asserted it to be of a depth which it never was. Again, that if it ever were of that depth, they did not take the precaution which all the overwhelming mass of testimony says was necessary to be taken in order to keep it reasonably clear of obstacles which nature would bring there from time to time. In other words, every spring there was always a probability of obstacles dropping there and remaining there, and the engineers say that in their judgment, for the safety of navigation, it is necessary to sweep the channel every year. Now, our contention does not go further than that. The only point I am trying to direct my attention to now, is the distinction between a case where the Minister of the Department is liable because they have taken no trouble whatever to have this necessary work per-

(1) L. R. 1 H. L. 93.

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formed, and the case where they are liable because they did not appoint an officer whose duty it was to do the work. My present contention is, that if I have shown that the reason this accident happened was because the Department, under whose control and management this work was, did not appoint any one to take the necessary care, to do what was necessary to render it safe, and to prevent accidents and injury to persons or property, then the Crown is responsible. You may take, for instance, two public roads within a quarter of mile of each other. On each there is a bridge which requires to be kept in repair for safety. Both are public roads, both are roads kept open for the use of the public ostensibly. As regards one of the bridges, the Department of Government charged with their management appoints a person to see that such bridge is kept safe. He neglects his duty. A man is injured there, and he gets compensation. In the case of the other bridge they appoint nobody. A man is injured there, and he gets no compensation. Now, how can one reconcile the two propositions?

[BY THE COURT: That is an argument to be addressed to the law-making power. If the law is that no action will lie, and then Parliament comes and says an action will lie in a given case, you cannot ask the court to add to that and to do what Parliament has left undone.]

But if what is said to be the law leads to an inconsistent and unjust result, such a result must be presumed not to have been intended. I quite agree that, if it had been provided that the Department should not be liable unless they have appointed some one to do the duty, and he has neglected it, or that there should be no responsibility for any omission on the part of the Department, or Minister, then it could not be said that such an enactment would lead to unreason-

able results. But, there is no stronger argument, as your lordship is aware, for benign interpretation, where construction is doubtful, than to show that a harsh interpretation leads to results that in all probability were never intended, because reason and justice are opposed to it.

A good deal of the reasoning for the narrow construction as it presents itself to my mind—though I cannot say to what extent it was the reasoning which operated upon your lordship's mind, but a good deal of the reasoning seems to be founded upon the apparent limitation of liability in sec. 16, sub-sec (*c*) of *The Exchequer Court Act.*

Now I understand the argument shortly to be, that a Minister is not an "officer or servant" of the Crown. It is said that unless you have an officer or servant of the Crown who, acting within the scope of his duties, neglected to do something, you cannot recover under the Act. Well, whether, as a matter of fact, those words: "resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment," are surplusage altogether, and really mean nothing, but are merely a sort of extended statement of the law as it stands, and would stand without them, may be a matter for argument. But, what I submit is, that according to the judgment of the learned Chief Justice, in the *Quebec* case (1), which I venture to think requires the most careful consideration, the provisions of the enactment in question are wide enough to include all actions of tort, whether arising from the negligence of some particular person or officer, or arising from negligence generally.

[BY THE COURT: It would not make any difference whether it was a public work, in the view the learned

(1) 24 S. C. R. 420.

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Chief Justice took. It would seem that Mr. Justice Taschereau did not agree with the Chief Justice's view of the law.]

I see no reason to think that Taschereau J. agreed with Gwynne J.'s view of the law. The Chief Justice certainly decided that the facts of the *Quebec* case did not come within section 16 (*c*), but that it did come within section 16 (*d*).

Then, I understand his lordship to have decided, what is perhaps more important, that it is by no means the law that the statute now is the only statute giving your lordship jurisdiction. The Chief Justice was very distinct and decided in his view that the old *Act respecting the Official Arbitrators* (1) is still in force; and that the jurisdiction which existed in the Official Arbitrators before the statute of 1887 is transferred to your lordship. In other words, that wherever there would have been a case which could be referred to the Official Arbitrators under the *Act respecting the Official Arbitrators* that same case can now be referred to the Exchequer Court, and that wherever the Official Arbitrators could have decided in favour of the petitioner, or suppliant, this court can now decide.

Now the *Act respecting the Official Arbitrators* was repealed by 50-51 Vict. c. 16 (*The Exchequer Court Act*), but the learned Chief Justice says that section 6 of the former Act still exists for the purpose of the jurisdiction of this court.

[BY THE COURT.—There is a clause in *The Exchequer Court Act* respecting the continuance of the jurisdiction exercised by the Official Arbitrators.]

Yes, section 58.

[BY THE COURT: That is not a saving clause of the statutes that are repealed.]

(1) R. S. C. ch. 40, sec. 6.

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The learned Chief Justice thinks it is. R. S. C. c. 40, sec. 6, enacts that "every claim against the Crown arising out of any death or injury to the person or to property on any public work" may be referred to the Official Arbitrators. There is nothing there about negligence, nothing about a servant or officer of the Crown acting within the scope of his duty. Now let me see if I am not quite right in saying that that section is still in force. Taking up the learned Chief Justice's judgment in the *Quebec case*, in 24 Supreme Court Reports, I read at page 430:

"Section 6 of *The Revised Statutes of Canada*, "chapter 40, before set forth, gives in the most "explicit terms a remedy to be attained by means "of the administrative procedure thereby prescribed, "for any direct or consequential damage to property "arising from or connected with the construction, 'repair, maintenance or working of any public work "or arising out of anything done by the Government "of Canada. If this enactment, or that particular "portion of it to which I have just referred, still "remains in force, it is clear that there is an existing "law of Canada which authorizes the claim against "the Crown made by the suppliant in this petition of "right. I now proceed to show how this section 6, of "chapter 40 is kept alive, notwithstanding the express "repeal of the whole chapter 40 by section 58 of "50 & 51 Vict., ch. 16. In the beginning of section "58 it is provided that the Acts and parts of Acts men-"tioned in schedule B to the Act are hereby repealed, "and in the schedule this chapter 40 is specified as "wholly repealed; such repeal is, however, expressly "made subject to the *Interpretation Act*. By the "subsequent part of section 58 it is declared that "wherever in any Act of Parliament it is provided "that any matter may be referred to "the Official

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"Arbitrators" or "that when any powers shall be "vested in or duty shall be performed by such arbitra- "tors" such matters shall be referred to the Exchequer "Court, and such powers shall be vested in and duties "performed by that court, and that wherever the "expression "Official Arbitrators" occurs in any such "Act it shall be construed as meaning the Exchequer "Court. It follows from this that claims provided "for by section 6 of *The Revised Statutes*, chapter 40, "which by that Act were to be referred to the arbi- "trators, are now, under this Act 50 & 51 Vict., ch. 16, "to be referred to the Exchequer Court, which neces- "sarily implies that all such claims against the Crown "are saved from the repeal and are therefore matters "in which parties are for the future to be entitled to "a remedy by the judicial procedure of the Exchequer "Court."

Now, I do not know how you are to get anything plainer than that. That is the clearest expression of opinion that section 6 of R S. C. c. 40, remains in force, and that the jurisdiction conferred by it upon the Official Arbitrators has been transferred to and is to be exercised by this court. His lordship proceeds to say:

"According to the section just quoted from, the "matters so saved from the repeal of chapter 40, are "to be referred to the Exchequer Court; from this, if "it stood alone, it would follow that the jurisdiction "of the Exchequer Court in such cases, could only be "exercised upon a reference by a Minister." And then he goes on to show that the same jurisdiction can be exercised by this court on a fiat for a petition of right: "The case made by the petition of right "must then, for the foregoing reasons, be considered a "claim against the Crown under sec. (*d*) of section 16 "of *The Exchequer Court Amendment Act* arising under

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" that particular law of Canada which is embodied in " the reinstated section 6 of the repealed Act, Revised " Statutes, chapter 40. The claim is one within the " purview of that section, in as much as the suppliant " complains of, and claims damages for, a direct, and " also a consequential, injury to his property."

Now, I do not understand how you are to frame a plainer declaration of opinion on the part of the learned Chief Justice than we find there on these two questions.

First, that this is a case not within subsection (*c*) but within subsection (*d*) of *The Exchequer Court Act*. Next, that it is a case which comes within section 6 of R. S. C. c. 40, which is alive and in force for the purposes of the jurisdiction of this court.

Then, I proceed to treat this case entirely as if it came within that section, and this subsection (*d*) of *The Exchequer Court Act*. If it does, whatever effect may be given to the words "resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment," in subsection (*c*) of the last mentioned Act is eliminated, because it is unnecessary to invoke that provision.

In the *Quebec case* (1) which came up before your lordship, your lordship said that if there is anything in section 16 which differs from the previous jurisdiction, in your view it is rather a limitation (which perhaps would have been implied in section 6 of *The Official Arbitrators Act* (2)) upon the previous jurisdiction. I do not admit it for a moment, but I see the force of the objection, that when you say there shall be a claim against the Crown for any injury to person or property upon any public work, why of course that does not mean any injury to any person or property whenever it is suffered on any public work irrespective

(1) 3 Ex. C. R. 164.

(2) R. S. C. c. 40.

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of the cause. I cannot go on a public work, injure myself, by my own fault, and say the Crown is liable. It must be an injury to person or property suffered on a public work without the fault of the suppliant or complainant; but it relieves us from the particular implication to which a good deal of force seems to have been given of an intention on the part of the legislature that the suppliant must point out some person within the scope of whose duties this particular thing came. We are relieved of that.

Beyond question here we have suffered an injury to our property upon a public work. The injury is within those words, beyond all doubt or question. But then it is said we cannot recover, because we have to prove the negligence of some officer whose duty it was to do this thing, the neglect of which we complain, and we cannot recover for the negligence of the Department or any one connected with the Department, apart from the officer I speak of. Now, if that is so, it must be because of some particular immunity attaching to the position of the Minister of the Crown which takes him out of the words of the statute: "An officer or servant of the Crown;" and which, notwithstanding the express words of the statute, shows that any omission or neglect on his part can never have been intended to be included. Referring to the *McHugh* case (1), there are two cases cited there to show that the Minister is not to be responsible under this section. One of them in the *McBeath* case (2), and the other is *Gidley* v. *Lord Palmerston* (3), both of them cases in which it was sought to make a Minister personally responsible.

(1) 6 Ex. C. R. 374.

(2) *McBeath* v. *Haldimund*, 1 T. R. 172.

(3) 3 Br. & B. at p. 286.

We are not seeking to do this. We are simply saying he is an officer or servant of the Crown for whose neglect the Crown, by this statute, has consented to be responsible. *McBeath* v. *Haldimund*, turned upon the law of agency. That was a case in which the Governor of a colony was sued for supplies furnished, and practically the case went off on the ground of agency; because they said people who dealt with persons in the position of Governor of a colony know perfectly well he is not acting on his own behalf, or in his personal capacity. The ordinary transaction by a public officer of that description is always assumed to be entered into by him in his official capacity. *Gidley* v. *Lord Palmerston* was a case in which a clerk in the War Office sought to recover from Lord Palmerston certain arrears of pension which he said was paid into Lord Palmerston's hands, and which it was claimed he should pay him; but it was decided that Lord Palmerston had no personal responsibility in the matter.

Then it was argued for the Crown in the *McHugh* case that section 27 of *The Public Works Act* renders an officer of that description criminally liable for injury to person or property on a public work through his negligence. But that has nothing whatever to do with the civil remedy against the Crown. The statute only makes criminally liable, as you would expect any statute to do, some officer of the Crown to whom a particular duty is assigned in writing by the Department, and who neglects that duty.

It was also argued for the Crown in the *McHugh* case that section 4 of *The Public Works Act* (1) makes the Deputy the chief officer of the Department; that in *The Revised Statutes of Canada*, c. 4, the ministers of the Crown are styled "public functionaries." But there is

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

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nothing in the enactments to prevent the liability of the Crown arising upon the action or inaction of one of its ministers. On the contrary there is much to support the view we are putting forward. *The Public Works Act* (1) says, *inter alia*, that the minister shall have the management, charge and direction of work for improving the navigation of any water. Therefore the statute imposes upon him, or empowers him at all events to manage, to take charge of, and direct this work. But the statute goes further. Section 9 says "that the minister shall direct the construction, maintenance and repair of all harbours, roads and other public works maintained at the expense of Canada, and which are by this Act, or are hereafter placed under his management and control."

If that had been the chief engineer for example, I suppose nobody would have contended for an instant, that when the chief engineer was directed by statute to maintain a public work, and to have the charge and direction of it, that he was not a person upon whom the duty was expressly cast by statute of doing what was necessary to maintain it. But, they say, although the minister is expressly named, and although the minister is expressly directed to maintain this public work, nevertheless he can do it or not as he pleases; and for any injury suffered by his want of taking the necessary steps to maintain it, there is no compensation. I quite understand the exemption of the minister of the Crown from any personal responsibility. That is another thing. But, why when the Crown consents to be responsible for the neglect of one of its "officers or servants," why it should be said that the minister is not included, it is difficult to imagine, unless it were by reason of some constitutional principle, and there is none. The essential distinction

(1) Sec. 7.

between the law of England, and the law of continental countries on the subject is this, that there is for instance, in France what is called the "droit administratif" which applies to all persons in the public employment. You cannot sue Government officials in the ordinary courts of the country, but they have certain tribunals which are called administrative tribunals, constituted for the express purpose of settling their liability, where any claim is made against them; and as Mr. Dicey points out, while such a law would never be permitted in England for a moment, it nevertheless has its advantages, and he gives an example of where a person in a public office committed what in France would have been a very fatal error, and would have involved very serious punishment, but which in England there was no common law applying to, and they had to pass a statute covering it (1).

If this were a case between subject and subject, the liability of the respondent would be undoubted. In such a case all that you have to do is to show that you are injured upon the work, that there was no proper precaution taken to protect you from injury. As to who should have been appointed to take the precaution, as to whether anybody was appointed or not, is a matter of utter indifference.

Then I want to call your lordship's attention to other legislation and other decisions in point. *The Queen* v. *Williams* (2). The issue there was left to the jury. Was Her Majesty's said executives aware of the existence of danger? Did Her Majesty's said executive neglect? and so on. There seems to be no shrinking there from saying Her Majesty's Executive Government was capable of negligence. Could it be said that the Executive Government did not include

(1) *Anson's Law of the Constitution* (The Crown) 2nd ed. p. 43.
(2) 9 App. Cas. 418.

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a Minister? Their Lordships of the Privy Council did not seem to think that there was any incongruity in saying there was negligence in the case.

I look upon the *Williams* case (1) as very like this. The Privy Council did not seem to see the slightest incongruity in asserting that the Executive Government was liable for negligence, and they have asserted, in the strongest language, their sense of the propriety of making them responsible. They say, instead of there being any presumption under the statute in question that it was not intended to make them responsible, just to the same extent as individuals, the presumption is very much the reverse. See also *Farnell* v *Bowman* (2).

Then there is the point arising under the Act 45 Vict. c. 45. Now, the Port Warden is a Dominion officer, he is appointed by order in council, on the recommendation of the Board of Trade, after an examination. One of his duties is that he shall not allow any vessel to clear, unless under certain circumstances. Sec. 16 of that Act prohibits any vessel from obtaining clearance from the Custom-House, until she has a certificate from the Port Warden. That is to say, no vessel on her outward voyage is allowed to get the necessary clearance unless she is examined, and if she is found unfit he is to state in what particular, and on what condition only she will be deemed in a fit state to leave, and shall notify the master not to leave the port, and so on. Then, certain rules have been made under that for his guidance, which are to be found in the statute 59 Vict. ch. 96. The 15th and 16th rules bear upon this question. The Port Warden is to examine and see whether the vessel is drawing too much water to make it safe for her to proceed on her voyage. He does that upon the faith of a gauge, as it

(1) 9 App. Cas. 418. (2) 12 App. Cas. 643.

is called, which is kept at Sorel, under the supervision of the superintendent of dredging on this channel, and relying upon that the Port Warden is induced to think there is 27·6 of clear water, and he says you can safely go.

Now, how can you say in face of that we are not invited by the Government to use this channel? The Government say: "You cannot use it until we give you leave, and we have given you leave. We will appoint an officer, and prevent your using this channel except under the authority of our certificate that it is safe. Our officer gives that certificate to you, you telling us you want to use it." Is it possible to say that the channel is not held out by the Government for use by vessels proceeding to sea? Supposing there is a boulder, or a vessel had been sunk there a week before, and the Government had knowledge of it, and had said, we do not care to remove that, but their officer, nevertheless, gives us a certificate, and says, you can go safely to sea, and we run against that obstacle, and lose our property, how is any one to say the Government did not hold that channel out as a channel which we might use, not that we might use in general, but which this particular ship, having this particular depth of water at that particular time, might safely undertake to use? Then, having used that channel under all those safeguards, complying with the request which they impose upon us, we are told, although that channel may have been choked up by their negligence, even if our property is destroyed by acting upon the Port Warden's misleading certificate, they have no responsibility. The Port Warden, a Dominion officer relies upon the information of the other Dominion officer, and the result is that we suffer. I say either the Port Warden was negligent, either he should not have taken that report of the superintendent and given

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us a certificate upon it, or if he was justified in doing that then the superintendent at Sorel was negligent.

It was a matter which we could not ascertain for ourselves. It was a matter about which the Government had the knowledge. The negligence consists in the omission to take reasonable precautions to keep the work in question safe.

*L. McCarthy* followed for the suppliants, and reviewed the evidence in detail. He claimed that the evidence warranted a finding by the court that there had been negligence under the statute for which the Crown was liable.

*The Solicitor-General of Canada:* The learned counsel for the suppliants (Mr. *Robinson*) seems to base his argument for the liability of the Crown in this case wholly upon the views of the learned Chief Justice as expressed in his dissentient opinion in *The City of Quebec* v. *The Queen* (1). That opinion he claims to be wide enough to support the proposition that subsection (*d*) of section 16 of *The Exchequer Court Act* gives a right of action against the Crown in every claim of tort where an action would lie between subject and subject. My answer to that contention is that before one can acquiesce in such a view it is necessary to concede that subsection (*c*) of the statute in question is quite meaningless and useless, because if in all cases of tort there is a claim against the Crown, to what purpose is it to expressly say that in a particular case there would be a claim?

[BY THE COURT: In that view the provisions of subsection (*c*) are superfluous.]

Yes, quite so. But further than that it is necessary to hold that chapter 40 of *The Revised Statutes of Canada*, notwithstanding the express terms used by the repealing statute, 50-51 Vict. c. 16, sec. 58 is in force. The

(1) 24 S. C. R. 640.

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argument for the suppliants must be carried this far, namely, that where a statute is expressly repealed it may be said for the purposes of a particular case to be revived by implication. I am extremely doubtful if any authority can be found for that proposition.

Counsel for the suppliants particularly contend that it is not necessary to show that the negligence complained of is the negligence of any officer or servant of the Crown. In short, their argument is that the accident having occurred, negligence arises upon the theory of *res ipsa loquitur*, and the Crown is liable therefor. This argument is rested solely upon the view that subsection (*d*) of section 16 of *The Exchequer Court Act* overlaps subsection (*c*). Now, clearly, the latter provision was merely intended to give the court in a modified form the jurisdiction the Official Arbitrators had. Section (*d*), on the other hand, simply confers jurisdiction to try claims arising under any particular statute passed by the Dominion Parliament to further the ends of justice. The phrase, "any law of Canada" is not to be taken to include the "common law," nor the specific statute law of one of the provinces. (Cites *Alliance Assurance Co.* v. *The Queen* (1); *McHugh* v. *The Queen* (2); *Filion* v. *The Queen* (3); *LaRose* v. *The Queen* (4).

Counsel for the suppliants will not extract much support for their argument from *Attorney-General of Straits Settlement* v. *Wemyss* (5), or from *The Queen* v. *Williams* (6), for the local enactments under which those cases arose are in quite different terms from the provisions relied upon here. The very widest phraseology is used to create a liability on the part of the

(1) 6 Ex. C. R. 76.
(2) 6 Ex. C. R. 374.
(3) 4 Ex. C. R. 134; 24 S. C. R. 482.
(4) 6 Ex. C. R. 425.
(5) 13 App. Cas. 192.
(6) 9 App. Cas. 418.

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Crown in the two cases just mentioned. On the other hand, our statute only provides for specific cases.

It is conceded, however, by the suppliants that the accident must occur on a "public work" before the Crown can be made liable. Very well, then, the accident occurred here in the bed of a river—the river St. Lawrence. Now the soil or bed of a river belongs to the Crown. *Lord Advocate* v. *Hamilton* (1). But the soil or bed belongs not to the Crown in right of the Dominion but in right of the province. (*Attorney-General of Ontario, &c.* v. *Attorney-General of Canada* (2). The right of the province, however, is subject to the legislative power of the Dominion Parliament to regulate navigation and shipping. But the Crown in right of the Dominion has no right of property in the river, and so by no ingenious argument can it be demonstrated that the *locus* of the accident should be treated as a "public work" within the meaning of section 16 of *The Exchequer Court Act.* In relation to the distinction between property in a river and the right to improve the navigation thereof, I would refer to *Cracknell* v. *Mayor of Thetford* (3).

As to the point that money had been voted by Parliament for the purpose of improving the navigation of the channel in question here, I contend that the courts have no power to review the discretion of the minister in such matters. The mere fact that he has the money to do so, does not create a legal obligation on the part of the Crown to make improvements. *Wakely* v. *Lackey* (4); *Colpitts* v. *The Queen* (5).

*N. W. Trenholme, K.C.* followed for the respondent:

With reference to the cases of *The Queen* v. *Williams and The Attorney-General of the Straits Settlement* v.

(1) 1 McQueen H. L. 46.
(2) [1898] A. C. 700.
(3) L. R. 4 C. P. at p. 634.
(4) 1 N. S. W. L. R. 274.
(5) 6 Ex. C. R. 254.

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*Wemyss*, upon which counsel for the suppliants so strongly rely, I submit that the principle upon which the Privy Council seem to have based their judgments in those cases does not exist in the present case. The Privy Council seem to have been very considerably influenced by the idea that in the cases above mentioned the colonial governments had entered into the field of private enterprise, that is, had undertaken enterprises that were ordinarily conducted for profit by private individuals, and that they should not share the benefits without sharing the burdens of such enterprises.

Now, the present case is the furthest possible from that class of cases. Not only has the Government done this deepening and improving of the channel of the St. Lawrence without expecting profit, but it is not even collecting tolls for using that work. It is purely in the public interest of the whole country that this work has been done. It is an exceptional case, as being exclusively done in the public interest, and not in the field of private enterprise in any respect whatever.

We submit, also, that it was not a public work within the meaning of the statute at the time of the accident. Perhaps it was so, as regards the period of time while the operations were being carried on. Probably if an accident occurred while these operations were being carried on we would fall within the statute. Probably if an accident occurred while these operations were being carried on, your lordship would hold that the accident occurred on a public work of the Dominion. But, after that work is done, we contend that it is not public work. It is an ancient public highway improved. That is all it is. The idea of the public highway predominates over any work done in the way of improvement; but it is more than a public

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highway, it is really an international highway now, and if a part of this channel between Montreal and Quebec is a public work, and in charge of the Minister of Public Works, then the whole channel is, because the Government practically have discharged the same duties, or have done the same work, in respect of the entire channel, purely in the public interest.

Now counsel for the suppliants admit that unless they can show some obligation imposed upon the Minister of Public Works to maintain this channel, and keep it clear, that they have no case. They sought to invoke sections 7 and 9 of *The Public Works Act*, chap. 36, in support of that view, especially section 9.

Your lordship will see that in section 8 it is stated that if at any time a doubt arises whether the management, charge and direction of any public work belongs to the Minister of Public Works, or to the Minister of Railways and Canals, the question shall be decided by the Governor in Council, and the works and property shall be under the management, charge and direction of either Minister from time to time. Then again a question might arise whether the work was within the jurisdiction of the Minister of Marine, or the Minister of Public Works. Your lordship sees that the question might arise in this very case, with regard to this ship channel. It appears that when this ship channel has been dredged to the depth of 27½ feet, the Department of Public Works steps out, and the lighting of the channel is taken in hand by another Department, the Department of Marine and Fisheries. Your lordship can see from the statute, and from the nature of the case, that there might be many instances where it is doubtful to which of the Ministers certain public works belonged, and in order to determine that, the statute, section 9, has picked out certain

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public works which it definitely places under the control of the Minister of Public Works. I think that is the meaning of section 9. It is to make it clear and beyond doubt that the work contemplated or referred to in section 9 shall be in the hands of the Minister of Public Works. I think that is a rational interpretation to put upon that section. These are works that the Minister shall have direction of. Not that he shall be under the obligation of maintaining these works. If the statute had intended to impose the absolute obligation upon the Minister of Public Works of maintaining these, it would have used, I think, very different language from this. It would have left no room for doubt or interpretation, if the intention was to impose the obligation, but that obviously is not the object of the statute.

Then, again, it is said that the Government, if they did not invite, did something very like inviting shipowners to make use of this channel, that there was an intimation at least to them to come into the channel, and make use of it; and having done that the Government was bound to see that it was kept in a state of safety, that the Government was bound to exercise reasonable care for the purpose of giving notice of danger.

Your lordship laid down in the case of *Leprohon* v. *The Queen* (1) that a man going to the post office was not going there on the business of the Crown. That principle obtains here.

Then with regard to the notice of the danger. In this case the evidence is that the public knew just as much about the likelihood of danger in this channel as the Government did. The Government were in no better position to know whether there were anchors or boulders in the channel than outsiders.

(1) 4 Ex. C. R. 100.

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Now, it is not like the New Zealand case (1) where the Government, through its employees, through its servants, actually knew of the danger, or what was the same thing, they knew of the dangerous snag in the water, and if they had removed that they would have removed what actually caused the damage in that case. They were held to have practically known of the danger, and to have neglected to remove it.

The fact that there was latent danger, unknown danger, is not a proof that there was culpability. So in this case, the fact that there were anchors in that channel is not proof that the Government was culpably negligent in not knowing of the existence of such anchors.

He cites *Brown* v. *The Queen* (2); *Leprohon* v. *The Queen* (3); *The Queen* v. *McFarlane* (4); *City of Quebec* v. *The Queen* (5); *Maybury* v. *Madison* (6); *Forbes* v. *The Lee Conservancy Board* (7); *Davies* v. *The Queen* (8); *McHugh* v. *The Queen* (9); *The Sanitary Commissioners of Gibraltar* v. *Orfila* (10); *Castor* v. *Corporation of Uxbridge* (11); *Encyclopedia of Laws of England* (12); *Pollock on Torts* (13); *Radley* v. *The London & North Western Railway Co.* (14); *Butterfield* v. *Forrester* (15); *Sindlinger* v. *City of Kansas* (16); *Casey* v. *City of Fitchburg* (17).

*C. Robinson, K.C.* replied, citing: *Farnell* v. *Bowman* (18); *Sherman & Redfield on Negligence* (19); *Todd's Parliamentary Government in England* (20); *Audette's Prac. Exch. Ct.* (21).

(1) *The Queen* v. *Williams* 9 Ap. Cas. 418.
(2) 3 Ex. C. R. 79.
(3) 4 Ex. C. R. 100.
(4) 7 S. C. R. at p. 238.
(5) 2 Ex. C. R. 252.
(6) 1 Cranch at p. 170.
(7) 4 Ex. D. 116.
(8) 6 Ex C. R. 344.
(9) 6 Ex. C. R. 374.
(10) 15 App. Cas. 400.
(11) 39 U. C. Q. B. 113.
(12) Vol. 9, p. 97.
(13) 5th ed., p. 431.
(14) 1 App. Cas. 754.
(15) 11 East 60.
(16) 126 Mo. 315.
(17) 162 Mass. 321.
(18) 12 App. Cas. 643.
(19) 5 ed. secs. 249, 250, 251, 313.
(20) 2nd ed. p. 49.
(21) Pp. 81, 104.

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THE JUDGE OF THE EXCHEQUER COURT now (July 18th, 1901), delivered judgment.

This action is brought to recover damages for injuries to the steam-packet *Arabia* and to her cargo. On the 26th of September, 1897, the *Arabia*, on a voyage outward from the port of Montreal, and while passing through the ship channel at Cap à la Roche, in the St. Lawrence River, took the ground or struck against some obstruction and was badly injured and the cargo damaged. The work of making a ship channel between Montreal and Quebec with a depth of twenty-seven and one-half feet of water was commenced by the Harbour Commissioners of Montreal and continued by the Government of Canada. This work, after the Government took it over in 1889, was carried on under the direction of the Minister of Public Works. The portion of the channel where the accident to the *Arabia* occurred was finished in the year 1894. During the construction of the channel, the work of excavation was tested from time to time by sweeping the channel to see if the required depth had been obtained. But after the work was finished no further tests were made and no sweeping took place prior to the accident referred to. After the accident the Minister of Public Works caused the channel at Cap à la Roche to be swept, when two anchors and a boulder were found in the channel.

Having regard to the evidence as to the marks left on the vessel's bottom, and the position in which the anchors and boulder were found it is not probable, I think, that the injuries to the *Arabia* were caused by either of the anchors or by the boulder. But it is obvious of course that either she came in contact with some obstruction in the channel or that she took the ground or bottom, her draught having been by accident or inadvertence unduly increased after leaving

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Montreal. In the view I take of the case it is not necessary to come to any conclusion as to which of the two things suggested is the more likely to have occurred, or as to whether or not the master and pilot did not by imprudent navigation of the vessel contribute to the accident.

It is conceded, and if it were not, it is clear and well-settled that the petition in this case cannot be maintained unless there is some statute giving the suppliants the remedy which they seek.

By the 16th section of *The Exchequer Court Act* (1) it is among other things provided that the Exchequer Court shall have exclusive original jurisdiction to hear and determine "(*c*) every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment;" and "(*d*) every claim against the Crown arising under any law of Canada." I refer to the latter provision in respect to claims arising under any law of Canada only to add that it does not in my view come in question here, as there is no law of Canada making the Crown liable in a case such as this, unless it be that which is recognized in the earlier provision of the section that I have cited. There is no law under which the Crown is liable for the mere non-repair of a public work, or for not using, to keep it in a safe condition, money voted by Parliament for a public work. Whether in any such case the repair shall be made or the money expended is within the discretion of the Governor in Council, or of the Minister of the Crown under whose charge the work is, and for the exercise of that discretion he and they are responsible to Parliament alone, and not to any court. As has been

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

frequently pointed out there is no remedy in any such case unless the claim arises out of a death or injury to the person or to the property on a public work, resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. I have had occasion in a number of cases to refer to this provision and to discuss its origin, scope and object, and I do not see that I can now on these subjects usefully add anything to what I stated in *The City of Quebec* v. *The Queen* (1); and in *Lavoie* v. *The Queen* (2). On the general question of the liability of the Crown for torts I have nothing to add to what I stated in the cases referred to.

The first question in all these cases is as to whether or not the accident occurred on a public work. *The Exchequer Court Act* contains no definition of the expression "public work," but the Act from which the provision in question, clause (*c*) of section 16, was adopted, contained such a definition. It will be found in *The Revised Statutes of Canada*, chapter 40, section 1 (*c*) and is re-enacted in *The Expropriation Act* (3). With the exception of some works that are under the charge of other ministers, the Minister of Public Works is by the 7th section of *The Public Works Act* given the management, charge and direction of the public works so enumerated. Among them we find "the "construction and repair of * * works for improv- "ing the navigation of any water." Now it cannot be doubted that the ship channel between Montreal and Quebec is a work for improving the navigation of the St. Lawrence River; and that while the work was in the course of construction or under repair it was a public work under the management, charge and direction of the Minister of Public Works. The same may

(1) 2 Ex. C. R. 252; 3 Ex. C. R. 164.
(2) 3 Ex. C. R. 96.
(3) 52 Vict. c. 13 s. 2 (*d*).

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be said of any work of dredging or excavation to deepen or widen the channel of any navigable water in Canada. But it does not follow that once the Minister has expended public money for such a purpose the Crown is for all time bound to keep such channel clear and safe for navigation; and that for any failure to do so it must answer in damages. It is argued that the section of *The Public Works Act* to which reference has been made, and the 9th section of the same Act, which provides that the minister shall direct the construction, maintenance and repair of all harbours, roads or parts of roads, bridges, slides and other public works and buildings constructed or maintained at the expense of Canada, impose that duty and responsibility on the Minister, and that the Crown is liable for his failure to maintain any public work and to keep it in repair. With that view I do not agree. I do not think it was the intention of Parliament in enacting *The Public Works Act* to impose any such obligation or responsibility on the minister and through him on the Crown. There is an evident intention to provide that when any work of the kind was to be done, it should, in respect of the enumerated works, be done under the direction of the Minister of Public Works; but I do not think there was any intention to make any such marked and striking departure from well understood rules and principles of government as that contended for. *The Public Works Act* was passed long before *The Exchequer Court Act*, and it cannot be doubted that it was never intended by any provision occurring therein to subject the Minister in respect of his political action or his discretion, or the Crown's as to the expenditure of public money, to the jurisdiction of any court.

On the broad question as to whether or not the Crown was under a legal obligation to keep the ship

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channel at Cap à la Roche in repair, and to sweep it and see that no obstruction had occurred therein, my opinion is that no such obligation existed. The importance of such precautionary measures is not questioned, and the expenditure necessary for the purpose is small and trifling compared with the great commercial interests involved. But the question as to whether the public money should be so expended or not was for the Governor in Council, or the responsible minister to determine, and it is not for the court to review the exercise of that discretion. On this question I adhere, without repeating them, to the views that I expressed in *McHugh* v. *The Queen* (1).

As for the Chief Engineer of the Department of Public Works, and the officers under him, it is clear that it was no part of their duties, without instructions and directions from the Minister, to undertake the sweeping of this channel, or to take any steps to keep it free from obstructions. Having no such duty they could not of course neglect it; and there is nothing in what they did or omitted to do to sustain the present petition.

Some reliance is placed by the suppliants on the fact that the *Arabia* was duly cleared by the Port Warden of Montreal, and that it is one of the regulations of the port that he shall not issue his certificate of clearance to any vessel which in his judgment is too deeply laden to pass with safety through the ship channel between Montreal and Quebec. This it is said is a representation that the *Arabia* might at the date of the accident pass through the channel safely, and that there were no obstructions in it to render its navigation dangerous. To that branch of the suppliants' case there are several answers which, it seems to me, dispose of it. First, there is no statute that makes the

(1) 6 Ex. C. R. 374.

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Crown liable for any misrepresentation of its officers, unless such misrepresentation should amount to negligence within clause (*c*) of the 16th section of *The Exchequer Court Act*; and without some such statute the Crown is not liable. Then the port warden and deputy port wardens of Montreal are not officers and servants of the Crown within the meaning of the provision cited from *The Exchequer Court Act*; and they had no duty to see that the ship channel at Cap à la Roche was kept in repair and free from obstruction or that it was swept. They had in the clearing of vessels to act upon the information given them from day to day as to the depth of water in the channel, and there is not the slightest ground for holding that the accident was due to any negligence or default on their part.

There will be judgment that the suppliants are not entitled to any portion of the relief sought by their petition; and the costs, as usual, will follow the event.

*Judgment accordingly.*

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

Solicitor for respondent: *J. J. O'Meara.*

NOVA SCOTIA ADMIRALTY DISTRICT.

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May 2.

WALTER N. CONWELL & R. E. CONWELL, OWNERS OF THE SCHOONER *CARRIE E. SAYWARD* ..... } PLAINTIFFS;

AGAINST

THE SCHOONER "*RELIANCE*".....DEFENDANT.

*Admiralty law—Collision—Fishing vessels—Sufficiency of Anchor light—Careless navigation.*

The *C. E. S.*, a fishing schooner, while lying at anchor on Bank Quero, was run into and sunk by another fishing vessel the *R.*, which was changing her berth in the night time. The weather was fine and the sea smooth. The *C. E. S.* was displaying a light in order to comply with the regulations; but it was claimed by the crew of the *R.* that they did not see the light until it was too late to avoid a collision. It was shown that the *R.* had been fishing in a berth four or five miles distant from the *C. E. S.*, that her crew knew that there were a number of vessels fishing in their vicinity, and that the master of the *R.* took no extra precautions in sailing at night over the closely crowded fishing grounds, but on the contrary went below himself leaving the ship under full sail to the charge of those on deck.

*Held*, that the *R.* was solely to blame for the collision.

ACTION *in rem* for damages arising out of a collision at sea.

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

The case was heard at Halifax, N.S., on September 21st, 1900; February 6th and 7th, 1901; March 8th and 12th, 1901.

*W. B. A. Ritchie, K.C.*, for the plaintiffs;

*R. E. Harris, K.C.*, for the defendant.

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Reasons for Judgment.

McDONALD (C.J.) L.J. now (May 2nd, 1901,) delivered judgment.

The *Carrie E. Sayward*, a fishing schooner of the Port of Provincetown, United States of America, while in pursuit of her fishing voyage was at anchor on Bank Quero, about one hundred miles east of Sable Island, on the morning of the 6th September, 1901. The schooner had a crew of twelve men all told and had nearly completed her cargo of fish, when about three o'clock on the morning of the day mentioned, she was run into by a schooner afterwards ascertained to be the *Reliance* of Nova Scotia, also fishing on the Bank Quero. The result of the collision was that the *Carrie Sayward* sank at her anchors, and the vessel and cargo were totally lost. The wind was blowing about a three or four knot breeze from the W. S. W. or S. W. The *Carrie Sayward* had occupied the berth at which she was anchored when the collision took place for about a fortnight, and three other fishing vessels, the *Lottie Burns*, *A. K. Damon* and the *Hattie Western*, were anchored southerly from her at distances varying from half a mile to a mile and a half. The *Reliance* had also been fishing in the neighbourhood for some weeks at a distance of three or four miles from the *Carrie E. Sayward*, and having resolved to change her berth her master was, when the collision occurred, sailing through and among the vessels anchored in the immediate neighbourhood of the *Carrie Sayward*. Some hours before the collision, the *Reliance* had passed and spoken the *Lottie Burns* while sailing N. N. W. or N. W. on the port tack, and, having tacked, was sailing a course near south and on the port tack when the collision occurred. At the time of the collision the *Reliance* had all her sails set and was making between two and one half and three miles an hour speed. It is generally admitted on both sides that during the

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early part of the night of the 5th September that the weather was fine, the sea smooth with a slight ground swell, bright moonlight and clear starlight. The moon sank about 2 a.m. on the 6th September, and there is much discrepancy as to the state of the atmosphere after the moon had disappeared, one party alleging that the night became dark and cloudy, while the others declare that it continued fine and clear till the collision took place. There is no question that the *Reliance* struck the *Carrie F. Sayward* a square blow about midships, and that from the effects of that blow the latter vessel with her cargo sank about two hours after the collision, after every effort had been made to save her by pumping. The only question for discussion, therefore, is that raised by the defendant vessel in her preliminary act, namely, "the fault or default "attributed to the *Carrie E. Sayward*, is as follows:

*a.* "She was carrying no light at all.

*b.* The light, if any, carried by her was very dim and indistinct, and not in accordance with the regulations for preventing collisions at sea.

*c.* The light was not so constructed as to shew a clear or uniform unbroken light, nor was the same visible at a distance of at least one mile; but was a very dim and indistinct light, and was only visible a few feet from the said ship."

This is the only defence the defendant attempted to make at the trial, except the contention that as the *Reliance* was on the eve of collision with the other vessel, the man at her wheel was misled by a cry from the watch on the *Sayward* to "keep off." There is in this case the contradictions or discrepancies usually met with in cases relating to accidents at sea; but so far as I could judge the witnesses on both sides were respectable people of their class, and the contradictions and discrepancies appearing in the evidence may, I

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think, fairly enough be attributed to careless observation of facts in which they did not feel personally interested at the time, and which, when the incidents were recalled after the accident, naturally presented themselves in a more or less distinct and truthful light according to the intelligence of the observer. The first question, therefore, is—was the light exhibited by the *Carrie E. Sayward* such as the statute requires, on the night of and up to the time of the collision? That there was a light of some sort, intended to fulfil the regulation requirements is, I think, beyond question. The watch on the deck of the *Reliance*, at the time of the collision, admit that a light was burning in the rigging of the *Carrie E. Sayward*, but so dim and imperfect was it, that they did not see it until they had approached so near the other vessel as to render avoidance of the collision impossible. This defence of the *Reliance* rests largely upon the fact that while on her voyage from Provincetown to the fishing grounds the lamp of the *Carrie E. Sayward* shewed some defect which rendered some repairs necessary. This was done by removing from the large lantern (protecting the inside lamp) the defective lamp, and substituting another, repairs which the plaintiffs allege were entirely satisfactory, and furnished a light during the seven or eight weeks they were on the fishing grounds sufficiently strong and clear and bright to meet all the requirements of the regulations in that behalf. The evidence of the master and crew of the *Carrie E. Sayward* is very clear and positive as to the sufficiency of the light during the whole voyage up to the time of the collision. It appears that in these vessels, while at anchor on the banks, only one of the crew is on watch at night at the same time, and they take their turn of an hour each on watch. The man on watch at the time of the collision swears positively that, when he

came on deck to take his turn, the lamp was burning clear and bright as usual, and quite equal to the lights of the vessels anchored around them. The master says he was present when the light was hoisted into the rigging on the evening of the 5th September, that it was then burning bright and clear, and that when he left the deck at 10 p.m. on the night of the 5th September it was burning clear and bright, and each of the crew in succession who had been on watch from the time the lamp was lighted, on the evening of the 5th September till the collision occurred, testified that the light burned that night, while they were respectively on deck, as bright and clear as throughout the preceding part of the voyage, and that it was only after the jar caused by the collision that the light apparently became less brilliant than usual. This evidence of those on board the vessel, who have best opportunity of learning and knowing the facts as to which they testify, has not in my opinion been seriously, if at all, shaken or impugned by testimony on the part of the defendant vessel, while it is corroborated very strongly indeed by the evidence of those on board the schooners in the immediate neighbourhood of the *Carrie E. Sayward* on the night of the collision, and as to the general character of the light on board the *Carrie E. Sayward*, not only on the night and morning of the collision, but during the whole period of her voyage on the banks. These witnesses are Brier, master of the *Lottie Burns;* Silver, master of the *Ada K. Damon;* Marshall, master of the *Hattie Western;* and Gasper, a fisherman on the *Ada K. Damon.* Some of the fishermen on the neighbouring schooners testified that they did not see a light on the *Carrie E. Sayward* shewing during some part of the night of the 5th or 6th September. In itself this testimony is in my opinion worthy of little consideration in the face of the testi-

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mony of the masters and others from the vessels to which I have referred. It is significant that the people on the deck of the *Reliance* admit that they saw a light in the rigging of the *Carrie E. Sayward* as they approached her, but not in time to avoid collision. The evidence in my opinion discloses strong evidence of careless navigation on the part of those in charge of the *Reliance*. They were sailing at night over waters covered, more or less, with those fishing vessels at anchor. They had previously fished in a berth four or five miles distant, and one would suppose extra precaution would be taken on coming on new ground among vessels anchored close together. But instead of that we find the master asleep in his cabin, having given those left in charge a roving commission among these anchored vessels, and she pursued her way under full sail, and in my opinion with careless and insufficient watch, with the result of the loss of this vessel and cargo. I am also of opinion that the light of the *Carrie E. Sayward* was, before and up to the time of the actual collision between the vessels, a bright and sufficient light as required by the regulations in that behalf, and that if a sufficient watch had been kept on board the *Reliance*, collision would have been avoided. I am also of opinion that the *Reliance* is solely to blame for the collision complained of, and that there must be judgment against her for the consequent damage with costs. There will be a decree accordingly, and it will be referred to the registrar and merchants to assess the damages.

*Judgment accordingly.*

Solicitors for plaintiffs: *Borden, Ritchie & Chisholm.*

Solicitors for defendant: *Harris, Henry & Cahan.*

THE BOSTON RUBBER SHOE COMPANY ..... } PLAINTIFF;

AND

THE BOSTON RUBBER COMPANY OF MONTREAL (LIMITED) ..... } DEFENDANT.

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Sept. 21,

*Trade-mark—Infringement—Corporate name—Use of when conflicting with trade-mark—Fraud—Intent to deceive.*

In the absence of fraud or bad faith, a body corporate may use its own name on goods of its own manufacture, although such use may tend to confuse its goods with goods of the same kind bearing the trade-mark of another manufacturer.

2. Where the defendants, a body corporate, had obtained their name before a trade-mark with which such name was said to conflict had been registered in Canada by the plaintiffs, a foreign corporation, and it was not shown that the defendants had adopted such name with intent to deceive the public, nor to sell their goods as those of the plaintiffs, the court refused to restrain the defendants from using their corporate name upon goods manufactured by them.

THIS was an action to restrain the alleged infringement of a trade-mark (1).

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

May 14th, 1901.

The case was heard at Montreal.

*R. V. Sinclair* for the plaintiffs;

The Canadian trade-mark of the plaintiffs was registered before the incorporation of the defendants. Of course the chief value of a trade-mark in this country is a juridical one. You must obtain registration before you can bring an action. If any one passed off

(1) This case was formerly before the court upon demurrer to the plaintiffs' statement of claim. See *ante* p. 9.

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his goods as those of your own manufacture you always had a common law action for the fraud; but you cannot restrain an infringement unless you have registered your mark in Canada. Once having done that, you can restrain the use of your mark whether it is used fraudulently or not. It is not necessary to charge fraud in an action for infringement; neither is it necessary to show an intention to deceive. *Pinto* v. *Badman* (1); *Sebastian on Trade-marks* (2); *Boston Rubber Shoe Co.* v. *Boston Rubber Company* (3); *Orr-Ewing* v. *Johnson* (4).

It is the duty of the defendants to exonerate themselves when we establish our right to the trade-mark. It is for them to show that the unwary and incautious purchaser could not have been deceived into buying the defendants' goods for those of the plaintiffs.

They have no right to adopt as their corporate name, a name that has already been made the subject of a trade-mark. The courts do not treat corporations with the same leniency as individuals in cases where the alleged infringement consists in the use of a name. Cites *Celluloid Manufacturing Co.* v. *Cellonite Manufacturing Co.* (5); *Indian Rubber Co.* v. *Rubber Comb and Jewellery Co.* (6); *Smith* v. *Fair* (7); 26 *American and English Encyclopædia of Law* (8); *Radde* v. *Norman* (9).

The evidence discloses that defendants adopted our trade-mark because our goods had an established place on the market.

*A. McGoun* for the defendants;

Plaintiffs must show that defendants used and employed the trade-mark with intention to deceive the

(1) 8 R. P. C. 181.
(2) 2nd ed. p. 124.
(3) 149 Mass. 436.
(4) 13 Ch. D. 434.
(5) 32 Fed. Rep. 94.
(6) 45 N. Y. (S. C.) 258.
(7) 14 Ont. R. 729.
(8) Pp. 321, 444.
(9) L. R. 14 Eq. 348.

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public. That is clearly the intention of the statute. That has not been established by the evidence. The decisions cited by counsel for plaintiffs were based upon a different law entirely from ours.

The defendants cannot be said to be infringing the plaintiffs' trade-mark by simply using their corporate name on their goods. Cites *Brown on Trade-marks* (1); *Sebastian on Trade-marks* (2); *Dalloz: Juris. Gén* (3); *Dalloz: Juris. Gén.* (4).

*R. V. Sinclair* in reply cited *Kerly on Trade-marks* (5); *Browne on Trade-marks* (6); *American and Eng. Ency. of Law* (7); *Re Paine's Trade-mark* (8); *Millington* v. *Fox* (9); "*Singer*" *Machine Manufacturers* v. *Wilson* (10).

THE JUDGE OF THE EXCHEQUER COURT now (September 21st, 1901), delivered judgment.

The action is brought to restrain the defendant company from impressing or using upon rubber boots and shoes manufactured by it words that constitute in substance its corporate name, and for damages for an alleged infringement, by such use of its name, of the plaintiff company's registered trade-mark.

The plaintiff company was in 1853 incorporated under the laws of the Commonwealth of Massachusetts, by the name of "The Malden Manufacturing Company," for the purpose of manufacturing cotton, silk, linen, flax, or india rubber goods at the town of Malden. In 1855 its name was by an Act of the Commonwealth changed to "The Boston Rubber Shoe Company." Since that time it has continued to do business by that name, and its business has prospered. In rubber boots and shoes it manufactures two grades

(1) 2nd ed. p. 197.
(2) 2nd ed. p. 24.
(3) [1878] II 23.
(4) (1880] I. 90.
(5) 2nd ed. pp. 4, 14, 316, 349.
(6) 2nd ed. p. 197.
(7) Vol. 26 p. 429.
(8) 66 L. J. Ch. 365; 66 L. T. 642.
(9) 3 My. & Cr. 338.
(10) 3 App. Cas. at p. 391.

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or lines of goods; the one that which is spoken of as "The Boston Rubber Shoe Line," and the other as "The Bay State Line." The former are known to the trade, and have been since as early as 1865 at least, as "Bostons." The other grade is known as "Bay State." The company's annual output of rubbers is about twelve million pairs. Mr. Sawyer puts it at from ten to fifteen millions. Of this quantity about half are "Bostons" and half "Bay State." These goods are sold in the United States, in Europe, and in Canada. But the sale in Canada is not, I infer from the evidence, large. Mr. Smith, of French & Smith, of Montreal, shoe merchants, for some seven years prior to last year, sold from fifteen hundred to two thousand dollars worth of these goods per annum, but not so many during the last year. Mr. O'Brien, another Montreal boot and shoe merchant, says that at present he sells a very small quantity of the plaintiff's goods, and he explains the reason to be that the duty is too great; that it keeps out American rubber goods for the last few years excepting job lots sold at a reduction in price. The regular goods they do not buy because they are too high. Mr. George H. Mayo, of William F. Mayo & Company, Boston, who are wholesale dealers in rubber shoes, and who sell, all over the United States and in Canada, rubber shoes made by the plaintiff company, gives from his books the sales in Canada in the year 1900 of such goods at something less than five hundred dollars worth.

In April, 1897, the plaintiff obtained registration in the United States Patent Office of the words "Boston Rubber Shoe Company," as a trade-mark for rubber boots and shoes. And in October in the same year it obtained registration in Canada of the same words as a specific trade-mark to be applied to the sale of rubber boots and shoes. In October, 1896, The Toronto

Rubber Shoe Manufacturing Company, Limited, had upon the allegation that it had been the first to use the same, registered as a specific trade-mark to be applied to the sale of rubber boots and shoes the word "Boston," and on September 27th, 1897, the latter company assigned all its right, title and interest in such specific trade-mark to the plaintiffs, but without, so far as appears, any assignment of any interest in the business in which The Toronto Company had used or intended to use such trade-mark.

In 1878, George H. Hood and others obtained, in accordance with the laws of the Commonwealth of Massachusetts, then in force, a certificate of incorporation as The Boston Rubber Company, with power, among other things, to manufacture and sell articles consisting wholly or in part of india rubber. For some ten years this company confined its manufacture and business to articles other than rubber boots or shoes. It then commenced to manufacture such articles, and in 1889 it registered in the United States Patent Office a trade-mark for india rubber boots and shoes consisting of a bell upon which appear the words "Boston Rubber Co, Boston, Mass." The Boston Rubber Shoe Company becoming aware of the intention of the Boston Rubber Company to engage in the manufacture of boots and shoes, applied, in the first instance, to the Attorney-General of the Commonwealth, praying him to file an information in the nature of a writ of *quo warranto* against The Boston Rubber Company to the end that the latter company might show by what warrant it used its name. The application being refused, a petition was presented to the Supreme Judicial Court of the Commonwealth for leave to The Boston Rubber Shoe Company to file such an information. The petition was dismissed.

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In 1896, The Boston Rubber Company appears to have gone out of the business of manufacturing rubber boots and shoes, and the promoter of the defendant company purchased for nine thousand dollars the portion of its tools, machinery and plant mentioned in the agreement, a copy of which is in evidence. The purchase included, among other things, all calenders, blocks, dies, patterns, moulds, and all furniture and tools specially adapted for the manufacture of rubber boots and shoes. This sale was effected on the 30th of May, 1896. On the 26th of August of that year an application was made by Charles L. Higgins, the purchaser of this plant, and others, for incorporation under *The Companies Act* (1) by the name of "The Boston Rubber Company of Montreal, Limited," for the purpose of carrying on the business of manufacturers of all kinds of rubber and gutta percha goods, and of all goods in the manufacture of which rubber or gutta percha is used, and for the purpose of dealing in such goods. After publication of the notice of application, letters patent were, on the 27th day of November, 1896, issued under the Great Seal of Canada incorporating the company for the purposes mentioned. In explanation of the choice of name, Mr Higgins says that "the town of St. Jérome had voted "a bonus of fifty thousand dollars to the new company "starting, and designated that company as The Boston "Rubber Company. Consequently we would have had "to have another vote taken in the town and at con- "siderable cost, and we thought it best to go on with "the same name under the circumstances." The Boston Rubber Company, like most rubber shoe companies, had made two grades of rubber boots and shoes, the better grade had impressed upon it the name of the company on the device of a bell (the company's

(1) R. S. C. c. 119.

trade-mark to which reference has been made), and the other grade bore the name of the Neptune Rubber Company. The defendant company never used any device of the bell for the reason, as stated by Mr. Higgins, that he thought it was a trade-mark belonging to The Boston Rubber Company, and because it was in use by the firm of J. & T. Bell, of Montreal. In using the moulds purchased from The Boston Rubber Company the words "Boston" and "Mass." were dropped and the word "Montreal" substituted. The defendant company also manufacture two grades of rubber boots and shoes. On the better grade are impressed the words "The Boston Rubber Company, Montreal, Limited," and these goods in the company's catalogues, price lists and advertisements are referred to as "Boston." In the Illustrated Catalogue, Exhibit No. 15, will be found the following: - "Our "Nepture brand is everything we claim for it—a high "grade second, not so good as the Boston, but a good "clean well made stylish rubber that will give excel- "lent satisfaction for the money," and in the same catalogue, as well as in the price list, Exhibit No. 16, the words "Boston Rubber Company" without any addition of the word "Montreal" frequently occur.

Now, although the sales of the plaintiffs' goods in Canada do not appear to be, or so far as the evidence goes, to have been, considerable, the term "Boston" or "Bostons" has, it seems to me, come in some way to have a commercial value as attached to rubber boots and shoes; and this value has, I think, been given to it by the plaintiffs' enterprise and business. I come to that conclusion notwithstanding the fact that the plaintiffs have seen fit to take from another company an asisgnment of a specific trade-mark, to be applied to the sale of rubber boots and shoes, consisting of the word "Boston," and obtained by such company on the alle-

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gation that it was the first to use it. I express no opinion one way or the other as to the validity of that trade-mark either as used by the company that registered it, or in the hands of the plaintiff under the circumstances existing in this case. But I am not prepared to accept the allegation mentioned as true. On the contrary, unless one splits hairs over the words "Boston" and "Bostons" as applied to rubber boots and shoes, it seems to me reasonably certain that the plaintiff company was the first to make use of the term in that connection; and that any value it has acquired in that connection, any secondary meaning that it has come to have as denoting excellence in rubber boots and shoes has been derived from its use in the plaintiffs' business. And it seems to me that the defendant company as honest manufacturers and traders ought to discontinue its use, except so far as it forms part of the corporate name of the company. But this action is not brought to restrain the use of the word "Boston" or "Bostons" in the company's catalogues, price lists and advertisements, but to restrain it from using upon goods of its own manufacture what in substance is its corporate name; the only difference being the omission of the preposition "of" before Montreal. But that does not appear to me of itself to be of great importance; and I should not have thought anything of it but for the intentional dropping of the word "Montreal" also in other connections, to which reference has been made. As it is one cannot wholly lose sight of the incident in coming to a conclusion as to whether the defendant is honestly impressing its corporate name on its goods; or whether it is endeavouring to put thereon something that will give it the advantage of the reputation acquired by the plaintiffs' goods. It would, I think, be much better and safer for the defendant to put on its goods its corporate

name in the terms in which that occurs in the letters patent. But for Mr. Higgins' explanation I should, I think, have come to the conclusion that the name of the defendant company had been chosen, and the form in which it is impressed upon the goods manufactured by the company had been adopted, with a view to use and to get the advantage of using the word "Boston" or "Bostons" to which, as connected with the rubber boot and shoe business, the plaintiff company's years of successful business had, especially in the United States, given a trade value and importance. However, in view of that explanation, which under all the circumstances I accept as a true explanation, I must, I think, acquit him and the company of any intentional or fraudulent adoption or adaptation of any part of the plaintiff company's corporate name, which subsequently to the incorporation of the defendant company it has registered as its trade-mark. The action is for the infringement of a registered trade-mark. The infringement alleged is the use, substantially, by the defendant of its own name upon its own goods. The name had been chosen and given after notice, before the plaintiff's trade-mark was registered. It had been chosen and the application for incorporation made before The Toronto Rubber Shoe Manufacturing Company applied for the registration of the trade-mark "Boston," although the letters patent did not issue until about a month after the latter mark was registered. There is no evidence of any attempt by the defendant company to sell its goods as those of the plaintiff. There is nothing to lead me to think that the defendant company has, in the use of its corporate name or otherwise, acted in bad faith or fraudulently. At most it has, I think, made the mistake—made it perhaps honestly enough—of thinking that as it had bought out the Boston Rubber Company it had as

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good a right to the use of the word "Boston" as anyone else. In that view it may be wrong; but that is not I think the question now before me. What is to be now determined is whether the company may or may not impress its corporate name upon goods of its own manufacture, and that I think it may do in the absence of any fraud or bad faith. Under ordinary circumstances it is not of course necessary to aver or to prove fraud to obtain protection for a trade-mark. But cases in which that which is complained of is the use of one's own name or the use by a company of its corporate name, stand in a somewhat different position. One may, if he does it honestly and with no fraudulent intent, use his own name on his own goods although that may tend to some confusion; and the same is, I think, true of the use by a company of its corporate name.

In the present case the name was no doubt chosen by the persons incorporated; and it was granted by the Crown upon the declaration by Charles Higgins, one of such persons, for himself and those associated with him, that the proposed corporate name of the company was not the name of any other known company incorporated or unincorporated or liable to be fairly confounded therewith, or otherwise on public grounds objectionable. If I thought that there had been intentional deception in obtaining the name, that it had been chosen with a view of reaping an advantage from the reputation that the plaintiffs' rubber boots and shoes had acquired in the market, I do not doubt that I ought to restrain the defendant company from using the name upon the rubber boots and shoes manufactured by it. But I do not think it was selected with any such object or motive; or that it is used (I speak now of the use of the corporate name) in bad faith or for any fraudulent or improper purpose.

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Within those limits it has, I think, so long as it is allowed to retain it, a right to use its own name on its own goods. If Higgins' declaration that the name proposed was not liable to be confounded with that of any other company, and that the name is not on public grounds objectionable is not true; if in making that allegation he was mistaken there are appropriate remedies provided, but these are not in question here. There will be judgment for the defendant company, and the costs will follow the event.

*Judgment accordingly.*

Solicitor for plaintiff: *R. V. Sinclair.*

Solicitors for defendant: *McGoun & England.*

1901
Nov. 2.

BETWEEN

WILLIAM MELDRUM.....PLAINTIFF;

AND

DAVID DOUGLAS WILSON AND JOHN A. WILSON..... } DEFENDANTS.

*Patent of invention—Cleansing pickled eggs—Claim—Patentability.*

The application of well known things to a new analogous use is not properly the subject of a patent.

The defendants employed a solution of hydro-chloric acid to remove from pickled eggs the deposit of carbonate of lime that forms upon them while being preserved in a pickle of lime-water. From the known properties of the acid and its use for analogous purposes it was to be expected that it would accomplish the purpose to which it was put. The purpose was new, and the defendants were the first to use the process and to discover that it could be practised safely and with advantage in the business of preserving and marketing eggs; but there was nothing in the mode of employing such solution demanding the exercise of the inventive faculties.

*Held*, that there was no invention, and that a patent for the process could not be sustained.

THIS was an action to set aside the Canadian letters-patent numbered 67,813 issued to the defendants for a process of cleansing pickled eggs.

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

June 4th, 5th and 6th, 1901.

The case was heard at Toronto.

*C. A. Duclos* and *C. A. Masten* for the plaintiff.

*A B. Aylesworth, K.C.* and *W. C. Mackay*, for defendants.

*C. A. Duclos*, for the plaintiff, argued as follows:

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Argument of Counsel

First, as regards the utility of the patent in question, I submit it is not useful. The treating of eggs by this process does not in any manner improve their quality. At most it but gives the egg an improved appearance, and so increases the chance of practicing a fraud upon the public. It is improper to protect the process by a patent. (Cites *Langdon* v. *De Groot* (1); *Merwin on Patentability* (2); *Westlake* v. *Carter* (3).

Secondly, there is an absolute want of inventiveness in this process. The properties of the solution used by the defendants to cleanse the eggs were well known. It was common knowledge before the defendants got their patent that muriatic, or hydro-chloric, acid will attack and dissolve lime. The defendants simply applied a well-known principle without devising any new method of application. If the invention is simply the application of a well known principle to an analogous use, although it may be true that it is accompanied by advantages not thought of or practiced before, there is no invention. (Cites *Elias* v. *Grovesend Tin Plate Co.* (4); *Harwood* v. *Great North Western Railway Co.* (5); *Morgan* v. *Windover* (6); *Lane Fox* v. *Kensington Electric Light Co.* (7); *Reg.* v. *Cutler* (8); *Tetley* v. *Easton* (9); *Ralston* v. *Smith* (10).

*C. A. Masten* followed for the plaintiff:

The defendants placed eggs upon the market treated according to the process covered by this patent long before their patent was obtained. They, therefore, had communicated the nature of their discovery to the public and forfeited their right to a patent.

[BY THE COURT: The sale of the eggs would not necessarily communicate the nature of the process.

(1) 1 Paine 203.
(2) P. 263.
(3) 6 Fish. 519.
(4) 7 R. P. C. 455.
(5) 11 H. L. C. 654.
(6) 7 R. P. C. 131.
(7) 9 R. P. C. 221, 413.
(8) 3 C. & K. 215.
(9) 26 L. J. C. P. 269.
(10) 11 H. L. C. 223.

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The purchaser does not purchase the process when he purchases the eggs.]

Perhaps not, but when coupled with the elementary knowledge supposed to be possessed by all, it may be said that the sale of the treated egg is a sale of the patented article. I say that this may very well be the case under our Patent Act, which seems to make the sale of the product such a use of the invention as would preclude the inventor from obtaining a patent.

But the patent is bad upon a more fatal ground than that, namely, the defendants' claim is too broad. If this, instead of being an action of *sci. fa.* to set aside the patent, were an action brought by the defendants to restrain an infringement of their patent, what process of cleaning the eggs would not be an infringement? A "chemical solution" is so wide a term that it would include almost any process of cleansing known to the trade. (Cites *Edmunds on Patents* (1); *Gadd* v. *Mayor of Manchester* (2); *Re Adamson's Patent* (3).

*A. B. Aylesworth, K.C.* for the defendants:

It is no objection to the patentability of a discovery or invention that it is simple, or that it consists in the application of well-known principles. (Cites *Bicknell* v. *Peterson* (4); *Dion* v. *Dupuis* (5); *Tilghman* v. *Morse* (6); *Nobles* v. *Anderson* (7); *Penn* v. *Bibby* (8); *Washburn* v. *Haish* (9); *The Queen* v. *Laforce* (10).

The subject-matter of our patent is a process which is useful, and a process or art which is new. (*Curtis on Patents* (11). So long as there is a new mode of attaining an old result, or a mode of attaining a new

(1) 2nd ed. p. 94.
(2) 9 R. P. C. 249.
(3) 6 DeG. M. & G. 420.
(4) 24 Ont. A. R. 427.
(5) 12 Q. R. (S. C.) 465.
(6) 9 Blatch. 421.
(7) 11 R. P. C. 115.
(8) L. R. 2 Ch. 127.
(9) 4 Fed. R. 900.
(10) 4 Ex. C. R. 14.
(11) 4th ed. sec. 9.

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result in any department of industry there is the exercise of inventive skill which will support a patent. Our patent is for a process for restoring eggs to their natural appearance after the eggs have been pickled or preserved. We obtain a definite result by an original method, and our patent came to us as a matter of right. It cannot be set aside on the ground of want of invention.

Then, with reference to the alleged using of the process by the defendants before the application for their patent, that was no disclosure or publication of the process by which the eggs were cleansed. The authorities all sustain me in that proposition. (*Summers* v. *Abell* (1); *Bentley* v. *Fleming* (2); *Ingall* v. *Mast* (3); *Leonhardt & Co.* v. *Kalle & Co.* (4); *Dick* v. *Tullis* (5).

The specification and claim read as a whole disclose no ambiguity, and contemplate a perfectly patentable matter.

(He cited on this point, *Toronto Auer Light Co.* v. *Colling* (6); *Vickers* v. *Siddel* (7).

*C. A. Duclos* replied, citing *Smith & Davis Mfg. Co.* v *Mellon* (8).

THE JUDGE OF THE EXCHEQUER COURT now (November 2nd, 1901), delivered judgment.

This action is brought to obtain a declaration that letters-patent numbered 67,813, granted to the defendants on the 21st of June, 1900, for an alleged new and useful improvement in the process of treating eggs, be declared void. The validity of the patent is challenged on the grounds (1) that the defendants were

(1) 15 Gr. 532.
(2) 1 Good. P. C. 42.
(3) 2 Bann. & Ard. 24.
(4) 12 R. P. C. at p. 115.
(5) 13 R. P. C. 149.
(6) 31 Ont. R. 18.
(7) 15 App. Cas. at p. 505.
(8) 66 Off. Gaz. Pat. (U.S.) 173.

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not the true and first inventors of the alleged invention; (2) that it was not the subject matter of valid letters patent; (3) that it was not new, but was well known and used by many persons other than the defendants long before their alleged invention thereof; (4) that it had been in public use with the consent and allowance of the said defendants for more than one year previous to the application in Canada for a patent therefor; and (5) that the specification was not sufficient. In addition to these grounds of objection which are set up in the statement of claim, it was at the hearing argued that after the defendants' alleged invention and before their application for a patent, the public became possessed of a knowledge of the invention without the consent and allowance of the inventors, and that on the true construction of *The Patent Act*, and having regard especially to clause (*d*) of section sixteen, they were not entitled to a patent. I understand that argument (stating it briefly) to be that while the knowledge or use of an invention by other persons, that would under section seven preclude an inventor from obtaining a patent, is a knowledge or use prior to the invention, and while the public use and sale therein mentioned for more than one year prior to the application for a patent must be a public use or sale with the consent and allowance of the inventor, there is another contingency that may happen; namely, that by reason of the invention or discovery of others and without any consent or allowance of the first inventor, and before his application for a patent the public may become possessed of the invention, and that if that happens (as it was contended that in this case it had happened) the inventor is not entitled to a patent; that he has no consideration to offer to the public for the grant he seeks and cannot obtain it; that on that subject the law of Canada is the same as

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the law of England, subject only to this, that the inventor shall not be prejudiced by his own communication to the public of a knowledge of his invention, if he makes his application for a patent within one year thereafter. In the view that I take of another objection on which the plaintiff relies, I shall not have occasion to discuss this question, or to determine whether or not, in this case, there has been such a prior knowledge or use of the invention as would defeat the patent.

It will, I think, be convenient in the first instance to describe the alleged invention and claim of the patentees, in their own language, as used in their specification, from which the following is extracted:

"Our invention relates to an improvement in a "process for treating eggs, the object being to restore "eggs to their normal appearance after having gone "through the pickling or preserving process.

"Under the old system of preserving eggs by the "use of lime-water, the eggs were placed in the pre-"serving fluid and left either uncovered or covered by "placing cloths on top of them and then placing a "quantity of quick slacked lime on top of the cloths, "which in both instances caused the eggs to become "quickly coated with carbonate of lime or alkali. After "removing the eggs from the preserving fluid, it has "been the practice heretofore, to merely wash them "with clear water. But in so doing the particles of "lime adhering to the shell were not dissolved, thus "leaving them with an unnatural appearance and con-"dition. Added to this is the well known disadvan-"tage that eggs with carbonate of lime left on the shells "are thereby rendered air tight and will not boil with-"out bursting.

"We propose covering the preserving fluid in the "vats or tanks containing the eggs with deodorized oil

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"for the purpose of excluding air, and the carbonic acid "gas contained therein, from the eggs and preserving "fluid, thus preventing to a great extent the formation "and deposit of carbonate of lime on the shells, result- "ing from the action of carbonic acid with the lime "used in the pickling or preserving solution thus tend- "ing to keep the eggs sweet and in their natural con- "dition. After having been thus treated, the eggs are "taken out of the preserving solution, the oil first "having been carefully removed so that no particle "thereof shall come in contact with the eggs. The "eggs are now rinsed in water and they are then "restored to their normal appearance by passing them "quickly into, and quickly removing them from a "solution of hydro-chloric, acetic or sulphuric acid or "equivalent chemical which will dissolve the alkaline "deposit on the shell without affecting the shell itself.

"Upon removing the eggs from the restoring solu- 'tion, they are again thorougly rinsed with clear water 'so as to remove the acid and deposit upon the shell "loosened by the action of the acid and finally the "eggs are thoroughly air dried.

"The two features of our process which we would "particularly impress are, that the eggs are quickly "passed into and out of the acid solution so that the "acid is not given time to attack the shell itself, but "merely acts upon the alkaline deposit upon the shell, "and the other feature consists in the use of a solution "of such strength that this quick passage of the eggs "into and out of the solution accomplishes the result "desired.

"The result of this treatment is that the shells will "be almost, if not quite, restored to their natural bloom "and appearance and the danger of the eggs bursting "when boiled hitherto alluded to is greatly removed. "The danger of the eggs bursting when boiled is not

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"only lessened, but the eggs have such an appearance "as to very closely approximate that of a fresh laid "egg.

"Having fully described our invention, what we "claim as new and desire to secure by letters patent "is:

"1. The herein described process of restoring eggs "to their natural appearance after having been through "a pickling or preserving process, which consists in "subjecting the eggs to the action of a chemical solution "of sufficient strength to quickly loosen the deposit "thereon without attacking the shell of the egg, and "thereafter immediately cleansing the eggs, substan- "tially as and for the purpose described.

"2. The herein described process of restoring eggs "to their natural appearance after having been through "a pickling or preserving process, which consists in "subjecting the eggs to the action of a chemical solu- "tion of sufficient strength to quickly loosen the deposit "thereon without attacking the shell of the egg, and "thereafter immediately cleansing the eggs and finally "drying the eggs thoroughly, substantially as and for "the purpose described.

"3. The herein described process of restoring eggs "to their natural appearance after having been through "a pickling or preserving process, which consists in "first rinsing the eggs in water, then subjecting the "eggs to the action of a chemical solution of sufficient "strength to quickly loosen the deposit thereon with- "out attacking the shell of the egg, and thereafter im- "mediately cleansing the eggs, substantially as and "for the purpose described.

"4. The herein described process of restoring eggs "to their natural appearance after having been through "a pickling or preserving process, which consists in "first rinsing the eggs in water, then subjecting the

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"eggs to the action of a chemical solution of sufficient "strength to quickly loosen the deposit thereon with- "out attacking the shell of the egg, and thereafter im- "mediately cleansing the eggs and finally drying the "eggs thoroughly, substantially as and for the purpose "described."

It will be observed that four claims are made, but they constitute in reality but one claim. In the second and fourth statements of the claim, part of the process described is to dry the eggs thoroughly after they have been subjected to the chemical solution, and then cleansed by, as appears from the specification, "being thoroughly rinsed with clear water." And by the third and fourth claims part of the process consists in "rinsing the eggs in water" as well before as after they have been subjected to the chemical solution. But these rinsings in water and dryings, however important they may be in the actual business of preparing eggs for the market, are not important in determining whether the alleged invention or discovery is patentable or not. If the patent is not good for the process of restoring pickled eggs to their natural appearance by subjecting them to the action of a chemical solution it will not be good because the eggs are washed before or after their immersion in the solution, or because they are dried, and it will, I think, make no difference whether we regard the alleged invention as an improvement in the process of treating eggs to preserve them and prepare them for the market, or as a process to be applied to pickled eggs in getting them ready for the market. The alleged invention has to do with one step or incident in the process, and not with the process as a whole. The question then is whether one may have a patent for the process of restoring eggs to their natural appearance after having been through a pickling or pre-

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serving process, by subjecting them to the action of a chemical solution of sufficient strength to quickly loosen the deposit thereon without attacking the shell of the egg, no particular way or means of preparing or applying the solution being pointed out? The claim is for the process of subjecting the pickled eggs to a chemical solution of a sufficient strength for the purpose. The specification shows that the solution may be of "hydro-chloric, acetic or sulphuric acid, or an equivalent chemical which will dissolve the alkaline deposit" on the shell of the egg. The adjective "chemical" may in this connection be taken to mean, in accordance with the laws of chemistry, and the expression "chemical solution" used in the claim, means, I think, a solution of hydro-chloric, acetic or sulphuric acid or of any equivalent that will, in accordance with the laws of chemistry, combine with and dissolve carbonate of lime. But the specification does not give any but the most general direction as to the strength of the solution; neither does it disclose any particular way, means or process of applying to the matter in hand the well-known and understood principle or fact of chemistry that certain acids will act in that way on carbonate of lime. We are told that the solution must be strong enough, and the immersion of the eggs therein long enough, to act upon the alkaline deposit on the shells of the eggs, but that such immersion must not be long enough, or the solution strong enough, to attack the shells themselves. Certainly the claim for which the patent in question has issued is a large one, stated in a most general and indefinite way. And one who has to defend the patent does, I think, as Mr. Duclos argued, find himself on the horns of a dilemma.

There is of course no contention that the defendants discovered that the acids mentioned would dissolve carbonate of lime. That had been common knowledge

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for centuries; and use had been made of it in other trades and businesses. The defendants were, so far as the evidence in this case shews, the first to use such a solution to remove from pickled eggs the deposit of lime that forms on them during the process of preserving them in a solution of lime and salt. They found out that that was a good thing to do in the business of preserving and marketing eggs; that it could be done safely, without injury to the eggs; that a pickled egg so treated was less likely to burst open in boiling than one not so treated; and that the appearance of the shell was restored to something resembling somewhat that of a newly laid egg; and that, because of its improved appearance, the egg commanded a higher price in the market. But the defendants are not entitled to a patent simply because they were the first to discover that to subject pickled eggs to an acid solution was a good thing to do, and a safe thing, or because so treating them you get an egg less likely to burst open in boiling, or one that being free from the deposit mentioned, and brighter, took the eye of the market more readily. In addition to all that there must be invention somewhere. Here of course there could be no invention in the sense of a discovery that the acid solution would remove the deposit. That was well known. And if it had not been known, and if the defendants had been the first to discover the fact, or the principle or law of nature upon which the fact depends, they could not have had a patent therefor apart from some particular method, means or process of applying the principle or the fact to some useful purpose But what have we here? What is the method or means pointed out? We are told to subject the pickled egg to a solution of hydro-chloric or other acid. The solution is to be of sufficient strength but not too strong. The eggs are to be passed

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into and out of the solution quickly. There is to be strength of acid and time of immersion sufficient to remove the deposit on the shell of the egg without attacking the shell itself. Everything else is left to the judgment of the operator or workman. He must for himself discover what the sufficient strength is, and how the eggs are to be subjected to the solution, what appliances he shall use, and what methods he shall adopt.

Now if any competent workman, starting only with the knowledge that the specification gives, namely that the deposit of carbonate of line mentioned may safely and with advantage be removed from pickled eggs in a solution of one of the acids mentioned—if such a workman could without invention or addition successfully put in use the process for which the patent was granted then of course there is no invention in the method of applying the principle on which the success of the process depends. If on the other hand a competent workman, starting with such knowledge and direction as the specification gives, could not without invention or addition, without considerable ingenuity and experiment, successfully use the process in question, then the specification is insufficient and the patent cannot be supported. My own view is that a competent workman taking the patent and specification as they stand, could without invention, (I will not say without addition) but without invention or any considerable ingenuity or experiment successfully use the process described. The strength of the solution and the length of time of the immersion is left, and must of necessity to a certain extent, and within limits, be left to the person using the process. In use the acid solution is constantly losing its strength, and it is necessary from time to time to add more acid. On some eggs, depending upon the process used in

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preserving them and the manner in which that is carried out, there will be a greater deposit than on others. In that case the solution will require to be stronger, or the time of immersion longer than where the deposit is less. The workman must judge by the result. He must examine the effect produced on the eggs as he goes along; and his eye will, if he be a competent and experienced workman, tell him when his solution is too strong and when it is not strong enough; when the immersion of the eggs therein is not done quickly enough and when it is done too quickly.

The defendants in 1888 first used this process of immersing pickled eggs in an acid solution, as one step in the business of preserving them and putting them on the market. They have since used it largely and with profit in the way of their business; but they took what means they could to keep the process secret. They let two or three other dealers in eggs, friends of theirs, into the secret, but in confidence, and in order that the latter might test and use the process. The latter also used it commercially in a large way, but as secretly as the character of the business and the necessity of employing persons to assist would permit of. Other dealers finding eggs so treated on the market, and that they commanded a higher price than ordinary pickled eggs, set to work to find out how to produce them. Some of such dealers may perhaps have been assisted somewhat by information gleaned in some way from persons who had been employed by the defendants, or by the other dealers who, in confidence, were using the process. But other dealers having no such assistance were able to discover the process and use it successfully in their business. There is evidence of that being done as early as 1896; and by the time the defendants applied for their patent

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the process was in one way or the other in use very generally by those dealers who were preserving eggs for the British market; though each dealer was, as best he could, keeping his secret to himself. But I do not see that there was anything to prevent any dealer who knew what the deposit was, and that carbonate of lime could be removed by using a solution of hydrochloric or other acid, from finding out the process for which the patent issued, and how to use it successfully in his business; and that without invention or any very considerable experiment, unless it were to determine the strength of the solution most suitable for the purpose, as to which, except for the vague and general directions to which reference has been made, the specification is silent.

Now what the defendants, and the other persons who also found out the process in question, did, was to employ a well known agent for a purpose for which it had not before been used. From the known properties of the agent and from its use for analagous purposes, it was to be expected that it would accomplish the purpose to which it was put. The purpose was new, but there was nothing in the mode of employing the agent demanding the exercise of the inventive faculties. That within the meaning attaching to the expression in patent law is not invention. The law is well settled; it has been stated in different terms, but all are agreed that the difficulty is not in knowing what the law is, but in applying it to the case in hand. It is in each case a question of fact to be determined upon a consideration of all the circumstances existing in the particular case. In *Elias* v. *Grovesend Tinplate Company* (1), Lord Justice Lindley, adverting to the difficulty of applying the principle where there is some little ingenuity, though not much, says that in investi-

(1) 7 R. P. C. 467.

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gating the law on the subject one may now start with the cause of *Morgan* v. *Windover* (1), which was decided in 1890. In that case Lord Halsbury, Lord Chancellor, said the result of the examination of the case, as so often happens in a case of this sort, was that it was found really not to turn upon any question of law, for that had hardly been in doubt at the bar and certainly there had been no doubt in any of their Lordship's minds, as to what the law to be applied to a case of the sort was. "It is conceded" he adds "on "the part of those who insist upon the patent that "there must be invention. Whether that invention "is to be ascertained by considering something origi- "ginally discovered, or by considering a combination "producing a new result, still it cannot but be certain "that the statute of monopolies, and the whole "branch of the law founded on that statute make it "an absolute condition to the validity of a patent "that there should be what may properly be called "invention, and the application of well known things "to a new analagous use is not properly the subject "of a patent." And Lord Morris refers to Lord Westbury's well known enunciation of the same principle in *Harwood* v. *Great Northern Railway Company* (2), and which had been accepted by the House of Lords.

In the present case it seems to me that the plaintiff is entitled to succeed and that the letters patent in question should be declared void on the ground that the alleged invention was not the subject matter of valid letters patent. That being my view and finding on the question of fact presented by that issue, it is not necessary for me to discuss other grounds on which the validity of the patent is challenged.

I think, however, that I should add that it is no fault of the defendants that they are compelled to

(1) 7 R. P. C. 131. (2) 11 H. L. C. 682.

defend the patent and specification in the form in which it is before the court. As has been stated, they found in 1888 that the deposit occurring upon the eggs while preserved in pickle could be safely and with advantage removed by using for that purpose an acid solution. That, as has been already mentioned, was only one step in the process, or as I think one should say, in the business of preserving eggs during the summer months and of putting them on the market later. And although the defendants, and others, have since then used such solutions for that purpose many times, and of many different and varying strengths, there has, I think, been nothing added to the knowledge that the defendants then possessed, though it is probable that there has been some increase in skill arising from greater experience. But all that time the defendants and their friends, the dealers to whom in confidence they communicated what they had found out, have been experimenting, in a large way, as was no doubt necessary in such a case, with the composition of the preserving pickle and the manner of covering it to exclude the air. Some of the experiments as to the composition of the pickle were unsuccessful and involved heavy losses. With reference to the mode of covering it the defendants when they first commenced to subject the pickled eggs to the acid solution covered the pickle in the manner described in the specification by placing cloths on the top of the eggs and then covering the cloths with slacked line, or as some of the witnesses called it, putty of lime. Later they covered with oil the pickle that came up over the coating of lime on the cloths. Then William Richardson, of Walkerton, Ontario, one of the egg dealers whom the defendants had taken into their confidence in respect of dipping the pickled eggs in an acid solution, abandoned the use of cloths and putty of lime for

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a covering to the pickle and used oil only. He was the first to do that, and he found it to be better than the other way. The deposit of carbonate of lime on eggs preserved in the pickle so covered was less and more uniform; and the eggs could be more successfully treated with the acid solution than could eggs preserved in a pickle covered in the old way. In 1894, he communicated his discovery to the defendants who, however, continued to use the cloths and putty of lime and oil for a covering down to the year 1897. In that year Richardson persuaded the defendants to adopt his method of covering the pickle with oil only, and they have since used that method. In 1896 Richardson had, he thinks, perfected the process as a whole. The defendants, however, do not appear to have been fully satisfied with it until after the business operations of the year 1898, unless it is thought that they were taking their chances and depending for protection, as they no doubt had a right to do, to their ability to keep the knowledge of their process from the public. Anyway it was not until June or July of 1899 that they applied for a patent. The application then made was for the process as a whole then used by them and William Richardson. But there was difficulty about the specification first presented, and they were, I understand, refused a patent for a process in which one step was to cover the pickle with oil only. Then a new specification appears to have been prepared to meet the objections of the examiner at the patent office. It bears date of the third of May, 1900, and is in terms already set out. The grant of letters patent for the alleged invention therein described was objected to by the plaintiff and others; but their objections were overruled and the patent was granted on the ground substantially that the defendants did not broadly claim as their inven-

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tion the washing of pickled eggs in a solution of hydro-chloric or other acid to remove the deposit of carbonate of lime that forms thereon while the eggs are in the pickle. It is true that the defendants did not claim that broadly as their invention. Their idea of their invention or discovery which they thought they had perfected through years of business experience no doubt was that this was one step in the process, and that they had been the first to make use of it. But it seems to have been overlooked that by eliminating the other steps or incidents of the process that the defendants claimed, except the simple ones of washing the eggs before or after their immersion in the acid solution, or both, and of drying them thoroughly thereafter, no special or particular means of washing or drying being suggested, the alleged invention and claim were greatly enlarged and made broader and more general than the defendants intended. So at least it appears to me. Whether if a patent for the defendants' process as a whole could, if granted, have been sustained or not is not now in question. The question is whether or not the patent as granted can be sustained, and for the reasons that I have given. I do not think it can be.

There will be judgment for the plaintiff, and the declaration prayed for will be made.

*Judgment accordingly.*

Solicitors for the plaintiff: *Atwater & Duclos.*

Solicitor for the defendant: *W. C. Mackay.*

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Nov. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN McDONALD, ADMINISTRATOR OF THE ESTATE OF JOHN WILLIAM McDONALD..... } SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Government railway—Accident to the person—Negligence of Crown's servants —Action by parent of deceased—Pecuniary benefit—Damages.*

In the case of death resulting from negligence, and an action taken by the party entitled to bring the same under the provisions of *Revised Statutes of Nova Scotia*, 1900 c. 178, s. 5, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.

2. Such party is not to be compensated for any pain or suffering arising from the loss of the deceased, or for the expenses of medical treatment of the deceased, or for his burial expenses, or for family mourning. *Osborn* v. *Gillett* (L. R. 8 Ex. 88) distinguished.

PETITION OF RIGHT, under R. S. N. S. 1900 c. 178, s. 5, for an injury to the person, resulting in death, on a Government railway, such action being alleged to have been caused by the negligence of the servants of the Crown.

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

May 28th, 1901,

The case was heard at Halifax, N.S.

*H. McInnis*, for the suppliant, contended that the suppliant in addition to damages for his reasonable expectation of benefit from the continuance of his son's life, should be allowed the funeral expenses in view of Lord Bramwell's dictum in *Osborn* v. *Gillett* (1).

(1) L. R. 8 Ex. 88.

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*H. Mellish*, for the Crown, pointed out that *Osborn* v. *Gillett* was not decided under *Lord Campbell's Act* (1). He also contended that the offer of $100 by the Crown was ample compensation to the suppliant under the evidence.

THE JUDGE OF THE EXCHEQUER COURT now (November 2nd, 1901) delivered judgment.

This action is brought by the suppliant as administrator of the estate of his son John William McDonald, to recover damages for the injury resulting from the death of the latter, who was killed on the 28th of September, 1898, in a collision on the Intercolonial Railway, near Westville, in the County of Pictou and Province of Nova Scotia. The Crown has offered to suffer judgment by default for one hundred dollars, and the only question in controversy is as to whether or not that amount is sufficient.

By the second section of chapter 116, Revised Statutes of Nova Scotia, Fifth Series (now R. S. N. S. 1900, c. 178, s. 5) it is, among other things, provided that in an action such as this the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought. The language of the statute is copied ver-

(1) The following are the provisions of sec. 5 of the Act of the Nova Scotia Legislature, R. S. N. S. 1900, s. 178, which reproduce the provisions of *Lord Campbell's Act*: "Every action brought under the provisions of this chapter, shall be for the benefit of the wife, husband, parent or child of such deceased person; and the jury may give such damages as they think proportioned to the injury resulting from such death to the persons respectively for whose benefit such action was brought; and the amount so recovered, after deducting the costs not recovered (if any) from the defendant, shall be divided among such persons, in such shares as the jury by their verdict find and direct."

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batim from that used in *Lord Campbell's Act* (1) under which it has been decided that the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right, or otherwise, from the continuance of the life (2). The parties for whose benefit the action is brought are not to be compensated for any pain or suffering arising from the loss of the deceased (3); or for the expenses of medical treatment of the deceased or for his burial expenses, or for family mourning (4).

It was argued that the question of funeral expenses should be reconsidered in view of Lord Bramwell's expression of opinion in *Osborn* v. *Gillett* (5); but that was not an action under *Lord Campbell's Act*, but one in which the father sought to recover for the loss of his daughter's services and for expenses incurred in respect of the injury that occasioned her death, and it was held that the action would not lie. Although the decision has been the subject of comment by text writers it has never been overruled or judicially questioned (6).

John William McDonald at the time of his death was eighteen years old. His father, who then lived at Pictou, was, at the time he was examined for discovery, sixty-five; his mother about fifty. He had four brothers and four sisters, whose ages ranged from four to twenty-eight. One brother and one sister

(1) 9 & 10 Vict. c. 93, s. 21.

(2) *Franklin* v. *The South Eastern Railway Co*, 3 H. & N. 211; *Dalton* v. *The South Eastern Railway Co.*, 4 C. B. N. S. 296; *Duckworth* v. *Johnson*, 4 H. & N. 653; *Pym* v. *The Great Northern Railway Co.*, 2 B. & S. 759; *Boulter* v. *Webster*, 11 L. T. N. S. 598; *Rowley* v. *London and North Western Railway Co.*, L. R. 8 Ex. 221; *Hetherington* v. *The Great North Eastern Railway Co.*, L. R. 9 Q. B. D. 160.

(3) Per Watson, B. in *Duckworth* v. *Johnson*, 4 H. & N. 653.

(4) *Dalton* v. *The South Eastern Railway Co.*, 4 C. B. N. S. 296; *Boulter* v. *Webster*, 11 L. T. N. S. 598.

(5) L. R. 8 Ex. 88.

(6) Pollock on Torts, 5th ed. 63.

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were married. None of them appear in any way to have been dependent upon the deceased for support. The father had been a rigger, but work for riggers had fallen off and but little was to be had. He appears, however, to have had some means. The deceased had, after leaving school, lived at home and worked off and on, giving whatever he earned to his mother. His father says that he was very little idle, but he was unable to state how much the deceased had earned and given to his mother. At the time of the accident that resulted in his death he was on his way from Pictou to Providence, Rhode Island, to become an apprentice with a silver-plating company. His wages were to be three dollars a week at first, and every three months he was to get an advance, his wages to depend upon the amount of work he could do. In *Franklin's* case (1) it is stated by Pollock, C.B., delivering the judgment of the court, "we do not say "that it was necessary that actual benefit should have "been derived, a reasonable expectation is enough, "and such reasonable expectation might well exist, "though from the father not being in need the son "had never done anything for him. On the other "hand a jury certainly ought not to make a guess in "the matter, but ought to be satisfied that there has "been a loss of sensible and appreciable pecuniary "benefit, which might have been reasonably expected "from the continuance of the life." But there is, I fancy, much greater difficulty in applying such a rule than in stating it. For after all can one do more than make a fair guess as to what in the particular case the reasonable expectation of pecuniary benefit may be? In such a case as this it depends more upon the father's necessity than upon the son's power to earn. As long as the father is not in need the son may well

(1) 3 H. & N. at pp. 214, 215.

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make the best use he can of his labour for his own advancement in life. But if in the changing circumstances of life the father or the mother comes to need the son's help he or she is very sure of getting it. In this case I understand counsel for the Crown to concede that there was some reasonable expectation of pecuniary benefit accruing to the father from the continuance of the son's life. The question is to appreciate that expectation and state it in money, and I am free to confess that I cannot give any very good reason why it should be stated at two hundred dollars rather than at one hundred dollars. All I can say is that granted that the father should recover something, the latter sum appears, as it seems to me, to be a small sum, and the former not by any means a large or excessive one.

There will be judgment for the suppliant for two hundred dollars.

*Judgment accordingly.*

Solicitors for suppliant: *Drysdale & McInnis.*

Solicitors for respondent: *Ross, Mellish & Mathers.*

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Dec. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

THE GILBERT BLASTING & DREDGING COMPANY (LIMITED).. } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Public work—Contract—Breach of—Contractor's duty to press claims—Extra work—Loss of profits—Damages.*

By a clause common to the several contracts of the suppliants with the Crown for the construction of a public work, it was, in substance, stipulated that if the contractors had any claims which they considered were not included in the progress certificates it would be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of the certificate in which such claims are alleged to have been omitted; and by another clause it was stipulated that the contractors in presenting claims of this kind should accompany them with satisfactory evidence of their accuracy, and the reasons why in their opinion they should be allowed; and unless such claims were so made during the progress of the work and within the fourteen days mentioned, and repeated in writing every month until finally adjusted or rejected, it should be clearly understood that the contractors would be shut out and have no claim against the Crown in respect thereof. The suppliants did not comply with these provisions.

*Held*, that a petition of right for moneys claimed to be so due to contractors could not be sustained.

2. By one of the clauses of the contracts it was provided that the engineer might, in his discretion, require the contractor to do certain work outside of his contract.

*Held*, that there was no implied contract on the part of the Crown that work outside of the contract which the engineer might, under the authority so vested in him, have required the contractor to do, should be given to the contractor; and where this was not done by the engineer, and such outside work was given to others, the contractor is not entitled to the profits that he would have made on the performance of such work.

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3. Where, by a change in the plan of the works, certain works were abandoned and others substituted therefor, and the contractor was paid the loss of profits in respect of such abandoned works, he is not entitled to profits upon the substituted works.

PETITION OF RIGHT for damages for an alleged breach of certain contracts for the improvement of certain sections on the Cornwall Canal.

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

May 4th and June 13th, 1900.

*E. L. Newcombe, K.C.* for the respondent, moved for a non-suit at the conclusion of the suppliants' case:

Section 34 of the contract reads: "It is distinctly "declared that no implied contract of any kind what-"soever, by or on behalf of Her Majesty, shall arise or "be implied from anything in this contract contained, "or from any position or situation of the parties at any "time, it being clearly understood and agreed that "the express contracts, covenants and agreements "herein contained and made by Her Majesty, are and "shall be the only contracts, covenants and agreements "upon which any rights against Her are to be founded." I submit that this clearly and insuperably prevents any contract for the performance of the works claimed by the suppliants arising by implication. (He cited *Stewart* v. *The Queen* (1)).

Besides these considerations of law, upon the facts the suppliants have no right to complain. The works that are claimed by the suppliants were properly of a sort to be done by the contractors to whom they were given by the Government. There are, therefore, no merits in the suppliants' case.

*A. B. Aylesworth, K.C.* for the suppliants, contended that the works in respect of which the suppliants

(1) 7 Ex. C. R. 55.

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claimed damages for not being allowed to execute them were such as were necessitated by a change in the plans by the Government authorised by the contract, and that the altered works should be given to the suppliants. If the works were substituted for works originally called for by the contracts, then we are clearly entitled to do them. It is submitted that the evidence shows that the works were merely a deviation or variation from the original plan for the most part, and that in other particulars the works were rather a substitution. But all claimed by us should clearly have been given to us under the contract. Because the Crown has seen fit to abandon certain works originally called for, that has no effect upon our rights under the contracts.

*N. A. Belcourt, K.C.* followed for the suppliants. The plain intention of the four contracts entered into by the suppliants is that they should get all the work involved in the undertaking.

We further contend that where work was abandoned and new work substituted therefor which we were compelled to do, we still are entitled to the profit on the work that was abandoned.

THE JUDGE OF THE EXCHEQUER COURT now (December 2nd, 1901), delivered judgment.

The suppliants, by their Petition of Right, claim damages in a very large sum for the alleged breach of contracts entered into between Her late Majesty and themselves for the deepening and enlarging of sections five, six, seven and eight of the Cornwall Canal. There were, in all, four contracts each bearing date of the second day of November, one thousand eight hundred and eighty-eight. By these contracts the suppliants agreed to complete all the dredging and other works connected with the deepening and widening of the

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four sections mentioned, not otherwise provided for by the first day of November, eighteen hundred and ninety, and the whole of the work embraced in the several contracts by the twentieth day of April, eighteen hundred and ninety-one. Among the works contemplated by the contracts relating to sections five and seven, were the substructures of two road bridges over the canal. For the work embraced in the four contracts Her Majesty covenanted to pay the several prices set out in schedules of prices forming part of such contracts respectively. The contracts were in the main expressed in the same terms, and each contained, among others, the following provisions:

"5. The engineer shall be at liberty at any time, "either before the commencement or during the con- "struction of the works or any portion thereof, to "order any extra work to be done, and to make any "changes which he may deem expedient in the dimen- "sions, character, nature, location, or position of the "works, or any part or parts thereof, or in any other "thing connected with the works, whether or not "such changes increase or diminish the work to be "done, or the cost of doing the same, and the contrac- "tors shall immediately comply with all written "requisitions of the engineer in that behalf, but the "contractors shall not make any change in or addition "to, or omission, or deviation from, the works, and shall "not be entitled to any payment for any change, "addition, deviation, or any extra work, unless such "change, addition, omission, deviation, or extra work, "shall have been first directed in writing by the "engineer, and notified to the contractors in writing, "nor unless the price to be paid for any addition or "extra work shall have been previously fixed by the "engineer in writing, and the decision of the engineer "as to whether any such change or deviation increases

" or diminishes the cost of the work, and as to the " amount to be paid or deducted, as the case may be, in " respect thereof, shall be final, and the obtaining of " his decision in writing as to such amount shall be a " condition precedent to the right of the contractors to " be paid therefor. If any such change or alteration " constitutes, in the opinion of the said engineer, a " deduction from the works, his decision as to the " amount to be deducted on account thereof shall be " final and binding.

" 6. That all the clauses of this contract shall apply " to any changes, additions, deviations, or extra work, " in like manner, and to the same extent as to the " works contracted for, and no changes, additions, " deviations, or extra work shall annul or invalidate " this contract.

" 7. That if any change or deviation in, or omission " from, the works be made by which the amount of " work to be done shall be decreased, no compensation " shall be claimable by the contractors for any loss of " anticipated profits in respect thereof.

" 8. That the engineer shall be the sole judge of " work and material in respect of both quantity and " quality, and his decision on all questions in dispute " with regard to work or material, or as to the mean- " ing or intention of this contract, and the plans, " specifications and drawings shall be final, and no " works or extra or additional works or changes shall " be deemed to have been executed, nor shall the con- " tractors be entitled to payment for the same, unless " the same shall have been executed to the satisfaction " of the engineer, as evidenced by his certificate in " writing, which certificate shall be a condition pre- " cedent to the right of the contractors to be paid " therefor.

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"26. It is intended that every allowance to which "the contractors" [are] "fairly entitled, will be em- "braced in the engineer's monthly certificates; but "should the contractors at any time have claims of "any description which they consider are not included "in the progress certificates, it will be necessary for "them to make and repeat such claims in writing to "the engineer within fourteen days after the date "of each and every certificate in which they allege "such claims to have been omitted.

"27. The contractors in presenting claims of the "kind referred to in the last clause must accompany "them with satisfactory evidence of their accuracy, "and the reason why they think they should be "allowed. Unless such claims are thus made during "the progress of the work, within fourteen days, as in "the preceding clause, and repeated, in writing, every "month, until finally adjusted or rejected, it must be "clearly understood that they shall be for ever shut "out, and the contractors shall have no claim on Her "Majesty in respect thereof.

* * * * * * *

"33. It is hereby agreed that all matters of differ- "ence arising between the parties hereto upon any "matter connected with or arising out of this contract, "the decision whereof is not hereby especially given "to the engineer, shall be referred to the award "and arbitration of the chief engineer for the time "being having control over the works, and the award "of such engineer shall be final and conclusive; and "it is hereby declared that such award shall be a con- "dition precedent to the right of the contractors to "recover or to be paid any sum or sums on account or "by reason of such matters in difference.

"34. It is distinctly declared that no implied con- "tract of any kind whatsoever, by or on behalf of Her

"Majesty, shall arise or be implied from anything in "this contract contained, or from any position or "situation of the parties at any time, being clearly "understood and agreed that the express contracts, "covenants and agreements herein contained and made "by Her Majesty, are and shall be the only contracts, "covenants and agreements upon which any rights "against Her are to be founded."

During the progress of the work it was decided to strengthen and reinforce the south bank of the canal, which was adjacent to the Saint Lawrence River. As part of such work of strengthening that bank, and to hold in position the material by which it was proposed to reinforce it, it was decided to build a stone toe at the foot of the south side of the bank. By a letter of the 13th of February, 1890, the suppliants called the attention of the chief engineer to their facilities for building the stone toe in connection with their existing contract, and offered to do the work for a price mentioned in that letter. By a letter of the 22nd of the same month they called his attention to their "tender for the stone toe on the south bank of the Cornwall Canal." There does not appear to have been any acceptance in writing of this offer, or any written direction to the suppliants to do the work, but between the dates mentioned and June, 1891, when the work of constructing this stone toe was discontinued, they did a part of the work under direction of the chief engineer and were paid for it, and no question arises as to that. It appears, however, that in or before the year 1892, Wm. Davis & Sons, the contractors for section four of the canal (the adjoining section) built at the foot of the south side of the southern bank of the canal, for a distance of about three hundred and fifty feet within the limits of section five, a stone retaining wall which had the same object and answered the same

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purpose as the stone toe that has been mentioned, only it was, it seems, more substantially built. Wm. Davis & Sons also did the other work of reinforcing the south bank of the canal where the wall was constructed. The work of building the retaining wall and strengthening the canal bank at this point in the way in which it was done, formed no part of the work contemplated when the contracts mentioned were entered into. It was extra work. After large sums had been expended in executing in part the work covered by these contracts, and after the time therein limited for their completion had expired, another and a very fundamental change in the work as originally contemplated was made. That part of the old channel of the canal that was embraced within sections six and seven, and within the upper sixteen hundred feet of section five, and the lower thirteen and seventy-six feet of section eight was abandoned, with all the work that had been done thereon, and in place thereof the north channel of the Saint Lawrence River, the channel between the mainland and Sheiks Island opposite thereto, was utilized for the purposes of the canal. This was done by putting a dam across the north channel of the river at the head of Sheiks Island, and then at this point and below the dam cutting a passage or way from the old canal into the channel; and also by putting another dam at the foot of the Island, and then at a point above such dam cutting another passage or way from the channel into the old canal. In this way the north channel of the Saint Lawrence River opposite Sheiks Island was made a part of the Cornwall Canal. The work of making these dams and the ways or entrances from the canal to the channel was also given to Wm. Davis & Sons. The notice given to the suppliants that further work on sections six and seven would be abandoned, is

dated on the 21th of February, 1893. The notice of the chief engineer that the suppliants would not be required to do any more work on the upper sixteen hundred feet of section five, or on the lower thirteen hundred and seventy-six feet of section eight is dated on the 6th of March, 1893, and there is also a letter to the same effect, from the secretary of the Department of Railways and Canals to the suppliants, under date of the 8th of March of that year. The contract with Wm. Davis & Sons to make the dams mentioned bears date of the 19th of June, 1893. On the 20th of March of the same year the suppliants had, by a letter of that date to the Minister of Railways and Canals, stated that they would look to the Government for reasonable compensation for the delays, disbursements and loss of profits which would necessarily result from the course which his department had decided upon with reference to the sections of the canal in question. The matter having been considered, the Minister offered the suppliants to pay them, in settlement of their claim for loss of anticipated profits on the work so abandoned, a sum equal to fifteen per cent. on the estimated value thereof. The value of the work so abandoned was $195,663.62, and fifteen per cent. thereof would amount in even figures to the sum of $29,350. This offer was, on the 12th of March, 1894, accepted for the suppliants by Mr. Ferguson, their solicitor, in a letter in which he stated that the claims, if any, of the company in respect of or arising out of the works actually done would of course remain to be dealt with apart from the settlement. On the 28th of March an order in council was passed authorising the payment of this sum of $29,350 to the suppliants in full of the claim then made for loss of profits. The receipt for this amount was given on the 19th of April following and purported to be in full of all claims in respect of the

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abandonment of parts of sections five and eight, and the whole of sections six and seven of the Cornwall Canal, in accordance with the letter and order in council mentioned. On the 24th of April, 1894, by a letter of that date, the suppliants submitted to the Minister of Railways and Canals a claim for extra work, damages, etc., in respect of the works executed by them on sections five, six, seven and eight of the Cornwall Canal, and it was thereby pointed out that this claim was separate and distinct from the claim paid to them for loss of anticipated profits on abandoned work. The particu ars of this claim are not in evidence, but I infer that it was to something of the kind that Mr. Ferguson referred in his letter of March 12th, already mentioned. Mr. Aylesworth, when putting in this letter of April 24th, 1894, in answer to a remark made by Mr. Newcombe, admitted that it did not refer to the claim now under consideration.

The next matter, in order of time, to which it is necessary to refer, is the correspondence in November, 1895, between Mr. Rubidge, the Superintending Engineer of the Canal, and Wm. Davis & Sons that led to the work of building the piers and abutments for a bridge over the canal, and within the limits of section five, being given to them. On the 20th of April, 1896, Mr. Rubidge gave the suppliants notice that they would be relieved from any further work on that part of section five west of the lower end of the east rest pier of the new Milleroches Bridge; that is, as I understand it, of the bridge, for the building of the substructure of which Wm. Davis & Sons had in November preceding been given the contract.

The claim for which the Petition of Right in this case is brought was presented by the suppliants to the Minister of Railways and Canals in a letter to him, dated the 29th day of June, 1897; the matters then

complained of being substantially those now put forward. The claim made is, that under a fair construction of their contracts in question, the suppliants were bound to do the work hereinbefore mentioned that was given to Wm. Davis & Sons to do, and that there was a corresponding obligation on the part of the Crown to give them the work to do; that the failure of the Crown to do so constituted a breach of contract for which they are entitled to damages, to be measured by the profits that they would have made had they been afforded an opportunity of executing the work. The Crown denies that it was under any obligation to give the suppliants any of the work to do that was done by Wm. Davis & Sons; and a number of special defences arising upon the several contracts in question are set up. The payment of the sum of $29,350 fo loss of profits on the abandoned works is also relied upon as a defence to the petition.

Now the same considerations are not in all respects applicable to the different branches of the suppliants' claim. Some are applicable to the claim as a whole, but others are not, and it will be convenient in the first place to discuss those considerations or matters that affect only a particular part of the claim. In regard to the retaining wall built by Wm. Davis & Sons at the lower end of section five and the strengthing of the canal bank there, it will be observed tha this work was not connected in any way with the principal change in the work that was made, and which, as we have seen, resulted in the abandonment of a large part of the work as originally contemplated, and for the loss of profits on which the suppliants have been paid. The case as to this part of the claim is that the work was not within the contemplation of the parties to the contract when it was entered into; that it was extra work, and that the chief engineer or

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engineer did not, as under the fifth section of the contract he might have done, require the suppliants to do the work. It was given to another contractor to do. There is some question as to whether this part of the claim is included in the petition as filed. The claim, if any, arose in 1892, and the petition is founded on acts that were done in 1893 and afterwards. It is a very old claim, and does not appear to have been put forward until 1897, and if an amendment of the petition were necessary to include it, it is not at all clear that any such amendment could or ought to be made. For reasons that will appear I do not think the claim to be well founded and there is no occasion to determine the question of amendment.

The second or main branch of the claim is for loss of profits on the dams at the head and foot of Sheiks Island and the work incidental thereto, such as the channels or ways that have been mentioned, between the old canal and the north channel of the River Saint Lawrence. This work was done opposite to or within the limits of sections five and eight of the canal for which the suppliants had contracts. I shall assume (without deciding) that the chief engineer or engineer was at liberty under the fifth sections of such contracts to require the suppliants to do this work. It is certain that he did not exercise that power. This part of the claim is also affected by considerations arising from the acceptance of the $29,350 in settlement of loss of profits on the abandoned work. If this work of making the dams and ways between the canal and north channel of the River Saint Lawrence had been given to the suppliants, if they had been required to do this work as a change in the character, nature, location or position of the works as originally contemplated, no question of loss of profits on the work abandoned in consequence of such change could

have arisen. There would have been no breach of the contract, and no consequent claim to damages. There was no breach of any contract in the Crown abandoning the work that was abandoned. It had a right to do that. The breach, if any, consisted in giving the substituted work, the new work incident to the change in plan, to another contractor. If that had not been done the suppliants would, it is certain, have had no cause of action. It is not necessary to decide whether what was done really did constitute a breach of the contracts in question and give a cause of action. The Crown accepted that position and paid the damages agreed upon. Such damages if reasonable might, if they had not been settled, have been assessed with reference to loss of profits on the work that was actually done under the change that took place, and not with reference to the profits that might have been made on the execution of the work as originally contemplated. But it is not possible, it seems to me, that the suppliants can keep in their pockets the profits on the work that was abandoned and at the same time recover profits on the work that was substituted therefor. By accepting the profits on the former, they put it out of their power to recover the latter. They are not entitled to both. These considerations apply only to such work done by Wm. Davis & Sons as was reasonably incident to and connected with the change in the work that has been mentioned. They do not apply to the building of the piers and abutments for the Milleroches Bridge. As to that the facts, some of which have not been alluded to, are these: The work contemplated by the contract for section five, as has been stated, embraced the substructure for a road bridge over the canal within that section. The substructure, the abutments, piers and foundations, of another bridge, were included in the contract relating

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to section seven. A large part of the work on the foundations of the bridge within section five was done when work on that part of that section was abandoned. For the work so done the suppliants were paid, and on the value of what was not then done the suppliants received as part of the $29,500 mentioned, a profit of fifteen per cent. The work on the road bridge contemplated within the limits of section seven formed part of the work of that section, the estimate for which, at the suppliants' prices, amounted to $141,280. Other work on this section not contemplated in this contract brought the estimate up to $156,927.80. The value of the work done on the section at the date when work thereon was abandoned was $86,947.87. Whether this included any work on the foundations of this bridge is perhaps not clear. But it was either included therein or in the work on that section then remaining to be done, the value of which was $69,979.93. On the latter sum the suppliants were paid a profit of fifteen per cent. as part of the $29,350 mentioned. That is with respect to the work that the suppliants contracted to do in connection with these two bridges, they were paid for all the work that was done according to the prices agreed upon; and they were also in 1894 paid in respect of the work not done a profit of fifteen per cent. on the value thereof. They now claim that they ought, in addition, to have a profit on the work done by Wm. Davis & Sons on the bridge that was subsequently in 1895 or 1896 constructed across the canal, on the ground that the site of the bridge is within the limits of section five of the canal. The two bridges embraced in the contracts were settled for. The claim is for profits on work on a third or extra bridge that was not done by them. That does seem somewhat unreasonable. But the question is not

whether it is reasonable or unreasonable, but whether the suppliants are entitled to what they claim.

By reference to the third paragraphs of these contracts it will be seen that the works to be executed are those mentioned and "not otherwise provided for." The works in respect of which the present claim is made were "otherwise provided for," and would apparently fall within that exception, unless it were limited to works not otherwise provided for at the date of the contracts. It seems to me that it is fairly arguable that these words have reference to works otherwise at any time provided for. Their presence in these contracts would of themselves be sufficient to distinguish this case from cases in Canada in which it has been held that where a contractor is by a contract with the Crown required to do anything, there is a corresponding obligation on the Crown to give him that thing to do; and one would be free to follow the English cases which have been decided in a different way. But I do not rest my judgment on that view of the case.

The fifth and sixth paragraphs of these contracts should be read together, and in construing them the thirty-fourth paragraph should be kept in mind. The latter paragraph declares that no implied contract of any kind whatsoever, by or on behalf of Her Majesty, shall arise or be implied from anything in the contract contained or from any position or situation of the parties at the time. By paragraph five the engineer is at liberty at any time to order any extra work to be done by the contractors; and to make any changes which he may deem expedient in the dimensions, character, nature, location or position of the works, or any parts thereof, or in any other thing connected with the works; and the contractors are bound to comply with any written requisition of the engineer in that behalf.

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But they are not to make any change in, or addition to, or omission or deviation from, the works, unless they are first so directed in writing by the engineer; and without such direction in writing they are not entitled to any payment for any change, addition, deviation, or extra work. When in paragraph six it is provided that all the clauses of the contract shall apply to any changes, additions, deviations, or extra work in the like manner and to the same extent as to the works contracted for, and that no changes, additions, deviations or extra work shall annul or invalidate the contract, the meaning no doubt is, that such clauses shall apply to changes, additions, deviations and extra work directed in writing by the engineer as provided in the preceding paragraph, and that these shall not annul or invalidate the contract. Now it seems certain that the contractors were not under any obligation to do any extra work or any work involved in any change without the written requisition or direction of the engineer, and without such written requisition or direction they were not entitled to any payment therefor. No such requisition or direction was made or given; and the contractors being under no obligation no question of a correlative obligation on the part of the Crown arises. To hold the Crown liable for not giving the work in question to the suppliants one would have to imply a contract on behalf of Her Majesty that whenever there was extra work to do, or whenever there was by reason of some change, addition or deviation, other work to do, the engineer would give such extra or other work to the contractors. But in view of the thirty-fourth paragraph no such contract can be implied.

By the twenty-sixth and twenty-seventh paragraphs of the contracts the contractors agreed that they should have no claim on Her Majesty for anything not included

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in the progress estimates, unless the claim was made and supported by satisfactory evidence, and repeated every month. Nothing of the kind was done with respect to the present claim. Sometimes one feels that there may be some hardship in the Crown invoking these provisions against a contractor's claim. But perhaps one ought not to have that feeling where the contractor during the progress of the work lies back, and does not give any intimation that he thinks himself entitled in any way to that for which afterwards he puts forward a claim. At all events it is for the Crown to say when these provisions shall be invoked against a claim, and when they may be waived. In the present case the Crown relies upon them, and they constitute, I think, a bar to the whole claim.

Then, by various provisions of these contracts, the engineer, that is, the chief engineer and his assistants, acting under his instructions, is made the judge of divers matters, and his certificate is necessary to the payment of any money thereunder; and by the thirty-third paragraph it is provided that all matters in difference arising between the parties upon any matter connected with or arising out of such contracts, the decision whereof was not thereby specially given to the engineer, should be referred to the award and arbitration of the chief engineer, whose award should be final, and that his award should be a condition precedent to the right of the contractors to receive or be paid any sum or sums on account or by reason of such matters in difference. In view of these provisions also it is difficult to see on what ground the petition in this case can be sustained. The suppliants have no decision or certificate of the engineer in their favour and no award of the chief engineer; and there has been no waiver by the Crown of any of these matters. These considerations, as well as those aris-

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ing upon the provisions that require any such claim to be made and supported in the manner pointed out in the twenty-sixth and twenty-seventh paragraphs of the contracts, apply not only to the extra work and to the substituted work done by Wm. Davis & Sons, but also to any work done by them which may have been embraced within the contracts themselves. For instance, where the suppliants and Wm. Davis & Sons were working over the same ground, or adjacent to each other, there may be some difficulty in determining what work was entrusted to the latter as extra or substituted work; and what work the former were entitled to under the contracts. The culvert on which Wm. Davis & Sons did some work affords an instance of this kind, and perhaps also the widening, or part of the widening, of the canal on section eight to get a borrow pit for material to be used on the upper dam. But the claim not having been made in the way provided in the contract, and there being no decision, certificate or award of the chief engineer in the suppliants' favour, and no waiver by the Crown of any such defence, the petition, it seems to me, must fail.

At the conclusion of the suppliants' case Mr. Newcombe, for the Crown, submitted that no case had been made out. That question was then argued and reserved, on the understanding that if it were thought that a case had been made out, an opportunity would be given to the Crown to answer. That, in the view I take of the case, is not necessary.

There will be judgment for the respondent, and a declaration that the suppliants are not entitled to any portion of the relief sought by their petition.

*Judgment accordingly.*

Solicitors for suppliants: *Belcourt & Ritchie.*

Solicitor for respondent: *E. L. Newcombe.*

IN THE MATTER OF THE PETITION OF RIGHT OF

THE ALGOMA CENTRAL RAILWAY COMPANY..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... .....RESPONDENT.

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December 2.

*Customs legislation—Legislative authority of Canadian Parliament—Duty upon foreign-built ship—Construction of statutes—Interest—Payment by Crown—Tort—Crown's servant—Damages.*

The Parliament of Canada has legislative authority to impose a Customs duty upon a foreign-built ship to be paid upon application by her in Canada for registration as a British ship.

2. The provision in item 409 of *The Customs Tariff Act*, 1897, which purports to impose a duty upon a foreign-built ship upon application by her for a Canadian register, is not a clear and unambigious imposition of the duty such as would support the right of the Crown to exact the payment of such duty.

3. The Crown is not liable to pay interest except upon contract therefor, or where its liability therefor is fixed by statute.

4. In the absence of statutory provision in such behalf, the Crown is not liable to answer for the wrongful act of its officer or servant.

PETITION OF RIGHT to obtain a refund of certain Customs duties paid under protest upon the application for the registration in Canada of a foreign-built ship.

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

The case was heard at Ottawa on the 11th June, 1901.

*Wallace Nesbitt, K.C.* for the suppliants;

The Algoma Railway Company is a body corporate, its charter being a Canadian one, and, amongst other things, has the power of running steamships between certain of its terminal points. The boat in question is called the *Minnie M.* and she was built at Marquette,

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Michigan, and was bought last autumn. A provisional British registration under *The Merchant Shipping Act* of 1894 was obtained at Chicago, and the vessel thereafter proceeded to Sault Ste. Marie. Now the Sault is, for the purposes of registration of a British vessel under *The Merchant Shipping Act*, just as much a British port as the port of London or Liverpool, G.B. It is a Port of Customs and a port at which the registration of a British ship can be properly made. The owners of the ship presented to the Customs officer at the Sault the provisional registry certificate, and he was requested to issue a certificate of complete British registry. The Customs officer, after having communicated with Ottawa, and upon instructions from Ottawa, informed the master that he could not obtain registration until the duty payable upon the vessel, according to the contention of the authorities at Ottawa, was paid. The duty was subsequently paid under protest and the ship was thereafter registered at the port of Montreal—just why the port of Montreal, it is not clear—because she might have been registered at the Sault equally as well; but the fact is of no importance to the questions arising in this case. Now, as I understand it, the principal question—in fact it may be said the only question—that arises here, is whether a ship that has satisfied the provisions of *The Merchant Shipping Act* of 1894, by obtaining a provisional certificate of registry, can proceed without hindrance to be made a complete British ship, or whether it is competent for the Canadian authorities in Parliament to practically modify the provisions of *The Merchant Shipping Act* passed by the Imperial Parliament, by exacting a condition to the privileges created by the Imperial Act. The broad question is: Whether the suppliants can obtain complete registry in Canada when they have obtained

provisional registry under *The Merchant Shipping Act* of 1894, or whether the provisions of that Act can be modified by the provisions of the Canadian Customs or Tariff Acts?

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*The Merchant Shipping Act*, 1854, I might say, is the same in its provisions, so far as they affect this case, as the Act of 1894. Now, one has only to examine in even a cursory way *The Merchant Shipping Act*, 1894, to see its Imperial character. It will be seen at once that it is designed for the fostering of British trade throughout all the colonies of the Empire, and it is also intended for the protection of British shipping. So I say, upon an examination of this Act, your lordship must come to the conclusion that the port of Montreal, or Sault Ste. Marie, in Canada, is practically in the same position, so far as the registration of a British ship goes, as if that ship were registered in the port of London or in some port in the British West Indies. (Reads clause (*d*) of section 1 of *The Merchant Shipping Act* of 1894; section 4, clause (*e*)). Then attention should be directed to the order in council establishing the ports of Sault Ste. Marie and Montreal as Customs and registration ports. For the purposes of *The Merchant Shipping Act* they are in the same position as London or Liverpool, G.B. Then in chapter 72 of *The Revised Statutes of Canada* you will find section 11 provides that no fee shall be charged in Canada, except those mentioned in *The Merchant Shipping Act*, 1854. This is mentioned, because the Dominion of Canada, with the consent of the Imperial Parliament, could modify the provisions of *The Merchant Shipping Act* of 1854 or 1894. (He also reads section 13 of the Canadian Act and sections 21 and 22 of the Imperial Act). Section 22 is the section under which the ship in question obtained her provisional certificate in Chicago. Under

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this provisional certificate she is empowered to complete her registration as a British ship in any British port. Having obtained complete registration she is fully empowered to trade under the protection of the Imperial Act, and all Acts affecting such matters as the engagement and discharge of seamen in a foreign port, and as to regulations enacted governing the conduct of seamen on board the ship. Then section 62 of the Imperial Act makes provision as to fees, so we see that under the Imperial Act all possible conditions and obligations affecting the right to registration are dealt with. I would also refer to section 83 of *The Merchant Shipping Act* of 1854, and to *The Revised Statutes of Canada*, chapter 72, section 46, which is a re-enactment of the English Act. Section 69 provides as to her rights under the British flag. Section 89 makes provision as to the registration in the colonies. I might say that sections 88 to 91, inclusive, are material. Section 91 applies to the whole of Her Majesty's Dominions and contains a singular exception to the general view that the colonies, being self-governing are allowed to control their own business. Mr. Lefroy, in his book on *Parliamentary Government in Canada* comments on section 91, and I will give your Lordship a reference to his work later. I would also refer to section 735 of *The Merchant Shipping Act*, 1894. I might also say that *The Revised Statutes of Canada*, c. 72, instead of altering or modifying *The Merchant Shipping Act*, 1854, apparently makes similar provisions to those of the English Act as regards registration of ships. But in any event we say that it is not competent for a Dominion Parliament to make any such modification of rights accruing, or which have accrued and become vested under *The Merchant Shipping Act*, as the tax that is sought to be levied, under the provisions of the Canadian Tariff Act, and

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which seeks to make the ship here in question pay the sum of $3,500, actually does modify it. I say that any such power of alteration or modification of an Imperial statute is entirely without the ambit of the jurisdiction of colonial legislation, and it is a modification directly opposed to the spirit of the Act. For the purposes of registration of a British ship, under the provisions of *The Merchant Shipping Act*, 1894, you have to treat the Dominion of Canada as an integral part of the Empire, and the result would be that a ship is in the same position if she is registered in any port in Canada, as if she had been registered in Liverpool or London, G.B. I would ask counsel for respondent to differentiate the case of a ship registered in London and one registered in Montreal, so far as the purposes of *The Merchant Shipping Act* are concerned. I submit that they cannot be so differentiated, and if it is not competent for Canada to exact duty from a ship registered in London, such duty cannot be exacted in respect of a ship registered in Canada. Canadian registration is no more or less than British registration. Then again, if it be conceded that in Canada on application for registration an impost or duty may be imposed, it will also have to be conceded that so exorbitant or so excessive may the impost or duty be made that it might practically destroy the property of the subject altogether. I need not cite to your lordship the well known decisions of the Supreme Court of the United States which declare that the right to tax carries with it the right to destroy.

How is it possible to say that when the paramount legislature creates certain rights that the subordinate legislature may create restrictions upon those rights? I submit that this cannot be done and that this clause in the Tariff Act, affecting as it does, rights created by the Imperial Act, is against the whole purview of the

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latter Act and against the spirit of it as well. (Cites *The Queen* v. *The College of Surgeons* (1)). (He also refers to the case of *Routledge* v. *Low* (2); *Lefroy's Legislative Power in Canada*, proposition 12, page 208, and pages 218 *et seq.*) There is an absolute authority in the Imperial Parliament, whenever it sees fit, to do so to extend its legislation to the colonies. (*Graves* v. *Gorrie*) (3). I might say, by the way, that the suppliants have afloat three ships built in Holland, and they are registered in Sunderland, in England, and I would like to ask my learned friend if they are bound to pay duty in Canada? The question is a large one, and I look upon this exaction of duty as a restriction upon a privilege given by the Imperial Parliament, and I feel safe in saying that His Majesty's advisers in England never contemplated such a question arising. Take the "Beatty" line. Are its ships to be required to pay duty? Now take the item in the tariff itself, and I say it is as equally applicable to ships built in England as to the ship in question in this case. I am referring to item 409 of the Tariff Act of 1897. What we say is, that ships built out of Canada would include ships built in Great Britain and registered in Great Britain, and would cover ships built in Great Britain asking for registry in a British port, being a Canadian port. Surely, it was never contemplated by the Imperial authorities that one rule would have to be applied when a ship was registered in Montreal, and an entirely different one when registry was made in Liverpool, G.B. I submit that the impost is illegal and against the spirit of *The Merchant Shipping Act*.

*E. L. Newcombe, K.C.* for the respondent:

(1) 44 U. C. Q. B. 564.
(2) L. R. 3 H. L. 100.
(3) 32 Ont. R. 266.

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Counsel for the suppliants has opened up a number of questions which I do not think it is necessary for us to consider in arriving at a decision in this particular case. But at the same time I would submit that we are entitled to go considerably further in the execution of the powers conferred by our constitution than we have gone in this case and still be within the limits of *The British North America Act*. It is true that although we have been granted a constitution by *The British North America Act* which confers upon Canada, acting within its territorial jurisdiction, sovereign powers, still the Imperial Parliament is the paramount body and may legislate for Canada in respect of matters of Imperial concern; but I submit that so far as *The Merchant Shipping Acts* are concerned this admission is of no value to my learned friend here. *The Merchant Shipping Act* was in existence at the time of the union of the British North American Provinces, and with that statute in existence, by a statute of the Imperial Parliament, we were given a constitution empowering us to legislate concerning the regulation of Trade and Commerce and Navigation and Shipping. I say there might have been some question how far we were precluded, or governed, in any way concerning the matter in question here, by the Act of 1854; but in 1894 the Imperial Parliament re-enacted and consolidated the Shipping Acts, and it is a question whether the new enactment was intended to operate in Canada in view of our constitutional powers and our own legislation in the matter. It seems to me that it would be to a certain extent derogatory to our constitution for the Imperial Parliament to have extended the operation of the Act of 1894 to Canada. I have listened to the argument of the suppliants with reference to *The Merchant Shipping Act* and I have found in it nothing which is

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to my mind inconsistent with what has been done by Parliament here. We have simply enacted that, upon application for a Canadian register of a foreign-built ship, the ship must pay a duty of ten per cent. *ad valorem*. It seems to me there is nothing inconsistent between the two enactments. The Imperial enactment merely makes provision for a foreign-built ship to become a British ship by Canadian registration; the Canadian Act simply says that that ship, manufactured abroad, must pay a duty and so contribute to the Canadian revenue. There is no want of harmony between the two matters, they are simply two distinct and separate things. (He refers to item 54 of the Tariff Act of 1897, and reads article 409 thereof.) I submit that there is nothing in the Canadian Act that affects the registration of the ship, but that it is purely and simply the imposition of a tax. We have a clear right to impose taxes; we have the right to impose taxes for the purposes of the Dominion; and we have a perfect right to say that every ship not built in Canada, or, for that matter, we have a perfect right to say that every ship built in Canada shall pay a tax from ten to twenty-five per cent.; or we have a right to distribute it upon the articles entering into the construction of the ship. We have no right to treat this ship as different from any other property—I mean for the purpose of taxation. Of course ships have a peculiar character imposed upon them under *The Merchant Shipping Act* which distinguishes them from ordinary personal property. Your lordship will see upon the admissions that the question is whether this vessel is subject to taxation by the Dominion or not.

[BY THE COURT: Subject to taxation upon registration?]

Not exactly that.

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[BY THE COURT: It will not apply except upon application for registry? It is not a question like the importation of goods. If this vessel had gone to Newfoundland and got her registry you could not have exacted the duty.]

The vessel is liable upon importation into Canada to pay this duty, but so long as she does not make application for Canadian registry the duty is not due. I might say here that originally she did ask for British registry, and did not make application for Canadian registry. We said there is no Canadian registry as distinct from British registry. We said we will give you British registry in Canada, but you must pay the duty. I submit that unless you give effect to section 4 of the Tariff Act of 1897 you cannot administer this item at all. I think we were clearly in a position to make provision for the payment of duty in such a case as this.

I might say that if the question were put to me as to whether the proper officer of Customs might be compelled by mandamus to grant complete registration to a foreign-built ship tendering provisional British registry, I might have some difficulty in arguing that he could not be compelled to grant the complete registration. We might take the position that registration would not be granted until the duty was paid, and in case of such refusal very possibly they might go to the court and get a writ of mandamus to compel our officer to register the ship. But we would concurrently have the right, even if we admit the case for mandamus, to bring our action to compel them to pay the duty, and we could get an order to so compel them.

*Wallace Nesbitt, K.C.* in reply: Of course it is not necessary for me to argue that when a tax is imposed it has to be imposed in the clearest way as the courts

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place the strictest construction upon revenue laws. The point is whether Canada can make or impose a tax on the registration of a ship in the face of the provisions of *The Merchant Shipping Act*, 1894.

[BY THE COURT: *The Merchant Shipping Act*, 1894, applies to all colonies, with a provision that certain colonies may legislate in a certain way on the subject.]

By getting the consent of the Imperial authorities, I say that we have turned up here in Canada in the same way as if we had turned up with a provisional registration from some port in Brazil. The Canadian Act does not pretend to levy the duty under any other circumstances then those which arise under the provisions of *The Merchant Shipping Act* of 1894. It is in the very teeth of *The Merchants Shipping Act*. Section 409 of the Canadian Act clearly reads that it is upon the application for registration that the duty is to be imposed. We say, then, that this is an impost which stops us. Surely it is not possible to argue that when a colony says that you must pay a duty on registration that this is not a modification of *The Merchant Shipping Act*, 1894.

THE JUDGE OF THE EXCHEQUER COURT now (December 2nd, 1901) delivered judgment.

The main question arising upon the petition in this case is whether the foreign-built steam-ship *Minnie M.*, owned by the suppliant company, was, on application for registration in Canada as a British ship, subject to duty, as provided in item 409, schedule A, of *The Customs Tariff*, 1897. If that question is answered in the affirmative no other question arises. If answered in the negative a question of interest remains to be disposed of, and also a question as to the liability of the Crown for the detention of the ship. By the fourth section of *The Customs Tariff*, 1897, it is, among other

things, provided that there shall be levied, collected and paid upon goods enumerated in schedule A to the Act, the several rates of duties of Customs set forth and described in such schedule, when such goods are imported into Canada, or taken out of warehouse for consumption therein. Item 409 referred to, is in the terms following:

"Ships and other vessels, built in any foreign country, whether steam or sailing vessels, on application for Canadian register, on the fair market value of the hull, rigging, machinery and all appurtenances; on the hull, rigging and all appurtenances, except machinery, ten per cent. *ad valorem*; on the boilers, steam engines and other machinery, twenty-five per cent. *ad valorem*."

If the Parliament of Canada has legislative authority to impose a duty on foreign-built ships on application for registry in Canada as a British ship, and has by this provision duly imposed such a duty, the *Minnie M.* was subject to that duty, and the petition fails. But if Parliament has no such authority, or, if having it, the duty has not been duly and effectively imposed, the suppliant is entitled to a judgment in its favour.

A duty on foreign-built ships was first imposed in 1879. The duty prescribed by *The Customs and Excise Act* of that year was ten per cent. *ad valorem* on the fair market value of the hull, rigging, machinery and all appurtenances, payable "on application for Canadian Register" (42 Vict. c. 15, s. 1, and Schedule A, "Ships, etc"). That provision remained in force until 1882, when the duty on the boilers, steam engines and other machinery of any such ship was increased to twenty-five per cent. *ad valorem*, the duty on other parts of the ship remaining as before at ten per cent. *ad valorem*. (45 Vict. c. 6, s. 2, "Ships, etc.") Since that year no change has been made in the duty then imposed upon

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such ships, the provision cited from *The Customs Tariff*, 1897, being a re-enactment of the law as it existed at the time of the passing of that Act.

The authority of the Parliament of Canada to enact this provision is founded upon the 91st section of *The British North America Act*, 1867, which provides that the exclusive legislative authority of the Parliament of Canada shall extend, among other things, to all matters coming within the following classes of subjects: [2] The regulation of Trade and Commerce; [3] The raising of money by any mode or system of taxation; and [10] Navigation and Shipping. To the first of these three classes of subjects it will not be necessary to direct particular attention. It is mentioned because in some respects it might be thought to cover ground also covered by one or the other of the other two subjects mentioned. Legislation respecting customs duties or navigation and shipping is apt to touch more or less closely the trade and commerce of a country. But the question now to be determined relates more particularly to laws respecting tariffs and ships. And it will be convenient, I think, in the first place to take up the latter subject and to see in a general way what the legislative authority of Parliament is in respect of "shipping."

At the time of the passing of *The British North America Act*, 1867, by the Parliament of the United Kingdom, there were two statutes of that Parliament in existence to which it is necessary to refer, in order to obtain a clear understanding of the measure and limits of the legislative authority conferrred upon the Parliament of Canada in respect of the classes of subjects mentioned. By the second section of *The Colonial Laws Validity Act*, 1865 (1), it is provided that "any "colonial law which is or shall be in any respect

(1) 28th & 29th Vict., c. 63, and 55 & 56 Vict. c. 10.

" repugnant to the provisions of any Act of Parliament " extending " (by express words or necessary intendment of any such Act) " to the Colony to which such " law may relate, or repugnant to any order or regu- " lation made under authority of such Act of Parlia- " ment, or having in the Colony the force and effect " of such Act, shall be read subject to such Act, order " or regulation, and shall to the extent of such repug- " nancy, but not otherwise, be and remain absolutely " void and inoperative." That is one enactment that it is necessary to keep in mind. Then with reference to the subject of navigation and shipping, there was another,—*The Merchant Shipping Act*, 1854 (1). The second part of the Act relating to the ownership, measurement and registry of British ships by express words applies to the whole of His Majesty's Dominions (2), but subject to the provisions of the five hundred and forty seventh section of the Act, by which it was provided as follows :

" The legislative authority of any British possession shall have power by any Act or Ordinance confirmed by Her Majesty in council to repeal wholly or in part any provisions of this Act relating to ships registered in such possession; but no such Act or Ordinance shall take effect until such approval has been proclaimed in such possession; or until such time thereafter as may be fixed by such Act or Ordinance for the purpose."

It may perhaps be noticed in passing that in 1867 there was in force in the Province of Nova Scotia a short statute in respect to the Registry of Ships (3), and in the Province of Canada, *An Act Respecting the Registration of Inland Vessels* (not registered as British vessels under any Act of the Imperial Parliament (4)); and

(1) 17 & 18 Vict. c. 104.
(2) Sec. 17.
(3) R. S. N. S. 3rd Series, c. 75, part 2.
(4) C. S. C. c. 41.

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*An Act for the Encouragement of Shipbuilding* (1). These Acts were repealed by the Act of the Parliament of Canada, 36th Victoria, chapter 128, *An Act Relating to Shipping and for the Registration, Inspection and Classification thereof*, which, after the approval of Her Majesty in Council had been given thereto, and duly proclaimed, came into force on the 17th day of March, 1874. This Act was re-enacted as chapter 72 of *The Revised Statutes of Canada* and was repealed by virtue of the Act which gave effect thereto. (49 Vict. c. 4, s. 5 (2). R. S. C. pp. X. and 2284). It was not reserved a second time for Her Majesty's approval, and no such approval has been proclaimed in Canada. The repeal of the earlier statute would no doubt be effective, as that would require nothing beyond the assent of Her Majesty given in the usual way. Whether something more ought to have been done with respect to the re-enactment of provisions to which Her Majesty's approval had once been given in the way prescribed by *The Merchant Shipping Act*, 1854, is not now in question. Apparently for some reason it was not thought to be necessary, and the statute has since the passing of *The Revised Statutes of Canada* been accepted and acted upon as being in force as part thereof. Its validity has not been called in question in this proceeding; and for the present at least, it may be taken to be one of the Acts saved by the seven hundred and thirty-fifth section of *The Merchant Shipping Act*, 1894, to which reference will be made. We may, I think pass over the Acts of the Parliament of the United Kingdom enacted between the years 1867 and 1894 in amendment of *The Merchant Shipping Act*, 1854. All that it is material to keep in mind is that many of the provisions of such Acts applied to British possessions, and that Canada was included in

(1) C. S. C. c. 42.

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that term. By the seventh section of *The Merchant Shipping* (Colonial) *Act*, 1869 (1), it was provided that " in the construction of *The Merchant Shipping Act*, " 1854, and of the Acts amending the same, Canada " should be deemed to be one British possession "; and to the same effect is the definition of the expression " British Possession " given in *The Interpretation Act*, 1889 (2). *The Merchant Shipping Act*, 1894 (3), is a consolidation of enactments relating to merchant shipping. Some of its provisions apply to the whole of His Majesty's Dominions, and others do not. Section seven hundred and thirty-five corresponds to section five hundred and forty-seven of the Act of 1854 already cited. But from the power, in the manner therein prescribed, to repeal any provision of the Act, given to the legislatures of British possessions, are excepted those provisions of the third part of the Act which relate to emigrant ships; and there is added the following provision:

" Where any Act or Ordinance of the legislature of " a British possession has repealed in whole or in part, " as respects that possession, any provision of the Acts " repealed by this Act, that Act or Ordinance shall have " the same effect in relation to the corresponding pro- " visions of this Act, as it had in relation to the pro- " vision repealed by this Act."

This provision constitutes a saving clause in favour of colonial statutes respecting shipping then in force.

The supremacy of the Parliament of the United Kingdom of Great Britain and Ireland is not questioned by any one. All powers exercisible by the Parliament of Canada, or by the legislature of any Province of Canada, are subject to the sovereign

(1) 32 Vict. c. 11.

(2) 52 & 53 Victoria (U.K.) c. 63, s. 18 (2).

(3) 57 & 58 Victoria c. 60.

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authority of that Parliament. It has been contended by some that since *The British North America Act*, 1867, was passed, the Parliament of Canada, and a legislature of a province of Canada, could in respect of matters within their authority respectively, repeal the provisions of an Act of the Imperial Parliament extending to Canada, but passed prior to 1867; that to that extent at least *The Colonial Laws Validity Act* must be taken to be repealed or modified by *The British North America Act*, 1867. Those who hold that view would I suppose find in the ninety-first section of the latter Act ample authority for the Parliament of Canada to legislate in the largest way with respect to navigation and shipping, without reference to section five hundred and forty-seven of *The Merchant Shipping Act*, 1854, or to section seven hundred and thirty-five of the Act of 1894. The argument by which this view is supported is entitled to great consideration, but the view has not found favour with the law officers of the Crown. But even those who hold this view most strongly concede that *The Colonial Laws Validity Act* applies in the case of an Act of the Parliament of the United Kingdom, extending to Canada, and passed after *The British North America Act*, 1867; and that any Canadian legislation on the same subject repugnant thereto is void. So it appears to be certain that while the Parliament of Canada has power and authority to make laws for the peace, order and good government of Canada, in relation to navigation and shipping, any Act passed for the purpose must be read subject to *The Merchant Shipping Act*, 1894. If it is in any respect repugnant thereto it is to the extent of such repugnancy void and inoperative (1), or if it repeals wholly or in part any provision of that statute it will not take effect in Canada, until it has been con-

(1) 28 & 29 Vict. (U. K.) c. 63, s. 2.

firmed by His Majesty in Council, and His Majesty's approval has been duly proclaimed, or until such time thereafter as may be fixed by the Act for that purpose. *The Merchant Shipping Act*, 1894, s. 735, clause (1).

The authority of the Parliament of Canada to raise money by any mode or system of taxation is not surrounded by any similar statutory limitation. Where the Customs Acts of the United Kingdom are in force in any British possession, any law of such possession which is in any wise contrary thereto is null and void. (*The Customs Consolidation Act*, 1876, s. 161.) But these Acts do not extend to any possession in which, as in Canada, the parliament or legislature of the possession makes entire provision for the management and regulation of the Customs of the possession (*Ibid.* s. 151). As long ago as 1778 it was declared by an Act of Parliament that thereafter the King and Parliament of Great Britain would not (with an exception not now material) impose any duty, tax or assessment whatever, payable in any of His Majesty's Colonies in North America or the West Indies (1). And the policy of the Imperial authorities has been to leave the self-governing colonies free and uncontrolled in matters relating to taxation within such colonies respectively. While Canadians accept as a matter of course legislation by the Parliament of the United Kingdom respecting ships registered in Canada, and object, if there is ground or reason for objection, to the terms of such legislation, and not to the exercise of the power to legislate, they would no doubt receive with surprise and impatience any intimation of the passing of an Act by the Imperial Parliament to levy taxes in Canada, no matter how unobjectionable otherwise the provisions of the Act might be. Such an Act according to its provisions

(1) 18 Geo. 3, c. 12; Statutes of the United Kingdom, Revised. Vol. 3, p. 132.

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would be regarded as an unwarrantable interference with the freedom and authority of the Parliament of Canada or of the legislatures of the several provinces of the Dominion. Happily no such thing is possible. But the practical independence of the Parliament of Canada and of the provincial legislatures in that respect rests upon no unalterable convention or statute but upon the wisdom of those who control the destinies of the Empire. In reality the power of the Imperial Parliament is as great and its supremacy as absolute over the subject of taxation within Canada as it is over any other subject committed by *The British North America Act*, 1867, to the Parliament of Canada, or to the Provincial legislatures. The right of the Dominion Parliament and of the Provincial legislatures to legislate freely and without control, other than that defined in that Act, does not depend upon the absence of any supreme or sovereign authority, but in the knowledge and understanding, which has come in the course of events to be accepted as part of our constitution, that the sovereign authority will not exercise its undoubted powers unsolicited, or against their wishes. If these general observations are well founded, it will make no difference, in determining the question at issue in this case, whether the provision of *The Customs Tariff*, 1897, relating to a duty upon foreign-built ships is taken or considered to be an enactment respecting the registration of such ships, or one respecting taxation. It is immaterial from which standpoint it is regarded. If it is repugnant to any provision of *The Merchant Shipping Act*, 1894, in force in Canada; if its effect is to repeal any such provision it is inoperative, not having been confirmed by Her Majesty in Council and proclaimed in accordance with that statute. Is it repugnant to any provision of that Act? Does it in effect repeal any such provision? But before attempt-

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ing to answer these questions it will be necessary to refer further to the Imperial and Canadian statutes respecting the registration of ships.

It will be seen, on looking at the second section of the Act 36th Victoria, chapter 128, and the fifty-second section of *The Revised Statutes of Canada*, chapter 72, to which reference has already been made, that no particular provision of *The Merchant Shipping Act*, 1854, or of the Acts amending the same, was thereby repealed. The repeal is expressed to extend to so much of the provisions of that Act, and of the Acts amending the same and forming part thereof relating to ships registered in Canada, as is inconsistent with the Canadian Acts mentioned. To determine, then, whether any particular provision of *The Merchant Shipping Act*, 1894, (to which for convenience I shall refer as the Imperial Act) is in force in Canada one must first see whether by the terms of that Act it extends to British possessions generally. If it does not that is the end of the matter. If it does one must in the next place see if there was any corresponding provision in the Acts thereby repealed. If there was no such provision in the repealed Acts the particular provision of the Imperial Act in question would be in force in Canada. If there was any such provision in the repealed Acts the next step would be to examine *The Revised Statutes of Canada*, chapter 72, and any other Canadian statute to which like considerations apply, and see if any provision therein contained was inconsistent with the provision of the Imperial Act in question. If there is any such inconsistent provision in any Canadian Act duly enacted in the manner pointed out and so saved by the seven hundred and thirty-fifth section of the Imperial Act, it will be in force in Canada, and not the provision of the Imperial Act to which it is repugnant. That it is not a condition of matters tending to

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clearness or convenience in respect of legislation on such an important subject as shipping. The re-enactment by the Parliament of Canada of such Acts as deal with subjects also dealt with by provisions of the Imperial Act that extend to Canada, and the approval thereof in manner prescribed therein, would tend greatly to simplify matters and make clear what the law on such subjects is.

The provisions relating to the registering of ships are contained in Part I of the Imperial Act. That part of the Act (consisting of sections one to ninety-one) applies to the whole of His Majesty's Dominions and to all places where His Majesty has jurisdiction (s. 91). By the eighty-ninth section of the Act it is provided that the Governor of any British possession shall in such possession occupy the place of the Commissioners of Customs with respect to the registry of a ship. There is no occasion to go minutely into the provisions of the Act. In the main the law respecting the registering of ships, including the provision relating to the registry of foreign-built ships under which the *Minnie M.* was registered, are to be found therein and not in *The Revised Statutes of Canada*, chapter 72, though the latter Act contains some provisions of importance on the same subject. *The Customs Tariff*, 1897, and the earlier tariff Acts on the same subject refer, as will have been observed, to a "Canadian Register." The duty in question is payable on application for a Canadian register, and the question is raised as to whether or not there is by reason of the Canadian Act a Canadian register distinct from a British register. It seems to me that there is not. That seems to me to be clear from an examination of the Act, to a few of the provisions of which it may perhaps be convenient to refer more particularly.

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The Act (R. S. C. c. 72) is divided into four parts. The first part relates to the measurement and registration of ships; and the fourth part to the inspection and classification of ships. The fourth section of the Act (being the first section of Part I) exempts certain vessels from the provisions of the Act. The fifth and sixth sections are as follows:

"5. No ship propelled either wholly or in part by steam, whatever her tonnage, and no ship not propelled wholly or in part by steam, of more than ten tons burthen and having a whole or fixed deck, although otherwise entitled by law to be deemed a British ship, shall, unless she is duly registered in the United Kingdom or in Canada, or some other British possession, under *The Merchant Shipping Act*, 1854, and the Acts amending the same or under the provisions of this Act, be recognized as a British ship, or be admitted to the privileges of a British ship in Canada; but any ship which was duly registered under the provisions of the *Act respecting the Registration of Inland Vessels* forming chapter forty-one of the Consolidated Statutes of the late Province of Canada, need not be registered in pursuance of the provisions of this Act, except for the purpose of enabling her to proceed to sea as a British ship.

"2. No ship which was required to be registered by the said *Act respecting the Registration of Inland Vessels* shall, unless she was duly registered under the provisions of the said Act, be recognised in Canada as a British ship. 36 V. c. 128, s. 8 and s 14, part.

"6. No officer of Customs shall grant clearance to any ship required to be registered under the provisions of the Act in the next preceding section mentioned, or of this Act, for the purpose of enabling her to proceed on a voyage, unless the master of such ship, upon being required so to do, produces to him the proper certifi-

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cate of registry; and if any such ship attempts to proceed on a voyage as a British ship, without a clearance, any officer of Customs may detain such ship until such certificate is produced to him. 36 V. c. 128, s. 14, part."

The seventh section enables the Lieutenant-Governors of the provinces in certain cases to grant passes to British ships. The eighth section provides that the Governor in Council may appoint at and for every port at which he deems expedient to authorize the registry of ships, the collector or other principal officer of customs to be the registrar for all the purposes of *The Merchant Shipping Act*, 1854, and the Acts amending the same and of this Act. This provision is not repugnant to, but consistent with, section four (*e*) of the Imperial Act by which it is provided, among other things, that the chief officer of Customs at any port in a British possession, other than those specially mentioned, shall be registrars of British ships. The ninth section of the Canadian Act authorizes the Governor in Council to appoint surveyors to superintend the survey and measurement of ships in conformity with the said Acts and this Act. The tenth section empowers the Governor in Council to prescribe the fees and travelling expenses to which surveyors shall be entitled for the measurement of ships about to be registered for the first time. The eleventh section provides that no fees shall be charged in Canada for registering vessels or recording transactions relating to the registry of vessels under this Act or under *The Merchant Shipping Act*, 1854, or the Acts amending the same. From these and other provisions of the Act it will be seen that registry in Canada of a ship takes place not by force of the Canadian Act alone, but under that Act and the Imperial Act, and the registry of ships thereunder is in reality and in substance a British registry

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in Canada, and not a Canadian registry as distinct therefrom. The port of registry, the port to which the ship belongs is of course a Canadian port, and in the qualified sense of being granted in Canada, the certificate of registry may be spoken of as a Canadian certificate; but it is at the same time a certificate of registry as a British ship. The ship when registered in Canada is a British ship, though in respect of her origin or of the port to which she belongs she may at the same time be a Canadian ship.

The register that was obtained in the Province of Canada under the *Act respecting the Registration of Inland Vessels* was no doubt a Canadian register. And a ship could at the same time obtain in that province a British register. But since the repeal of the Act last mentioned there has been only one register that a ship could obtain in any part of Canada, and that, it seems to me, is a British register granted in Canada. That, I take it, is the meaning of the words "Canadian Register" where they occur in *The Customs Tariff*, 1897. The expression "on application for Canadian register" used in that Act must (if any meaning is to be given to it) mean on application under the Imperial Act and the Canadian Act to be registered in Canada as a British ship. So one may, I think, for the present put to one side the controversy that arose between the suppliant company and the officers of the Crown as to whether its application was for a Canadian register or an application in Canada for a British register. And taking that view of the provision in question we come back to the questions already stated: Is it repugnant to any provision of *The Merchant Shipping Act*, 1894? Does it in effect repeal any provision of that Act?

Now it appears certain that it does not repeal in whole or in part any provision of the Imperial Act. The provisions of that Act are in no way altered or

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affected by the imposition of this duty. But it is argued that it is repugnant to the provisions of the Act requiring or permitting a foreign-built ship to be registered to levy a duty on the application for registry. But is that really so? The duty is not a fee exacted in respect of the registration of the ship or of anything done under the Act in relation to such registration. It has in fact nothing to do with the registration of the ship, or the procedure applicable thereto. It is a tax levied upon an article of foreign make, at a time when at the election of its owners, it is about to be given the character and condition of a like article constructed in Canada. A foreign-built ship, if she is to be registered as a British ship, must of course have a port of registry in some part of His Majesty's Dominions. That port where she is registered is the port to which she belongs, her home port. The duty or tax is in reality levied upon the occasion of the foreign ship acquiring in Canada such a port, and the provision that it is payable upon application for a register fixes the time of payment, and nothing more. It seems to me that there is no repugnancy between the statute imposing the duty in question and *The Merchant Shipping Act*, 1894.

It is further contended, however, that if the Parliament of Canada may levy a duty in such a case it may levy one so excessive as to be prohibitory, and thereby render inoperative in Canada the provision of the Imperial Act respecting the registration of foreign-built ships. It will be time enough to consider that case when it arises. The duty now in question appears to be reasonable and in no sense prohibitory.

Then it is said that it is unreasonable that a duty should be levied on registration in Canada of a foreign-built ship when no such duty is imposed in other parts of the King's Dominions, the ship once registered

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in any part of the Empire having in Canada all the privileges of a British ship. For instance, it is said that the owners of the *Minnie M.* might have taken her to Newfoundland and obtained a registry there without the payment of duty; and that then in Canada her position and character would not have been different from what it now is. Beyond question the owner of a foreign-built ship desiring to obtain registry thereof as a British ship is under no compulsion to choose any particular port of registry or a port in any particular part of the King's Dominions. But if he chooses one and takes his ship there, she will be subject to the laws in force at that port, whatever they may be. Such laws differ greatly no doubt at ports in different parts of the Empire. And in all this there is nothing unreasonable. The same thing happens to registered vessels both British and foreign. Any ship coming in the course of her business to a British port submits herself to, and is subject to, the law of that port. A foreign ship intending to enter a British port, and subsequently entering it, was held to be subject to an Act requiring her to make a signal for a pilot before she had come within British waters (1). That she was, after she came within British waters, subject to the laws and regulations in force there did not admit of serious question. In the same way a foreign-built ship coming to a British port for registry as a British ship is subject to the law of that port; and it is no good objection to that law to say that it is not the same as the law in force at some other British port.

Leaving then the question of the authority of the Parliament of Canada to impose a duty on a foreign-built ship on application for registry in Canada as a British ship, we come to the other question mentioned,

(1) *The Annapolis and Johanna Stoll*, 1 Mar. L. C. 69.

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namely: Has such a duty been duly imposed by *The Customs Tariff*, 1897? The difficulty arising from the use, in the 409th item of schedule A to that Act, of the words "Canadian Register" has already been alluded to, and reasons have been given for thinking that the expression "on application for Canadian register" means on application for registry in Canada, the ship when registered becoming a British ship; that there is no such thing as an independent Canadian register; that any registration that takes place is under both the Imperial Act and the Canadian Act, and that the registration of a ship thereunder is a registry in Canada of such ship as a British ship. If I am wrong in the view I have taken of the meaning of these words, if that is not their true meaning, then the duty has not, it seems to me, been imposed in clear language and was not leviable in the case of the *Minnie M.* But that is not the only difficulty. If it were, I should think it might fairly enough be gotten over by giving the provision the meaning suggested. There is the further difficulty that the operative words of the statute, the words authorizing the levy and collection of duties, are not, I think, applicable to item 409, and that item contains in itself no such words. The fourth section of the Act provides that "there shall be levied, "collected, and paid upon all goods enumerated" (or) "referred to as not enumerated in schedule A to this "Act, the several rates of duties of customs set forth "and described in the said schedule and set opposite "to each item respectively, or charged thereon as not "enumerated, when such goods are imported into "Canada or taken out of warehouse for consumption "therein." That is a provision for levying duties of customs on goods imported into Canada. But a ship is not included in the word "goods," and that is clear whether we have regard to the ordinary meaning of

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the word, or to the meaning that may be assigned to it in this Act by reason of the interpretation given to the word in the second section of *The Customs Act*, and made applicable to this Act. (*The Customs Tariff*, 1897, s. 3.) The expression "goods" is, in the Act mentioned, defined to mean goods, wares and merchandise or movable effects of any kind including carriages, horses, cattle and other animals. Neither can a ship with propriety be said to be imported; and it would be absurd to refer to it as taken out of warehouse for consumption in Canada. The words of this provision—and it is the only one in the Act by which duties are actually imposed—are wholly inapplicable to a ship as a ship. That is recognised in item 409 itself, where the duty on a foreign-built ship, assuming it to be imposed, is declared to be leviable, not on importation into Canada, but on application for Canadian register. Then, as has been said, item 409 contains no substantive provision imposing a duty. The fact that the provision occurs in a schedule to the Act is not in itself an objection; though it is clearly out of place there and would be more appropriately enacted as a substantive provision of the Act. The schedule is, however, a part of the Act, and if there were in the provision any operative words, any words enacting that the duty therein mentioned should be levied, collected or paid, effect ought to be given to it. No doubt one may see from the connection in which the provision occurs that it was intended that the duty therein mentioned should be imposed and levied, and there are certain cases in which one is said to be at liberty to supply or add words omitted from a statute in order to give effect to its meaning and intention. But that is not permitted in the case of statutes imposing a tax or charge. Where a tax or charge is imposed express language is said to be indispensable;

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and the intention to impose a charge on the subject must be shewn by clear and unambiguous language. *Oriental Bank* v. *Wright* (1). In *Cox* v. *Rabbits* (2). Lord Cairns, L. C. stated the rule in these words: "A "Taxing Act must be construed strictly; you must "find words to impose the tax, and if words are not "found which impose the tax, it is not to be imposed." It seems to me, therefore, that it is not permissible to add to the words contained in the provision in question, or to read into it, other words to make it operative and to impose the duty therein specified. For illustration, suppose in some way the provision in the fourth section of *The Customs Tariff*, 1897, had been omitted from the Act, the schedule remaining as it is. Every one would know that it was the intention of Parliament to impose the duties mentioned in the schedule; but no authority except Parliament could supply the omission and make the Act effective for its purposes. What the whole schedule would in such a case lack, the provision in question here lacks, namely, the support of apt and operative words imposing the tax or duty.

There will be judgment for the suppliant company, and a declaration that it is entitled to be repaid the sum of three thousand five hundred dollars collected for customs duties on the *Minnie M.* The question as to interest on that amount, and that as to damages for the detention of the ship, not having been argued, will be reserved.

Ottawa, December 7th, 1901.

The reserved questions as to interest and damages recoverable by the suppliants were now argued.

*Wallace Nesbitt, K.C.* for the suppliants, cited R.S.O. 1897, c. 51, secs. 113, 114; *McCullough* v. *Newlove* (3);

(1) 5 App. Cas. 856. (2) 3 App. Cas. 478.
(3) 27 Ont. R. 627.

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*Webster* v. *British Empire Assrnce. Co.* (1); *Marsh* v. *Jones* (2); *Arnott* v. *Redfern* (3); *Re Gosman* (4); *Partington* v. *Attorney-General* (5); *Tobin* v. *The Queen* (6).

*E. L. Newcombe, K.C.* for the respondent;

If interest can be recovered at all it would be in the nature of damages in this case, and that would invoke the law of tort and the maxim that the "King can do no wrong."

THE JUDGE OF THE EXCHEQUER COURT now (December 15th, 1902), delivered judgment upon the questions reserved.

In giving judgment for the suppliants in this case for the sum of three thousand five hundred dollars, collected for customs duties on the steamship *Minnie M.* on application for registry in Canada, the questions as to whether or not the Crown was liable for interest on that amount or for damages for the detention of the ship, which were raised by the pleadings but not argued, were reserved for argument and further consideration. These questions have since been argued and now stand for judgment.

The duties in question were paid at the Port of Sault Ste. Marie, in the Province of Ontario, and the case is to be determined by the laws in force in that Province, notwithstanding that the certificate of registry was issued at the Port of Montreal, in the Province of Quebec. These duties were paid under protest, and in order to obtain registry of the steamship. It has been decided that the company is entitled to have the money so paid returned to it; and unless it is repaid with interest it will, through no fault of its own but

(1) 15 Ch. D. 169.
(2) 40 Ch. D. 566.
(3) 3 Bing. 353.
(4) 17 Ch. D. 772.
(5) L. R. 4 E. & I. 100.
(6) 16 C. B. N. S. 310.

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by reason of the acts of the Crown's servants, have suffered a loss for which there is no remedy. The same is true also of the damages that it incurred by the detention of the ship until the duties were paid. But where, as in this case, it is a question of law only, one must, in coming to a conclusion, put considerations of that kind to one side. They are proper matters for the consideration of the Crown and of its advisers, or of Parliament; but a court whose duty is limited to declaring and enforcing the law has no responsibility in respect to them.

Now where the Crown's officer, without authority of law, takes or exacts for the Crown the subject's goods or money, he is liable to an action for the wrong that he commits, unless protected by some statute. The fact that he acts under directions from the Crown or some minister of the Crown does not constitute a good answer; and herein, in the first instance, are found the subject's, protection and remedy. The wrong cannot be imputed to the Crown, and the officer who commits it must answer therefor. If the goods or money so taken or exacted come into the possession of the Crown a petition of right will lie for their recovery. But these remedies are distinct, and the liability of the Crown and that of its officer are not necessarily the same. In both cases this court has jurisdiction. Against the Crown's officer it possesses concurrent original jurisdiction with other competent courts; (*The Exchequer Court Act*, s. 17 (*c*)) against the Crown it has exclusive original jurisdiction (*Ibid.* s. 16). If in the present case the action had been brought against the registrar of shipping he could, in respect of anything he did as such registrar, have set up in defence the provisions of the third clause of the fourth section of *The Merchant Shipping Act*, 1894, whereby it is enacted that a registrar, shall not be liable to damages or other-

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wise for any loss accruing to any person by reason of any act done or default made by him in his character of registrar unless the same has happened through his neglect or wilful act. But that provision does not in the present case afford any defence to the Crown; and in the same way and for like reasons the measure of what, but for the statute, would have been the officer's liability is not of necessity the measure of the Crown's liability. The petition lies for the money, that has come into the Crown's possession; not for any wrong the officer may have done. On such petition the suppliant is entitled to judgment for the money but not for damages for the act of the officer. No wrong can, as has been stated, be imputed to the Crown, and without the authority of some statute, no damages for a wrong can, on a petition of right, be recovered against the Crown.

Now with reference to the interest claimed, it is certain that there is no statute authorizing its recovery. By the thirty-third section of *The Exchequer Court Act*, it is provided that no interest shall be allowed upon any claim arising out of a contract in writing in the absence of a stipulation in writing for payment of such interest, or a statute providing in such case for the payment of interest. In cases where lands are taken for, or injuriously affected by, the construction of a public work, the court may allow interest (1). And after judgment in this court, and from the date thereof, the Minister of Finance may allow interest at a rate not exceeding four per centum per annum on any moneys or costs to which the suppliant thereby becomes entitled (2). But there is no statute authorizing the court in a case such as this to allow interest. And perhaps in passing one might point out that in

(1) *The Expropriation Act*, 52 Vict. c. 13 s.s. 29 & 30, and 63 & 64 Vict. c. 22, s.s. 1 & 2.

(2) 52 Vict. c. 38, s. 4.

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that respect the statute law of Canada is not less liberal than that of other countries. In England there is no statute allowing interest to be recovered in such a case; and in the United States it is expressly enacted that no interest shall be allowed on any claim up to the time of the rendition of the judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest (1).

It is certain also that there is in this case no contract on the part of the Crown to pay interest That being so, it only remains to ask the question, whether or not damages in the nature of interest may be allowed for the wrongful exaction of the duties, or for the wrongful detention of the money. But that obviously cannot be done without making the Crown liable for a wrong done to the suppliant. And the Crown can, in law, do no wrong, and for the wrongs of its servants it is not answerable, unless expressly made liable by statute.

Then with regard to the wrongful detention of money, the case of *The London Chatham and Dover Railway Co.* v. *The South Eastern Railway Co.* (2) is an authority that even as between subject and subject interest cannot at the common law be given by way of damages for the detention of a debt, the law upon the subject, unsatisfactory as it was said to be, having been too long settled to be departed from.

There are of course statutes such as the Acts of the Parliament of the United Kingdom, 3 & 4 Wm IV. c. 42, s.s. 28 & 29, which make interest or damages in the nature of interest recoverable in cases where it was not recoverable at common law. The provisions of that Act either by express re-enactment here, or by

(1) Acts of the 3rd of March, 1863, R.S.U.S. s. 109; *Tillou* v. *The United States*, 1 C. Cls. 232.

(2) [1893] L. R. App. Cas. 429.

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reason of its application as part of the law of England, is in force in most of the Provinces of Canada (1).

The Act in force in the Province of Ontario goes further than the English Act and provides that interest shall be payable in all cases in which it was payable by law, or in which it has been usual for a jury to allow interest. See *Michie* v. *Reynolds* (2); and *McCullough* v. *Newlove* (3). But the rights and prerogatives of the Crown are not affected by these statutes, it not being provided therein that the Crown shall be bound thereby.

If the action were against the Crown's officer he would be bound, and his liability to damages in the nature of interest would depend upon the law in force in the province in which the cause of action arose. But not so with respect to the Crown.

It has been held by the Supreme Court of Massachusetts that where taxes, assessed without authority, are recovered back, interest may also be recovered. *The Boston and Sandwich Glass Co.* v. *The City of Boston* (4); but the Crown stands in this respect in a wholly different position from a civic or municipal corporation.

Then there is a class of cases in which where administration on behalf of the Crown to the estate of a person dying intestate without leaving any known next of kin is taken out, and the proceeds are paid into the treasury; if thereafter the next of kin obtains a decree in his favour interest is allowed on such proceeds. (*Turner* v. *Maule* (1); *Edgar* v. *Rey-*

(1) 7 Wm. 4 (U.C.) c. 3, ss. 20, 21; C. S. U. C. c. 43, ss. 1, 3; R. S. O. (1877) c. 50, ss. 266, 268; R. S. O. (1897) c. 51, ss. 113, 115; R. S. N. S. 1st S. c. 82, ss. 4 & 5; R. S. N. S. 4th S. c. 94, ss. 231 & 232; 12 Vict. c. 39 (N.B.) ss. 27 & 28; C. S. N. B. c. 37, ss. 118 & 119; 28 Vict. (P.E.I.) c. 6, ss. 4 & 5.

(2) 24 U. C. Q. B. 303.

(3) 27 Ont. R. 627.

(4) 4 Metcalfe 181.

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*nolds* (2); *Attorney-General and Reynolds* v. *Kohler* (3); *Bauer* v. *Mitford* (4); *Partington* v. *The Attorney-General* (5). But in these cases the action was brought against the Crown's nominee or representative, not against the Crown itself by petition of right. They stand upon a footing of their own and cannot be considered as authorities for the proposition that the Crown is liable for damages in the nature of interest. In the case of *The Toronto Railway Co.* v. *The Queen* (6) the plaintiff recovered against the Crown the amount of certain duties of customs paid under protest and interest on that amount. But although interest was claimed by the plaintiff in the statement of claim, the question of the Crown's liability to pay it was not raised until after the Queen's order had been made. Subsequently a petition was presented praying that the order should be so amended as to make it clear that the question of interest claimed in the action had not been concluded but left open to be dealt with by the tribunal below. The petition was dismissed. Lord Macnaghten is reported, by the shorthand writer who took notes of the argument, to have stated that that question was not presented when the case was before the Judicial Committee of the Privy Council, and that he could hardly understand the Government, who have wrongly taken a person's money, refusing to pay interest upon it; that he could quite understand that the representatives of the Government would not think of arguing such a question and that he did not think they ought to. The case cannot, however, be taken as an authority that the Crown may be condemned to pay interest, or declared liable therefor in such a case, if the Government refuses to pay it out

(1) 18 L. J. Ch. N. S. 454.
(2) 27 L. J. Ch. N. S. 562.
(3) 9 H. L. C. 655.
(4) 3 L. T. N. S. 575.
(5) L. R. 4 E. & I. App. 101.
(6) [1896] App. Cas. 551.

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of money available for the purpose, if any, or to invite Parliament to make provision for its payment in case no money is so available. That is a question for the Crown's advisers, and the responsibility of deciding it rests with them and not with the court.

On the question of the Crown's liability for interest, it does appear to be clear that the law is as briefly stated by the Master of the Rolls, in *In re Gosman* (1), that interest is only payable by the Crown by statute or by contract.

Then as to damages for the detention of the ship, that stands on the same footing as damages by way of interest. In each case the damages would be given for a wrong done. Those arising from the detention of a ship might in some cases be greatly the more important, and the hardship arising therefrom much greater than that accruing from the detention of the money. But as the law stands the Crown is not liable for the wrong done, although its officer, unless protected by statute, may be.

With reference to the questions of interest on the duties paid, and of damages for the detention of the ship, the judgment of the court is that the company suppliant is not entitled to any portion of the relief claimed.

*Judgment accordingly.*

Solicitor for suppliants: *H. C. Hamilton.*

Solicitor for respondent: *E. L. Newcombe.*

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(1) L. R. 17 Ch. D. 772; 45 L. T. N. S. 268; 50 L. J. N. S. 624.

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Dec. 11.

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

AND

THOMAS SEDGER.....DEFENDANT.

*Expropriation—Public work—Compulsory taking—Value to be considered —Compensation.*

It is the value of the land at the time of the expropriation that the court has to consider in assessing compensation. If the property has depreciated in value between the time it was acquired by the person seeking compensation and the time of the expropriation by the Crown, the former has to bear the loss.

2. Where the property is occupied by the owner as his home, and he has no need or wish to sell, the compensation ought to be assessed upon a liberal basis.

INFORMATION for the expropriation of certain lands required for the purposes of a public work of defence.

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

September 28th and 30th, 1901.

The case was heard at Victoria, B.C.

*A. F. R. Martin* for the plaintiff.

*George Jay* for the defendant.

THE JUDGE OF THE EXCHEQUER COURT now (December 11th, 1901), delivered judgment.

The only question to be determined is the amount of compensation that ought to be paid to the defendant for land adjacent to the barracks at Work Point, Victoria harbour, B C., taken from him, for purposes of defence. The land taken formed part of lot number one, block twenty, portion of lot twenty-nine,

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section sixteen, Viewfield farm, in the District of Esquimalt. The whole of the defendant's lands there, with the buildings and improvements thereon, was taken. The land, with the buildings and improvements, had cost the defendant between four thousand and five thousand dollars, but he had bought the land when prices therefor were inflated, and so the property had cost him more than it would have cost at the time when it was taken or since, and more than it would sell for then. The Crown offers to pay the sum of three thousand five hundred dollars, and that possibly is as much as he could have obtained for it at the time of the expropriation had he been obliged to sell it. But he had no need or wish to sell it. It was his home, from which, by the proceedings that were taken, he was compelled to remove against his will. I think he was not wise in refusing to give up possession to the Crown; but for that he has had to bear the costs of the proceeding to obtain possession, and in view of what the place had cost him, it is not to be wondered at that he thought the amount offered to him to be insufficient. There is other evidence than his own that the offer was inadequate; but on the evidence as a whole it would appear not to have been unreasonable. The case is one, however, in which the compensation ought to be assessed liberally, and I shall allow a small advance upon the amount tendered. I assess the compensation to be paid for the land taken at three thousand seven hundred and fifty dollars. Allowing that amount the case does appear to involve some hardship, as it leaves the defendant out of pocket; but that in reality is attributable to his having bought the land at prices that have not been maintained.

The sum of three thousand one hundred and forty dollars has already been paid to the defendant: He is entitled to the balance of six hundred and ten dollars,

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with interest (in accordance with the Act 63 & 64 Vict. c. 22) at five per centum per annum since the fourteenth of January, 1891, when possession was obtained.

There will be the usual judgment and declaration as to the title of the lands being vested in the Crown, and the defendant will be allowed his costs.

*Judgment accordingly.*

Solicitors for the plaintiff: *Langley & Martin.*

Solicitors for the defendant: *Yates & Jay.*

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA } PLAINTIFF ;

AND

DENNIS REGINALD HARRIS, AND HARRY DALLAS HELMECKEN, TRUSTEES OF THE ESTATE OF JAMES WILLIAM DOUGLAS ..... } DEFENDANTS.

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Dec. 11.

*Expropriation—Possession by officers of the Crown of lands not expropriated —Taking of highway—Rifle range—Damages.*

Defendants complained that possession of certain lands, not covered by the plan and description filed by the Crown in an expropriation proceeding, had been taken by the officers of the Crown, and claimed compensation therefor.

*Held*, that the right to recover compensation must be limited to lands actually mentioned in the plan and description filed, and to the injurious affection of other lands held therewith.

2. The defendants' predecessor in title in laying off into lots the land of which a portion was taken from the defendants by the Crown, left a roadway between the land so divided and the top of the land adjacent to the sea. This roadway had been used by the public, and work had been done upon it by the municipal authorities. The land between that so taken and the sea was not included in the plan and description filed ; but the Crown closed up the roadway and from the land taken from the defendants opened another in lieu thereof.

*Held*, that the defendants were not entitled to compensation in respect of the taking of such roadway.

3. Where property adjoins a rifle range, the site of which has been expropriated from the lands of the owner of such adjacent property, he is entitled to compensation for the damages arising from the use of such rifle range.

INFORMATION for the expropriation of certain lands required for the purposes of a rifle range near Victoria, B.C.

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

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October 2nd, 1901.

The case was heard at Victoria, B.C.

Argument of Counsel.

*W. D. Helmcken K.C.* for the defendants, cited *Mayor of Montreal* v. *Brown* (1); *Paint* v. *The Queen* (2); *Lefebvre* v. *The Queen* (3); *Stebbing* v. *Metropolitan Board of Works* (4); *Cowper Essex* v. *Acton* (5); *Letourneux* v. *The Queen* (6); R. S. B. C. c. 111, sec. 66.

*A. E. McPhillips, K.C.* followed for the defendants, and cited *Re Ontario & Quebec Railway Co. and Taylor* (7); *Penny* v. *Penny* (8); *Moore* v. *Woodstock Woollen Mills Co.* (9).

*A. F. R. Martin*, for the plaintiff, cited *American and English Encyclopedia of Law* (10).

THE JUDGE OF THE EXCHEQUER COURT now (December 11th, 1901), delivered judgment.

The questions at issue are:

1. Whether the sum of eight thousand three hundred and sixty dollars mentioned in the sixth paragraph of the information, as amended at the trial, is sufficient compensation for the value of the lands taken, as therein set out, for a rifle range near the City of Victoria, in the Province of British Columbia, and for damages occasioned by the taking, and by reason of other lands of the defendants being injuriously affected by the taking of such lands for the purposes mentioned; and

2. Whether the defendants are entitled to compensation or damages in respect of lands mentioned in the second paragraph of the statement in defence, and

(1) 2 App. Cas. 168.
(2) 2 Ex. C. R. 149.
(3) 1 Ex. C. R. 121.
(4) L. R. 6 Q. B. 37.
(5) 14 App. Cas. 153.
(6) 7 Ex. Ch. 1.
(7) 6 Ont. R. 338.
(8) 37 L. J. Ch. 340.
(9) 29 S. C. R. 627.
(10) 2nd ed. vol. 9, pp. 21, 73.

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lying between those taken and high-water mark, alleged to contain about three and one-third acres.

With reference to the first question I find under the evidence that the amount offered is sufficient compensation for the value of the lands taken, with a fair allowance for the compulsory taking, with probably a few hundred dollars to the good. As to whether or not the lands held with those taken, and situated to the north thereof, are injuriously affected, there is a difference of opinion among the witnesses. But I agree with those who think that the taking of the lands in question for the purposes of a rifle range has injuriously affected the lands of the defendants to the north of and adjacent to such lands, and in respect thereof, and the lands taken, I would increase the compensation to nine thousand three hundred and fifty dollars.

With reference to the second question I am of opinion that the defendants are not entitled to any compensation or damages for the lands to the south of those taken and lying between such lands and high-water mark, described in the second paragraph of the statement of defence. In the first place these lands are not included in those taken. They are outside of the lands described in the plan and description filed; and although the Crown's officers may have taken possession of them, that would not, even if the defendants owned them, give them a right to recover their value in this proceeding, which must be limited to the lands taken and to the injurious affection of other lands held therewith.

The defendants' predecessor in title in laying off into lots the land of which a portion was taken, left a roadway between the land so divided and the top of the bank adjacent to the sea. A reference to exhibit number four will make this clear. South of the lands, a portion of which was taken, is shewn a roadway to

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the top of the bank, and then below and at the foot of the bank is the sea. This way has been used, and work has been done on it, by the city. This land between that taken and the sea was not included in the plan and description filed; but the Crown closed up the road, and from the land taken from the defendants opened another road in lieu thereof. Not having been taken, the defendants cannot, as has been said, recover its value. But even if it had been taken with the other lands in question, the defendants could not, I think, have recovered anything in respect of it. By reason of the act of their predecessor in title and what had happened it was of no value to them, and the case, as to that falls within the rules laid down in *Stebbing's Case* (1), and followed in *Paint's Case* (2). For similar reasons nothing could be recovered because this land was thought to be injuriously affected by the taking of the adjacent land for the purposes mentioned.

There will be a declaration that the lands described in the information are vested in His Majesty the King. There will also be a declaration that the sum of nine thousand three hundred and fifty dollars is a sufficient compensation therefor and for all damages to lands held therewith occasioned by reason of such taking for the purposes mentioned. On that sum interest at the rate of five per centum per annum will be allowed from the sixteenth day of November, 1900. Such sum and interest will be payable to the defendants on giving the Crown a good acquittance for the same from themselves and any other person having any claim to, or interest in, such compensation or damages, and leave is reserved to apply to the court in case any question in respect thereto arises.

(1) L. R. 6 Q. B. 37.

(2) 2 Ex. C. R. 149; 18 S. C. R. 718.

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The defendants are entitled to their costs of the issue as to the sufficiency of the sum of eight thousand three hundred and sixty dollars offered.

The Crown is entitled to the costs of the issue in respect of the lands mentioned in the second paragraph of the statement in defence.

*Judgment accordingly.*

Solicitors for plaintiff: *Langley & Martin.*

Solicitors for defendants: *Drake, Jackson & Helmcken.*

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Dec. 11.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA } PLAINTIFF;

AND

CECILIA ELIZA YOUNG AND ROLAND STUART ..... } DEFENDANTS.

*Expropriation—Lessor and lessee—Covenant to build on demised premises—Compensation.*

When a lessee is under covenant to build upon the demised premises, and a part of the said premises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from his covenant, and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the court in fixing the amount of compensation to be paid to such lessee.

INFORMATION for the expropriation of certain lands near Victoria, B.C., required for the purposes of a public work of defence.

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

September 27th and 28th, 1901.

The case was heard at Victoria, B.C.

*A. P. Luxton* and *H. D. Helmcken*, for the defendants, cite *The Queen* v. *Carrier* (1); *Secretary of State* v. *Charlesworth* (2).

*A. F. R. Martin*, for the plaintiff.

THE JUDGE OF THE EXCHEQUER COURT now (December 11th, 1901) delivered judgment.

The questions to be determined have reference to the amount of compensation to be awarded to the defendants, respectively, for the taking, to be used in

(1) 2 Ex. C. R. 36. (2) [1901] A. C. 373.

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connection with the fortifications at Esquimalt, of six and four-tenths acres of land, with buildings and improvements, forming part of section fifteen in Esquimalt District, in the Province of British Columbia. The lands mentioned were taken by the Crown on the 15th day of May, 1899. At that date the defendant, Cecilia Eliza Young, was seized in fee of the said lands, subject, however, to a lease thereof and of other lands to the other defendant, Roland Stuart. The lease embraced something over two hundred acres of land, and these were demised for a term of ten years from July 1st, 1897, for a yearly rental of two hundred and ten dollars, payable quarterly. The lessee was also bound within eighteen months from that date to build a house on the lands taken, such house to cost not less than one thousand dollars. It was also a condition of the lease that in case the lessor should during the term thereby granted sell or otherwise dispose of the premises thereby demised, or any part thereof, to the Crown, the lessee would, upon receiving three months' notice in writing, quit and deliver up possession of the same, or such part thereof as might be desired by the Crown, upon the lessor paying to the lessee the value of any crops which might then be sown, or the value of any ploughing which might be done upon the land sold, and of which possession was required. It appears to be certain that the six and four-tenths acres taken from this property was the most valuable portion of it, and the only portion from which any income to speak of could be derived. Some use was made of the balance in connection with certain ditches and flumes used for the purpose of conveying water to Esquimalt Harbour for the ships there stationed. At times some use could also be made of the residue of the property for pasturage, but the annual value thereof was small. All the witnesses

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who speak of it are agreed that the six and four-tenths acres in question here constituted, for the present, at least, the valuable part of the lands demised. The property as a whole was assessed at ten thousand dollars, but that, so far as I can judge from the evidence, was an excessive valuation for any purpose to which the lands could be put.

For the lands taken the Crown offers to pay to the defendant Cecilia Eliza Young the sum of sixteen hundred dollars; that is at the rate of two hundred and fifty dollars an acre, free from all incumbrances, and including in that sum the amount of any damages to which the tenant Stuart may be entitled. That sum appears to me, however, to be insufficient.

The lease mentioned seems to have been made in the ordinary course of business and without any exceptional circumstances tending to increase the rent obtained. The amount of the rent would seem to show that the land taken, situated as it was with such improvements as were at the time on it, was really worth more than the sum mentioned; and then there is the question of severance to be taken into account. At the same time I do not doubt that it was not worth anything like the six or seven thousand dollars at which some of the witnesses valued it.

I assess the compensation to be paid in this case, including both the interest of the lessor and that of the lessee, with all damages to which they or either of them are entitled, at two thousand seven hundred and fifty dollars.

The defendants consent that the court may apportion the rent payable in respect of the six and four-tenths acres expropriated, and the residue of the lands comprised in the lease, such apportionment to be made as and from the 15th day of May, 1899, the date of the

expropriation. Under the evidence it would, I think, be fair to attribute the sum of one hundred and sixty dollars annually to the lands taken, leaving fifty dollars a year to be paid by the lessee to the lessor, in equal quarterly payments, in respect of such residue. The lessee is by force of the expropriation relieved from his covenant to build on the land expropriated; and his rent being reduced the damages which he will otherwise sustain are not considerable. There is evidence of what, in the opinion of some of the witnesses, could have been made from the cultivation of the lands in question and by building a house thereon; but in making such estimates witnesses are very apt to overlook how much any such return is due to the capital and energy employed, and to lose sight of the fact that there are other lands equally available for cultivation.

On the sum of two thousand seven hundred and fifty dollars interest at six per centum per annum will be allowed from the 15th of May, 1899. Of this sum and interest the defendant Roland Stuart will be paid one hundred dollars and interest from that date, and in addition a sum that will equal the amount of rent, in excess of fifty dollars per annum that has since that date accrued due and been paid by him, with interest on such excess from the dates when the same was paid.

The balance of the amount mentioned and interest will be paid to the defendant Cecilia Eliza Young, upon her undertaking to reduce the rent payable under the lease mentioned to the sum of fifty dollars per annum payable quarterly as before, and upon her giving the Crown a good and sufficient acquittance for such compensation money and damages.

There will be the usual judgment and declaration as to the title to the lands mentioned in the infor-

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mation being vested in the Crown, and the defendants will be allowed their costs.

*Judgment accordingly.*

Solicitors for the plaintiff: *Langley & Martin.*

Solicitors for the defendant Young: *Drake, Jackson & Helmcken.*

Solicitors for the defendant Stuart: *Davie, Pooley & Luxton.*

1902

Jan. 15.

IN THE MATTER OF THE PETITION OF RIGHT OF

JAMES ROSS AND WILLIAM McKENZIE ..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Customs duties—Importation of steel rails—Return of duties paid under protest—Interest—Law of Province of Quebec.*

The suppliants had imported at different times during the years 1892-1893 large quantities of steel rails into the port of Montreal to be used by them as contractors for the construction of the Montreal Street Railway. The Customs authorities claimed that the rails were subject to duty, and refused to allow them to be taken out of bond until duties, amounting in the agregate to the sum of $53,213.54, were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council of the case of *The Toronto Railway Company* v. *The Queen* ([1896] A. C. 551), and some time in the year 1897 the Customs authorities returned the amount of the said duties to the suppliants. The suppliants claimed that they were entitled to interest on the same during the time it was in the hands of the Crown, and they filed their Petition of Right therefor.

*Held*, that as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec.

2. That on the particular question as to interest at issue in this case the law of the Province of Quebec is the same as the laws of the other Provinces of the Dominion.

3. That as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed it could not be made liable by the institution or commencement of an action. *Lainé* v. *The Queen* (5 Ex. C. R. 128), and *Henderson* v. *The Queen* (6 Ex. C. R. 39) distinguished.

*Algoma Central Railway Co.* v. *The King* (*ante* p. 239) referred to.

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Argument of Counsel.

PETITION OF RIGHT for interest upon moneys wrongfully exacted for customs duties at the port of Montreal, P.Q., and subsequently returned to the suppliants.

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

June 17th, 1901.

The case was heard at Ottawa.

*I. F. Hellmuth* for the suppliants: We submit that under the decisions of the Supreme Court of Canada and the Privy Council we are entitled to interest. In *The Queen* v. *Henderson* (1) the Supreme Court decided that interest was recoverable against the Crown without contract therefor, and their lordships of the Privy Council in *The Toronto Railway Company* v. *The Queen* (2) decided also interest should be allowed to the suppliants, who demanded it in the petition. I do not think that the case of *Page* v. *Newman* (3) enunciates a rule at all applicable to this case, because interest was there sought to be obtained in respect of a debt secured by a written instrument. (See the opinion of this case expressed by Lords Herschell and Watson in *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (4). *Page* v. *Newman* is only authority for the proposition that where no interest is provided for upon a written instrument you cannot get interest in such a case by way of damages. In the case of *The Caledonian Railway Co.* v. *Carmichael* (5) Lord Westbury held that where money has been wrongfully withheld, interest is recoverable. (He also cited *Webster* v. *British Empire Life Ins. Co.* (6); *Marsh* v. *Jones* (7); *In re Metropolitan Coal Con-*

(1) 28 S. C. R. 425.
(2) Unreported, *quoad* this question.
(3) 9 B. & C. 378.
(4) [1893] A. C. 440, 441.
(5) L. R. 2 H. L. Sc. Ap. 56.
(6) 15 Ch. D. 169.
(7) 40 Ch. D. 563.

*sumers Co.*: ex parte *Wainright* (1). *In re Gosman* (2); *Attorney-General* v. *Partington* (3); *Rodger* v. *Le Comptoir D'escompte de Paris* (4); *Bower* v. *Mitford* (5); *Turner* v. *Maule* (6).

We submit that the Crown is in the same position as the subject in respect of liability to pay interest on money wrongfully withheld.

*A. Saunders* followed for the suppliants, citing *Mayne on Damages* (7); *Grand Trunk Railway Co.* v. *The Queen* (8).

*E. L. Newcombe K.C.*, for the respondent, relied upon the cases of *The London, Dover & Chatham Railway Co.* v. *The South Eastern Railway Co.* (9) and *In re Gosman* (10) as to interest. Upon the question of the non-liability of the Crown to pay damages for the withholding of moneys or property from the subject, he cited *Julien* v. *The Queen* (11); *Tobin* v. *The Queen* (12), and *Rishton* v. *Grissell* (13).

THE JUDGE OF THE EXCHEQUER COURT now (January 15th, 1902) delivered judgment.

For the reasons stated in the case of *The Algoma Central Railway Co.* v. *The King* (14), which without repeating them, I desire to make, in part, my reasons for the judgment about to be given, I am of opinion that the Crown is not liable for the interest claimed in the petition of right filed in this case.

As the duties on which interest is claimed were paid at the port of Montreal, it is contended, and I think rightly, that the case is to be determined by the

(1) 59 L. J. Ch. 281.
(2) 17 Ch. D. 772; 29 W. R. 14 and 793; 45 L. T. N. S. 267.
(3) L. R. 4 H. L. 100.
(4) L. R. 3 P. C. 465.
(5) 3 L. T. N. S. 575.
(6) 18 L. J. Ch. N. S. 454.
(7) 6th ed. 165.
(8) 2 Ex. C. R. 132.
(9) [1893] A. C. 429.
(10) 17 Ch. D. 772.
(11) 5 Ex. C. R. 238.
(12) 16 C. B. N. S. 353.
(13) L. R. 10 Eq. 393.
(14) *Ante* p. 239.

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law of the Province of Quebec, but on the particular question at issue the law of that province is, I think, the same as the law of the other provinces of the Dominion.

In the case of *St. Louis* v. *The Queen* (1) the suppliant was allowed interest on his claim from the commencement of his action. In accordance with the rule adopted in that case interest was allowed in the case of *Lainé* v. *The Queen* (2), and in *Henderson* v. *The Queen* (3). The latter case was brought to recover the value of goods sold and delivered, and on appeal to the Supreme Court it was held by the majority of the court that the plaintiffs were entitled to interest from the commencement of the action on the amount they recovered (4). By Article 1067 of the Civil Code of Lower Canada a debtor is put in default by the commencement of a suit, or by a demand in writing, and by Article 1077 damages to consist of interest may be allowed from the time of the debtor's default. By the 9th Article of the Code it is provided, in accordance with a well settled rule that no Act of the legislature affects the rights or prerogatives of the Crown unless they are included therein by special enactment. By the 6th Article of the Code the law of Lower Canada is to be applied whenever the question involved relates, among other things, to public policy and the rights of the Crown, and in all cases specially provided for by the Code. In the case of *The Exchange Bank of Canada* v. *The Queen* (5), it was held that the Crown is bound by the two Codes of Lower Canada. The proposition is stated in general terms and without any qualification, but it is probable that it should be read subject to the question then under consider-

(1) 25 S. C. R. 665.
(2) 5 Ex. C. R. 128.
(3) 6 Ex. C. R. 39.
(4) 28 S. C. R. 425.
(5) 11 App. Cas. 164.

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ation as a decision that in respect of the subject of priorities, which it is said is exhaustively dealt with by the Codes, the Crown is bound by them, and that in regard to other provisions of the Codes the question as to whether the Crown is bound is not concluded. But that is a matter that need not now be considered; for *Henderson's case* is an authority binding on this court that the Crown is, to the extent at least to which that case goes, bound by Articles 1067 and 1077 of the Civil Code.

In the present case, however, the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought, and there is no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not, as I think it was not, liable for the interest now claimed, it could not be made liable by the institution or commencement of an action.

The judgment is that the suppliants are not entitled to any portion of the relief sought by the petition, which is dismissed with costs.

*Judgment accordingly.*

Solicitors for suppliants: *Kingsmill, Hellmuth, Saunders & Torrance.*

Solicitor for respondent: *E. L. Newcombe.*

1901
Nov. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF FRANCES AMELIA HOGABOOM, GEORGE A. CASE AND CHARLES MILLAR, EXECUTRIX, EXECUTORS AND TRUSTEES OF GEORGE R. HOGABOOM, DECEASED... } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

AND

ANDREW S. KIRKPATRICK, ONE OF THE CREDITORS OF THE CENTRAL BANK OF CANADA, AND EDWARD STRACHAN COX, ONE OF THE SHAREHOLDERS AND CONTRIBUTORIES OF THE SAID BANK, PARTIES ADDED BY ORDER OF THE COURT TO REPRESENT RESPECTIVELY THE CREDITORS AND THE SHAREHOLDERS AND CONTRIBUTORIES OF THE SAID BANK.

*Insolvent bank—Winding-up Act — Sale of unrealized assets—Set-off—Funds in hands of Receiver-General—Estoppel.*

Where moneys belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General as unadministered assets in the case of the insolvency of a Bank in proceedings under *The Winding-Up Act*, (R. S. C. c. 129) and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund,—

*Held* that if it was clear that the matter had been really determined, effect should be given to the estoppel; but that where to give effect to it would work injustice, the court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision.

In this case there was no estoppel, and a reference to the registrar was directed to ascertain what proportion of the fund in the hands of the minister properly belonged to the suppliants. The rule as to estoppel stated by King J. in *Farwell* v. *The Queen* (22 S. C. R. 558) referred to.

2. One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount

which he had at his credit in the Bank at the date of its insolvency. It appeared that at the time of the Bank's insolvency certain of its debtors had at their credit in the Bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General.

*Held*, that the suppliants were not entitled to such indemnity.

PETITION OF RIGHT for the recovery of moneys in the hands of the Receiver-General of Canada by virtue of proceedings taken to wind up the affairs of the Central Bank of Canada under *Revised Statutes of Canada*, chapter 129.

May 17th, June 6th and 7th, 1901.

The case was heard at Toronto.

*F. Arnoldi, K.C.*, for the suppliants, contended that they had no recourse against the liquidators for not making the reductions by way of set-off in favour of the suppliants. That the suppliants were entitled to these reductions being made in their favour is undoubted, but the liquidators having been discharged by the competent authority therefor, we are in no position to re-open the matter against them. Our release is no bar to the recovery of moneys collected by the liqidators for our use and not accounted for by them to us. We say that we have shown that in the fund in the Receiver-General's hands are moneys belonging to us beyond all doubt. Hence we have brought our petition. (He cited *Schofield* v. *Lockwood* (1); *Clark* v. *Justin* (2); *Wood* v. *Doris* (3); *Annesley* v. *Annesley* (4); Ex parte *Symonds* (5); *Knapping* v. *Tomlinson* (6); *Olley* v. *Fisher* (7); *Delap* v. *Charlebois* (8).)

(1) 33 L. J. N. S. 106.
(2) 16 Ont. R. 68.
(3) 11 Ex. 493.
(4) 31 L. R. Ir. 457.
(5) Cox's Eq. Cas. 200.
(6) 18 W. R. 684.
(7) 34 Ch. D. 367.
(8) 22 S. C. R. 221.

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Argument of Counsel

*A. H. Marsh, K.C.*, for the creditors and contributories, (added parties):

The suppliants are estopped by the proceedings held in the High Court. The moneys which had been paid out to them were ordered to be returned into court by them, and they are now in the hands of the Receiver-General for the benefit of the creditors of the bank. (He cited *Shoe Machinery Co.* v. *Cutlan* (1); *Greathead* v. *Bromley* (2); *Barber* v. *McQuaig* (3); *Routledge* v. *Hislop* (4); *Flitters* v. *Allfrey* (5); *Alison's Case* (6); *The Queen* v. *Hartington* (7); *Houston* v. *Sligo* (8); *In re Hallett's Estate* (9); *In re Hallet & Co.* (10); *Hogaboom* v. *Receiver-General of Canada* (11); *Jack* v. *Jack* (12); *Williams on Executors* (13).)

*F. E. Hodgins*, for the Crown:

If it is true that the suppliants are estopped on their petition by reason of the judgment of the High Court, then the creditors and contributories of the Bank would have been entitled to the money claimed. (He cited *In re The Central Bank of Canada* (14). But if it is too late for them to recover them, then, possibly, the moneys should be paid to those who have not received dividends or were not considered in the winding-up proceedings.

*F. Arnoldi, K.C.*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (November 2nd, 1901) delivered judgment.

The suppliants, by their petition of right, claim to be entitled to a fund now in the hands of the Minister

(1) [1896] 1 Ch. 667.
(2) 7 T. R. 455.
(3) 31 Ont. R. 593.
(4) 2 El. & El. 549.
(5) L. R. 10 C. P. 29.
(6) L. R. 9 Ch. 24.
(7) 4 E. & B. 780.
(8) 29 Ch. D. 448.
(9) 13 Ch. D. 696.
(10) [1894] 2 Q. B. 237.
(11) 28 S. C. R. 192; 24 Ont. A. R. 470.
(12) 12 Ont. A. R. 476.
(13) 9th ed. pp. 1207, 1208.
(14) 30 Ont. R. 320.

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of Finance and Receiver-General of Canada, which was, in the matter of the winding-up of the Central Bank of Canada, paid over to him under *The Winding-Up Act* and certain orders of the High Court of Justice of Ontario, and which he now holds subject to the provisions of that Act. By the forty-first section of the Act it is provided that if after payment over to the Minister of Finance, the money is claimed, it shall be paid to the person entitled thereto. The amount of the fund now held by the Minister is stated to be $3,332.19, or thereabouts, and one of the creditors of the Bank has by order of the court been added to represent in this proceeding the whole body of the creditors, and one of the shareholders and contributories to represent the class to which he belongs.

The late George R. Hogaboom was the purchaser of the unrealized assets of the said Bank as they existed on the 22nd day of July, 1891. It was one of the conditions of sale that the liquidation should proceed in the meantime and that the purchaser of the assets should be bound by the acts of the liquidators in respect to any asset up to the acceptance of the tenders. Hogaboom, by his tender, offered $44,500 cash for all the assets of the Bank as they were on the 22nd of July, 1891, and to accept the cash received by the liquidators after that date in satisfaction of what it was received for. There were, it appears, some differences between the liquidators and Hogaboom as to the acceptance of this tender; but these differences were accommodated and the sale to Hogaboom of the unrealized assets of the Bank, with certain exceptions not now material, was approved and confirmed by the Master-in-Ordinary, and by the Chancellor of Ontario. By these orders (the order of the Master-in-Ordinary being made on the 3rd of October, 1891, and that of the Chancellor on the 23rd of October of the same

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year) Hogaboom was declared entitled to deduct from the amount of his tender for the moneys received by the liquidators between the 22nd day of July, 1891, and the 9th day of September, 1891, the sum of $2500, being part of the sum of $4819, the total amount of such moneys so received by the liquidators between the dates mentioned; and also to deduct therefrom all other moneys over and above the latter sum received and to be received by the said liquidators after the 22nd of July, 1891, and until the transfer of the said assets. It was also, among other things, ordered that the assets of the Bank, so purchased by Hogaboom, should be vested in him "subject to the encumbrances, "if any, existing, or the equities and conditions attach- "ing to any particular asset or assets on the 22nd of "July, 1891." On the 9th and 13th of October, 1891, the following correspondence passed between the solicitors for the liquidators, and the purchaser's solicitors:

"TORONTO, CANADA, October 9th, 1891.

"MESSRS. MORPHY, MILLAR, LEVESCONTE & SMYTH,

"Barristers, &c., Toronto.

*Re Central Bank & Hogaboom.*

"DEAR SIRS,—The amount of purchase money to be "paid by Mr. Hogaboom is $40,331.30 made up as fol- "lows:

| | | |
|---|---|---|
| "Purchase money, less deduction for cash received by the liquidators up to the 9th September.. | | $42,000 00 |
| "The liquidators have received since the 9th of September, from | | |
| "Ardagh.....$ | 50 00 | |
| "Simpson ..... | 4 00 | |
| "Jarmyn ..... | 41 25 | |
| "J. R. Roustead, *re* Webb..... | 61 71 | |

| | | |
|---|---|---|
| "Cordelia Young, interest..... | 60 49 | |
| "A. G. Brown..... | 29 25 | |
| "Wishert..... | 25 00 | |
| "McMillan..... | 4 00 | |
| "and there is in our hands received since the 9th September from | | |
| "R. H. Young..... | 1,390 00 | |
| "Cockburn..... | 3 00 | |
| "Total..... | | 1,668 70 |
| "Leaving..... | | $40,331 30 |

"For this amount we would be pleased to receive "your cheque at once, less the $4,000 received today.

Yours truly,

(Sgd.) MEREDITH, CLARKE, BOWES & HILTON."

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"TORONTO, 13th October 1891.

"MESSRS. MEREDITH, CLARKE, BOWES & HILTON,
"Barristers, &c., City.

"*Re Central Bank & Hogaboom.*

"DEAR SIRS,—Enclosed we beg to send you Mr. "Hogaboom's marked cheque for $36,331.30 payable "to Mr. Henry Lye and Mr. W. H. Howland, liqui- "dators of the bank, *re* purchase money Central Bank "assets. We send this cheque as being the balance of "the amount claimed by you in your letter to us of "October the 9th. We think the cheque is for more "than you are entitled to as the balance of the purchase "money, and that you have not given credit to us for "all the amounts received, and this cheque is sent "without prejudice to that contention, the right being "hereby reserved to us to claim that by this cheque "we have overpaid you, and that we are entitled to a "refund of the overpayment.

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"Kindly acknowledge receipt of the cheque upon "these terms, and we shall not expect you to use it "unless these terms are assented to.

"Yours truly,

(Sgd) MORPHY, MILLAR, LEVESCONTE & SMYTH."

"Enclosed cheque $36,331.30."

It is now alleged for the suppliants, and it appears to be true, that the sum of $1668.70 mentioned, was not all the moneys received by the liquidators after September 9th on account of the assets that Hogaboom had purchased. It is claimed that other sums amounting in all to $1201.10 were so received and applied by the liquidators to the purposes of the liquidation. The amount is not, it seems to me, satisfactorily established, but that circumstance will be referred to again. For the present it may be taken to be true that the liquidators received on Hogaboom's account and for his use, in addition to the sums of $4819 and $1668.70 mentioned, certain other moneys for which they did not account to him. These moneys were put to their credit as liquidators of the Bank and increased by so much the balance left in their hands, and the balance or fund now in the hands of the Minister of Finance. This is one ground on which the suppliants lay claim to that fund.

Then it happened that certain debtors of the Bank, whose debts Hogaboom purchased, had at the time of the Bank's insolvency various sums at their credit in the Bank's books, which they would on payment or settlement of such debts have a right to apply in reduction thereof. The suppliants contend that the liquidators should have made good to the purchaser such reductions, and because they did not do so the suppliants should now be indemnified out of the fund in question. But clearly that is not so. Each of such

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debts was purchased subject to the equities and conditions attaching to it; and one of such equities or conditions was undoubtedly that the debtor had a right to set off against his debt the amount which he had at his credit at the Bank at the date of its insolvency. The contention has no merits. It does not appear that the liquidators did anything to prejudice the recovery of any amount for which any such debtor was liable; and even if they had, that consideration could not be relied upon here. If any such thing had happened, if the liquidators had committed any such wrong to the prejudice of the suppliants, their remedy would have been by an action or proceeding against the liquidators. I expressed myself to that effect at the argument of this case, and I see no reason to doubt the correctness of the conclusion then arrived at. But the other ground on which the petition is supported stands in a different position. The suppliants' money, collected by the liquidators, has been applied to the purposes of the liquidation. It went to increase the balance in hand to the credit of the estate at the conclusion of the proceedings in liquidation. The fund held by the Minister of Finance is larger by the amount of such money than it otherwise would have been, and I see no reason why such fund may not now be taken to be in part composed of such money.

Why then are not the suppliants entitled to that extent to such fund? Why may they not now have what is their own? Two reasons are set up. First it is said that the suppliants have themselves released the Bank and the liquidators from the claim now put forward. Among the many controversies that have arisen in respect of the purchase by Hogaboom of the unrealized assets of the Central Bank was one about the transfer to him of such assets. That controversy, with some other matters, was settled by an agreement

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bearing date the 22nd of July, 1892, by minutes of settlement made between the solicitors of the parties of the 3rd of March, 1893, and an order of the Chancellor of Ontario made on the 19th of June, 1893. The agreement, after reciting that "in the transfer of the "unrealized assets of the Central Bank of Canada to "George R. Hogaboom, the purchaser thereof, the "liquidators of the Bank have not been able to transfer "certain of the properties, notes, bills of exchange, and "choses in action mentioned in the schedule of the "said assets filed, by reason of the same not being "owned by or in the possession of the said Bank or "the said liquidators," proceeds as follows:

"Therefore in consideration of fifty dollars paid to "me by the liquidators of the Central Bank I hereby "release, discharge and abandon all claim against the "said Bank and the liquidators thereof for damages, "compensation or otherwise in respect of the non-"delivery to me of the said property, notes, bills of "exchange, mortgages, deeds, other securities, or evi-"dence of securities or choses in action mentioned in "the schedule annexed to the order vesting the unreal-"ized assets of the said Bank in me."

In the 'Minutes of Settlement' the following provision occurs:

"Hogaboom to be paid $50 as agreed on in full of all "claims against the liquidators of the Bank in respect "of assets not handed over, and the release already "executed and delivered to be and remain binding."

The order of the learned Chancellor follows in this respect the 'Minutes of Settlement' and is expressed in similar terms. The fifty dollars mentioned was eventually paid by a cheque dated September 26th, 1892, given by the liquidators expressed on its face to be "in full of agreement 22nd July, 1892." This cheque had been substituted for one of like amount

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and date which Hogaboon had refused to accept, and which purported to be " in full of settlement of all " claims against the Central Bank of Canada or the " liquidators thereof, excepting only the claim for books " and papers."

Now it is contended that any claim Hogaboom had to any moneys which the liquidators had collected on his account was included in this discharge. But that does not appear to me to be so. It is certain that this claim was not one of the matters then in controversy; and it is not covered by the terms of the release or of the minutes of settlement, or of the order to which reference has been made. It was a claim for money received from unrealized assets for Hogaboom's use and benefit, and not in any sense a claim for not handing over any such asset.

Then, in the second place, it is said that although it is true that the liquidators did, in addition to the sums of $4,819 and $1,668.70 accounted for, receive other moneys for Hogaboom's use and benefit which were not accounted for, but placed to the credit of the Bank's account in the liquidation proceedings, yet that must now be taken not to be true because in proceedings between the same parties it has been so decided. And that brings us to another controversy, and to another phase of the litigation that has taken place in reference to this fund. The story of this litigation is a long one and somewhat involved. But I shall attempt to be brief, omitting whatever does not appear to me to be material to a just disposition of the issue now depending. The liquidators of the Bank passed their accounts, paid the balance in hand into the High Court of Justice for Ontario and were discharged. Then, in succession to them, Mr. George S. Holmestead, the accountant of the Supreme Court of Ontario, was appointed liquidator, but nothing, I

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think, now turns on that. In the end there was a sum left unadministered, and the suppliants obtained two orders of court for the payment out to them of this balance. The orders were made on the representation that such balance formed part of the unrealized assets of the Bank. Knowledge of this having come to the Minister of Finance, an application was made on his behalf to have the orders set aside and the money repaid into court. In the litigation that ensued three principal questions, one of fact and two of law, were in issue: (1) Was this balance part of the unrealized assets of the Bank that Hogaboom purchased, and the representation on which it had been paid out to the suppliants true or not? And had the court authority (2) either on the application of the Minister of Finance, or (3) of its own motion, to set aside the orders and to direct the suppliants to repay the money into court? These issues were determined against the suppliants; the moneys that had been wrongfully taken out of court were with interest returned thereto; and thereafter they came into the hands of the Minister to be held, as we have seen in accordance with the provisions of *The Winding-Up Act*. It is possible that when the suppliants applied to have this balance in court paid out to them they had some extraordinary notion that the purchaser of the unrealized assets had a claim to any balance of the estate not administered, no matter where it came from. But such a view would of course be found too absurd for serious litigation. So they set up a claim to retain the moneys that had been paid out to them on, so it appears, the two grounds on which they now rely and which have already been discussed. And there are, in the reasons that more than one learned judge gave for the judgment that was pronounced, expressions of opinion that the suppliants were not entitled to any

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part of the moneys that had been paid out to them. But that expression of opinion does not appear to have been absolutely necessary to support the judgment that was given. Beyond question the moneys obtained from the court were not as a whole part of the unrealized assets of the Bank; they had been obtained on a representation that was not true, and it was clear that the suppliants ought to put them back. It would, it seems to me, have made no difference if the suppliants had made clear to the court what they appear to have failed to make clear, but which now is said to be clear, namely, that this fund was larger than it otherwise would have been because in it were included certain moneys, not accounted for, that the liquidators had received for the use and benefit of the suppliants. In any event it seems to me that the order of the court must have been that as the money had been improperly obtained from the court, it should be paid back. If after that the suppliants had any just claim to any part of it they should have established the claim in a proper proceeding taken for that purpose. The question is not free from difficulty. The rule as to when a party is concluded by a former judgment was stated by Mr. Justice King in *Farwell* v. *The Queen* (1), in the following terms:

" Where the parties (themselves or privies) are the " same, and the cause of action is the same, the estop- " pel extends to all matters which were, or might " properly have been, brought into litigation. Where " the parties (themselves or privies) are the same, but " the cause of action is different, the estoppel is as " to matters which, having been brought in issue, " the finding upon them was material to the former " decision."

(1) 22 S. C. R. at p. 558.

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This rule as to estoppel in such cases is one that in general tends to the furtherance of justice, though perhaps in a particular case it might appear to work injustice. But while that would afford no reason for a refusal to enforce it in the particular case, it would seem to suggest that the court should be very certain that the case is within the rule if to enforce it would be an injustice to any one. Now it does seem to be right and but common justice that if moneys that belonged to the suppliants have gone to form part of the fund in qustion, such moneys should to that extent be paid out to them, and that it would be a great injustice to deny them what is really and in fact their own. And I should, I think, resolve in their favour any doubt I have on the question of estoppel. But doing that I shall take precautions that no mistake is made, and that they do not get anything to which they are not honestly entitled.

Since the hearing of the case an application has been made on the part of the suppliants to submit further evidence to establish the amount that they are entitled to, but I think it would be more convenient to refer the question to the Registrar of the court for an enquiry and report. It is one that ought to be capable of exact and conclusive determination. The question to be so referred will be: Whether in addition to the two amounts of $4,819 and $1,668.70 that the liquidators of the Central Bank accounted for to Mr. Hogaboom, the purchaser of the unrealized assets of the bank, they collected between the 22nd day of July, 1891, and the date of the transfer to him of such assets, any other sum or sums on his account and for his benefit, not accounted for to him but applied to the purposes of the liquidation, and if any such sum or sums were so collected and applied, the amount thereof?

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The first part of the question is referred for greater certainty, and with the object that if further enquiry should show that the liquidators accounted to Mr. Hogaboom for all the moneys they received to his use, there may be no question of that issue having been disposed of at the present time.

Upon the Registrar's report being filed any party hereto may apply for directions as to the judgment to be entered, as well as to costs.

*Judgment accordingly.*

Solicitor for the suppliants: *W. N. Ferguson.*

Solicitor for the respondent: *E. L. Newcombe.*

Solicitors for the added parties: *Marsh & Cameron.*

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WILLIAM ARTHUR KEMP .....PLAINTIFF;

AND

W. W. CHOWN & COMPANY AND THE W. W. CHOWN COMPANY, LIMITED.....DEFENDANTS.

*Patent of invention — Infringement — Lantern — Want of element of inventiveness.*

This was an action for infringement of Letters-patent No. 69,088 for an improvement in lanterns, the globes of which could be lifted vertically for the purpose of lighting the lanterns. One question in issue was as to whether or not in the idea or conception that if the bail of the lantern was made of the right length to drop under the guard or plate of the globe, the bail would hold up the globe while the lantern was being lighted, or in the working out of this idea or conception, there was invention to sustain a patent.

*Held*, that there was no invention.

AN action to restrain the infringement of the Canadian Letters-Patent No. 69,088 for improvements in lanterns, and for damages.

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

December 12th and 13th, 1902.

The case was heard at Toronto.

*C. A. Masten*, for the plaintiff, contended that the element of "invention" was present in the plaintiff's patented device. The plaintiff had taken an old part of an industrial article and applied it to a new use. The invention consisted in endowing the bail of a lantern with a new quality or function, namely, making it do duty as a lever to lift the globe of the lantern vertically for the purpose of lighting the lamp. He

cited the following cases: *Vickers* v. *Siddell* (1); *Longbottom* v. *Shaw* (2); *Gadd* v. *Manchester* (3); *Edison Bell Telephone Corp.* v *Smith* (4); *Fawcett* v. *Homan* (5); *Rickmann* v. *Thierry* (6); *Barbed Wire Patent* (7); *Lein* v. *Myers* (8); *Fowell* v. *Chown* (9); *Smith* v. *Goldie* (10); *Brickill* v. *New York* (11).

*C. A. Duclos* followed for the plaintiff, citing: *Neilson* v. *Harford* (12).

*W. B. Raymond*, for the defendants, argued that there was no "invention" involved in employing the bail for the purpose described. He cited the following cases: *Clarke* v. *Adie* (13); *Wisner* v. *Coulthard* (14); *Crompton* v. *Belknap Mills* (15); *Carter* v. *Hamilton* (16); *Harrison* v. *Anderston Foundry Co.* (17); *Deeley* v. *Perkes* (18).

*B. Osler* followed for the defendants, citing *The Patent Act*, secs. 7, 16 and 47.

*C. A. Masten* replied.

THE JUDGE OF THE EXCHEQUER COURT now (January 31st, 1902), delivered judgment.

The case has to do with one feature only of lanterns, the globes of which may be lifted vertically for the purpose of lighting them, and it presents two questions of fact and one of law:

1. Whether in the idea or conception that if you make the bail of the lantern of the right length to drop under the guard or plate of the globe, the bail will hold up the globe while the lantern is being lit,

(1) 7 Cutl. R. P. C. 292.
(2) 8 Ibid. 333.
(3) 9 Ibid. at p. 525.
(4) 11 Ibid. at p. 389.
(5) 13 Ibid. at p. 398.
(6) 14 Ibid. at p. 109.
(7) 143 U. S. at p. 283.
(8) 97 Fed. Rep. 607.
(9) 25 Ont. R. 71.
(10) 9 S. C. R. 46.
(11) 5 B. & Ard. 544.
(12) 1 Web. P. C. 295, 342.
(13) L. R. 10 Ch. 667; 2 App. Cas. 315.
(14) 22 S. C. R. 178.
(15) 3 Fish. P. C. 536.
(16) 3 Ex. C. R. 351 · 23 S. C. R. 172.
(17) 1 App. Cas. 574.
(18) [1896] A. C. 496.

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or in the working out of that idea or conception there is invention to sustain a patent?

2. Whether such a device was, at the time of the plaintiff's alleged invention, new; and

3. Whether the defendants are in any case entitled to make use of the alleged invention, having, before the issue of the patent therefor and apart altogether from the plaintiff, acquired and enjoyed the right to manufacture lanterns with bails adapted to hold up the globes in a manner similar to that adopted by the plaintiff?

To sustain the action it is necessary to answer the first question and the second in the affirmative, and the third in the negative.

I think the first question should be answered in the negative. Possibly the same answer should be given to the second question, but it is not necessary, in view of the answer given to the first, to determine that, or to express any opinion on the question of law that has been raised.

There will be judgment for the defendants.

*Judgment accordingly.*

Solicitors for plaintiff: *Masten, Warren, Starr & Spence.*

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

IN THE MATTER OF THE PETITION OF RIGHT OF CATHERINE McGEE.. } SUPPLIANT; 1902 Jan. 21.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Right of way over Crown property—Easement—Prescription C. S. U. C. c. 88, 37, 40 and 44—Possession—Predecessors in title.*

The provisions of chapter 88 of *The Consolidated Statutes of Upper Canada*, sections 37, 40 and 44, were in force at the time of Confederation and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada.

2. Under such provisions, where in Ontario one enjoys an easement as against the Crown and over Crown property, within the limits of some town or township, or other parcel or tract of land duly surveyed, and laid out by proper authority, for a period of twenty years he thereby establishes a right by prescription in such easement; and if the Crown interferes with the enjoyment of it by expropriation proceedings the owner is entitled to compensation.

3. To establish the easement by prescription it is not necessary to show that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription.

PETITION OF RIGHT for damages for the injurious affection of lands arising from the construction of certain works in the Iroquois Canal.

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

October 17th, 1901.

*D. B. Maclennan, K.C.*, for the suppliant, cited the following cases: *Grassett* v. *Carter* (1); *Stevenson* v. *McHenry* (2); *Smith* v. *Millions* (3); *Harrison's Muni-*

(1) 10 S. C. R. 105. (2) 16 Ont. R. 139.
(3) 15 Ont. R. 453.

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*cipal Manual* (1); *Consolidated Statute of Upper Canada*, chap. 88, sec. 37; *Great Western Railway Co.* v. *Rogers* (2); *Turnbull* v. *Merriam* (3); *Plumb* v. *McGannon* (4); *Harris* v. *Smith* (5); *Fielder* v. *Bannister* (6). 29 & 30 Vict. (Can.) c. 51, sec. 322; 36 Vict. (Ont.) c. 48, sec. 423; 55 Vict. (Ont.) c. 42, sec. 545.

*A. Johnston*, for the respondent, relied on *Roche* v. *Ryan* (7); *Gooderham* v. *Toronto* (8); *Nash* v. *Glover* (9); *Shea* v. *Choat* (10).

*D. B. Maclennan, K.C.* replied.

THE JUDGE OF THE EXCHEQUER COURT now (January 21st, 1902) delivered judgment.

The suppliant is seized in fee simple of part of village lot numbered 4, in block 8, in the Village of Iroquois, in the County of Dundas and Province of Ontario. By certain works done on and in respect of the Iroquois Canal, a public work of Canada, in the year 1899, this property was injuriously affected, and she brings her petition to recover compensation therefor.

In the deed by which she acquired title to the property, as well as in those by which her two immediate predecessors in title acquired title, the lot of land is described as bounded on the south by Water Street. This street although shown on the plans of the subdivision of the property of which it once formed part, and on the plan of the village, had never been opened or used as a street. Opposite the suppliant's property and adjoining Water Street to the south, and between it and a catch drain, was a narrow strip of land that formed part of that which the Crown had originally

(1) (Biggar's ed.) p. 818.
(2) 29 U. C. Q. B. 245.
(3) 14 U. C. Q. B. 265.
(4) 32 U. C. Q. B. 8.
(5) 40 U. C. Q. B. 33.
(6) 8 Grant 257.
(7) 22 Ont. R. 107.
(8) 19 Ont. A. R. 641.
(9) 24 Grant 219.
(10) 2 U. C. Q. B. at p. 221.

acquired for the purposes of the Iroquois Canal. Then going south you come to this catch drain or Government ditch, as it was called, and across that, and along the north side of the canal was a highway, which on two of the plans in evidence is named King Street, and on one is referred to as Dundas Street or the Queen's highway. When many years ago the canal was constructed, this highway was substituted for one that was closed up by the construction of the canal. Within the limits of the Village of Iroquois it has since been maintained by the village corporation. On the other hand, so far as there is any evidence, it would appear that the ditch or drain adjoining it to the north had been maintained by the Government as part of or incident to the canal.

As has been stated Water Street had never been opened or used. Those whose property was bounded by it occupied it in the same way that they did the lots that they were entitled to; and they obtained access to King Street, the highway along the north bank of the canal, by bridges thrown over the Government ditch. That was the way in which the suppliant, before the execution by the Crown of the works complained of, had access to and from her property. The works complained of consisted in part of the raising of the north bank of the canal, including King Street where it was opposite to the suppliant's property; and the deepening of the Government ditch. In doing that work the bridges that the suppliant and others used to cross the ditch were removed by authority of the Crown, and the raising of King Street makes it practically impossible to get access to that street from the suppliant's property even if she were permitted to construct another bridge, which she is not permitted to do. To remove or mitigate the inconvenience occasioned to the suppliant and her neighbours by destroying the

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access by bridges from their properties to King Street' the Crown proposed to open up and grade Water Street, and has done that for a short distance from John Street with which it communicates. Water Street is only twenty-five feet wide, and adding the strip of land that belonged to the Crown north of the Government ditch, it would only be about thirty-three feet wide. But narrow as it is, it would be a convenience to the owners of property abutting on it to have it opened up and graded. And it would give access to these properties. There is, however, some question as to the right of the village council to open up a street as narrow as Water Street is, and the suppliants, and perhaps others, taking advantage of that question have hitherto been able to prevent it being opened up except for the short distance mentioned. They do not, I infer, wish any amelioration of the inconvenience to which, as owners of land abutting on Water Street, they are subjected, not at least until after the question of compensation has been settled.

One difficulty that the case presents is to determine how far and to what extent the Crown has dedicated King Street to the public use as a highway. That the Crown may, in the Province of Ontario, dedicate public property to public use as a highway is clear from the instructive judgment in *The Queen* v. *Moss* (1); and that there has been some such dedication of King Street in the present case admits, I think, of little doubt. The evidence is very meagre and it is not perhaps possible to say whether the street and all to the north of it, including the ditch or drain and the narrow strip of land adjoining the ditch, has been so dedicated, or only the travelled portion which has been maintained by the village council. If the former inference is the proper one it would follow, I think, that the

(1) 26 S. C. R. at p. 332.

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suppliant had, as an incident of the ownership of the land in question, a right of access across the unopened street to King Street, which right of access has been interfered with in a manner that would support this petition and sustain a claim to compensation. But if on the other hand the true inference to be drawn from the facts is that the Crown retained the possession of the Government ditch and the strip of land adjoining it to the north, as part of the public work, and that there was no dedication thereof to the use of the public, then the question to be determined is whether at the time the access by a bridge from the suppliant's property to King Street was destroyed, she had acquired any such right of access by prescription. If she had, it has undoubtedly been interfered with and the petition will lie. If she had not acquired any access in that way, then the petition would fail.

The suppliant had two bridges over the Government ditch, one for carriages, the other a foot bridge. It is not clear when the latter was constructed; but the former was, it appears, built in the spring or summer of 1878. From that time until the summer of 1899, when it was removed, it had been used without interruption by the occupiers of the land now claimed to be injuriously affected. One Harvey Roberts built the bridge and used it until 1887, when he conveyed the land and premises, in connection with which it was so used, to Annie Lavis. Annie Lavis used it until 1896 when she conveyed to the suppliant, who continued to use it until it was removed by the authority of the Government. The user of the bridge was open and so far as appears as a matter of right and without any authority from the Crown.

By the Act of the Province of Canada 10th and 11th Victoria, chapter 5, section 2, it was, among other things, provided that no claim which might lawfully

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be made at common law by custom, prescription or grant to any way, or other easement, to be enjoyed or derived upon, over, or from any land or water of our Lady the Queen, Her heirs or successors, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as therein last before mentioned had been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, should be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to the period of twenty years; but nevertheless such claim might be defeated in any other way by which the same was then liable to be defeated. And where such way or other matter as therein last before mentioned should have been enjoyed as aforesaid for the full period of forty years the right thereto should be deemed absolute and indefeasible, unless it should appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. By the fifth section of the Act it was, among other things, provided that in all pleadings to actions of trespass, and in all other pleadings wherein it would formerly have been necessary to allege the right to have existed from time immemorial, it should be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in the Act as might be applicable to the case, and without claiming in the name or right of the owner of the fee as was usually done. By the eighth section of the Act it was, among other things, further provided that nothing in the Act should extend to support or maintain or be construed to support or maintain any claim to any way or other easement or to any watercourse, or the use of any water to be enjoyed

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or derived upon, over or from any land or water of our Lady the Queen, Her heirs and successors, unless such land, way, easement or watercourse, or other matter, should lie and be situate within the limits of some town or township or other parcel or tract of land duly surveyed and laid out by proper authority. Sections two and five of the statute mentioned were taken from, and correspond to, sections two and five of the Act of the Parliament of the United Kingdom, 2nd & 3rd Wm. 4, c. 71. *Gale on Easements* (1). The provision of section eight occurs in the Canadian but not in the English statute. The Act 10th & 11th Victoria, chapter 5 applied to Upper Canada only. It was re-enacted in the Consolidated Statutes of that Province (2), and was in force there at the time of the union of the provinces. The provisions of this statute were by the 129th section of *The British North America Act*, 1867, continued in force until repealed, abolished, or altered by the Parliament of Canada or the Legislature of the Province of Ontario, according to the authority of the parliament or of that legislature. It will not, I think, be disputed that so far as these provisions affected the rights of the Crown, as represented by the Government of the Dominion, the authority to repeal, abolish, or alter the law was vested in the Parliament of Canada. They were repealed by the Legislature of Ontario in 1877, and re-enacted as part of the Revised Statutes of Ontario, chapter 108 (3). Such repeal was not, however, to be construed to extend to any provision of the Act thereby repealed that related to subjects in regard to which the Parliament of Canada had exclusive powers of legislation (4). Chap-

(1) 7th ed. pp. 180, 184.
(2) C.S.U.C. c. 88, ss. 37, 40 & 44.
(3) 40 Vict. (Ont.) c. 6, s. 6; R. S. O. (1877) pp. LIII and 1045; See also R. S. O. (1887) c. 111, and R. S. O. (1897) c. 133.
(4) 40 Vict. (Ont.) c. 6, s. 7; R. S. O. (1877) p. LIII.

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ter 88 of *The Consolidated Statutes of Upper Canada*, in which the provisions mentioned occur, has been treated by the Parliament of Canada as being within the authority of the Legislature of Ontario, and it has not been in any way affected by any legislation of that parliament (1). No part of it is re-enacted or repealed (2).

With respect to the rights of the Crown, as represented by the Government of Canada, it is in force, and will remain in force until repealed, abolished, or altered by the Parliament of Canada.

Then the question as to whether one who against the Crown has enjoyed an easement for twenty years may claim the protection of the statute is not in the Province of Ontario a new one. It was in *Bowlby* v. *Woodley* (3) decided that he could; and that case should, I think, be followed in the present case. It will of course have been observed that no one of the persons who were in occupation and possession of the land in question occupied it and used the right of way by the bridge to King Street as incident to such occupation and possession for a period of twenty years. It is only by taking the occupation and possession of the suppliant and her two immediate predecessors in title that an enjoyment for a period of twenty years of an easement on the Crown's property can be made out. But the provision as to pleading which has been referred to and which affords, it has been said, a key to the construction of the Act, (*Shuttleworth* v. *LeFleming* (4); *Mounsey* v. *Ismay* (5)) goes, I think, to show that the person who claims the easement may rely upon its enjoyment by previous occupiers, so long as there has been no interruption of the enjoyment. It is sufficient, it appears, "to allege the enjoyment" of the

(1) R. S. C. Appendix No. 1, p. 2325.
(2) R. S. C. Schedule A, p. 2249.
(3) 8 U. C. Q. B. 318.
(4) 19 C. B. N. S. at p. 711.
(5) 3 H. & C. at p. 498.

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easement "as of right by the occupiers of the tenement in respect whereof the same is claimed." In *Bowlby's* case (1), to which reference has been made, the defendant justified by a plea alleging enjoyment of the easement by himself and others as occupiers of the premises to which it was annexed for the full period of twenty years before the commencement of the action. If, then, to an information by the Crown the suppliant could, as it appears she could, have pleaded the enjoyment for a period of twenty years of the easement as a matter of right by her and others, the occupiers of the premises in question, she had acquired a right thereto, an interference with which would sustain her petition in this case.

With reference to compensation the amount claimed is out of the question. It is as much, if not more than the whole property was worth before any works were constructed by the Crown. I have no intention either of allowing the suppliant damages for anything that she would not, but for her own acts, have suffered. In estimating the depreciation in value of her property by reason of what had been done, one must see what reasonable people could do or permit to be done to prevent or mitigate the effects of the acts complained of. I think a sum of three hundred dollars will fully compensate the suppliant for any permanent depreciation in the value of her land, and for all damages to which she is entitled. On the sum of three hundred dollars interest will be allowed from the first of August, 1899, and the suppliant will have the costs of her petition.

*Judgment accordingly.*

Solicitors for the suppliant: *Maclennan, Cline & Maclennan.*

Solicitors for the respondent: *Johnston & Bradfield.*

(1) 8 U. C. Q. B. 318.

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Jan. 21.

IN THE MATTER OF THE PETITION OF RIGHT OF

JAMES McQUADE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Public work—Injurious affection of property—Deprivation of access—Street—Damages.*

By the construction of a public work, a public highway was closed up at a point two hundred and fifty feet distant from the suppliant's property which fronted on the highway. In the first expropriation of land in the neighbourhood, for the public work, no part of the suppliant's property was taken. Afterwards, and during the construction of the public work, a portion of his property was taken for the public work, and on the trial of a petition of right for compensation, the question arose as to whether or not the depreciation of the property by reason of the closing of the street or highway should be taken into account as one of the elements of damage.

*Held*, that it should be so taken into account, first, because it appeared that the depreciation from this cause in fact occurred subsequent to the taking of the land, and secondly, it was a case in which the suppliant was entitled to compensation for the injurious affection of his property by reason of the obstruction of the highway which was proximate and not remote. *Metropolitan Board of Works* v. *McCarthy* (L. R. 7 H. L. 243); *Caledonian Railway Co.* v. *Walker's Trustees* (7 App. Cas. 259); *Barry* v. *The Queen* (2 Ex. C. R. 333) referred to.

PETITION OF RIGHT for damages occasioned by the expropriation of certain lands for the purposes of the Galops Canal, a public work of Canada, and for damages occasion d by the construction of the canal to other lands held therewith.

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

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October 17th, 1901.

The case was heard at Cornwall.

*D. B. Maclennan K.C.*, for the suppliants, cited *Paradis* v. *The Queen* (1); *The Queen* v. *Carrier* (2); *James* v. *Ontario and Quebec Railway Company* (3). He contended that the deprivation of access by the closing up of the street was a matter for compensation under the authorities.

*P. K. Halpin*, for the respondent, contended that the closing up of the street at a point two hundred and fifty feet distant from the suppliant's property was not such an element of damage as the court should consider under the authorities relied on by the suppliant's counsel.

THE JUDGE OF THE EXCHEQUER COURT now (January 21st, 1902) delivered judgment.

The suppliant, by his petition, claims a sum of seventeen hundred dollars and interest for compensation for the value of a piece of land of his taken by the Crown for the Galops Canal, a public work of Canada, and for damages to other lands held therewith occasioned by the construction of the canal. The Crown has tendered the suppliant and offers to pay to him the sum of six hundred dollars for the land taken and the damages occasioned, and the sufficiency of that amount is the issue raised by the pleadings.

The amount is, I think, sufficient if the suppliant is not entitled to anything for the depreciation that will be occasioned to the property in question by the closing of Dundas street on which it fronted. It is the amount at which Mr. Pope and Mr. Thompson, the Government valuators, put the depreciation in value of the property from causes other than the closing up

(1) 1 Ex. C. R. 191. (2) 2 Ex. C. R. 136.
(3) 15 Ont. A. R. 1.

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of this street, and it seems to me that from the standpoint from which they assessed the damages their estimate was sufficiently liberal. I think, however, that the suppliant is entitled to compensation to the whole extent that his property has been depreciated by the taking of a portion of it, and by the construction of the canal, the effect of which is to close up Dundas street at a point distant only two hundred and fifty feet from this property.

The portion of the suppliant's property expropriated was taken by the Crown on the eleventh day of March, 1899. Prior to that date the principal expropriation of land in the neighbourhood for the public work mentioned had taken place, and work on the canal which crosses Dundas street had been proceeding. If no portion of his land had been taken, the suppliant's property would eventually have been depreciated in value from this cause. But such depreciation had not actually occurred at the time a portion of his land was taken. The work of construction which causes the depreciation was in progress but it had not at that time had its natural effect, because with such construction there came a temporary increased demand for houses that tended for the time to maintain land values in the neighbourhood. The full effect of closing the street had not for the reason mentioned become manifest. The value of land taken for a public work, and the damages for injury thereto occasioned by the construction of the work must be assessed as of the time of the taking. But the compensation must be assessed once for all, and the depreciation that will probably arise in the future must be taken into account. In this case there has, I think, been a depreciation in the value of the suppliant's property since a portion of his land was taken, that is fairly attributable to the closing up of Dundas street by the construction of the

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canal, and it seems to me that such depreciation is likely to be more manifest in the future. On the facts of this case this element of damage ought, I think, to be taken into account. Another reason for not excluding it is to be found in the fact that the obstruction of the public highway was at a point near to the suppliant's property. It was nearer than the interference that occurred in either *McCarthy's* case (1), or in the case of *Walker's Trustees* (2), in each of which cases it was held that the plaintiff was entitled to compensation. In the latter case the obstruction of the highway took place at a point two hundred and seventy feet from the plaintiff's mill, and in the former the access to the River Thames was obstructed at a distance of three hundred and seventy-two feet from the premises affected. In this view of the case the suppliant would have been entitled to compensation for the depreciation in the value of his property occasioned by the closing of the street on which it abutted, although no part of his land had been taken. Apart from the taking of land there would have been such an interference with his right to use the highway as would have given a right of action incident to his ownership of the property (3), and where such a right of action would arise the plaintiff is entitled to compensation for the injurious affection of his property. On both grounds mentioned, I think the suppliant is entitled to succeed.

I am of opinion, however, that many of the estimates of depreciation in the value of the property in question are exaggerated and excessive.

I assess the compensation to be paid to the suppliant for land taken and for all damages at eight hundred dollars, for which sum there will be judgment for him,

(1) L. R. 7 H. L. 243.
(2) 7 App. Cas. 259.
(3) See cases cited in *The Queen* v. *Barry*, 2 Ex. C. R. 333.

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with interest from the eleventh day of March, 1899. He is also entitled to his costs.

Some time after the case had been heard an application was made on behalf of the suppliant to submit further evidence as to the date of the expropriation and of the actual obstruction of Dundas street by the construction of the canal, alleging that he had been taken by surprise, as the contention that he was not entitled to compensation for the depreciation of his property by reason of the closing of that street had not been raised in the pleadings. That application stood over to be disposed of when judgment was given. But, as the judgment is in that respect in his favour, there does not appear to be any reason for taking any further evidence, even if otherwise such a course of procedure had been proper, as to which no opinion is expressed.

*Judgment accordingly.*

Solicitors for the suppliant: *Maclennan, Cline & Maclennan.*

Solicitor for the respondent: *P. K. Halpin.*

1901

Dec. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

ROBERT WEDDELL, MICHAEL McAULIFF AND RULIFF GRASS, CARRYING ON TOGETHER THE BUSINESS OF CONTRACTORS UNDER THE NAME OF THE WEDDELL DREDGING COMPANY..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Contract for improvement of Government Canal—Change in works—Breach of contract—Spoil grounds—Cost of—Allowance for.*

The suppliants were contractors for certain works of improvement on the Rapide Plat Division of the Williamsburg Canals. For their own use and benefit, and without notice to or request of the Crown in such behalf, they obtained certain grounds upon which to waste the material excavated by them.

*Held*, that the Crown was not bound to indemnify them for money expended in obtaining the said spoil grounds.

2. In order to carry on the works in the way contemplated by the contract and specification the contractors changed certain dump scows into deck scows. Thereafter a change was made by the Crown in the manner of carrying out the work, which required the contractors to convert the deck scows into dump scows.

*Held*, that the contractors were not entitled to recover from the Crown the expense they were put to in respect to the scows, because the change in the works being provided for in the contract, there was no breach; but that such expense might be taken into account in considering the increased cost of doing the work under the circumstances in which it was done as compared with the cost of doing it in the way contemplated by the contract.

PETITION OF RIGHT for damages arising out of an alleged breach of a contract with the Crown for the construction of certain works of improvement of the Rapide Plat Division of the Williamsburg Canals.

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

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WEDDELL v. THE KING.

Argument of Counsel.

September 3rd, 1901.

The case was heard at Ottawa.

*A. B. Aylesworth, K.C.* for the suppliants. The claim here arises under a contract for the widening and deepening of section No. 2 of the Williamsburg Canals. The work consisted of excavating, and, as provided by the specification, for the most part re-handling, the excavated material and depositing it at the places mentioned in the specification. Then the change which was made from the specification upon which we entered into the contract, put us to considerable expense, in the matter of remodelling scows and part of our plant, amounting to $3,628.65; and an additional expense of $500 for the purchase of a place to deposit the dry earth taken from the excavation occasioned by the change of the works. Our total claim at the conclusion of the work was $80,261.75 more than we received. The Crown has waived the provisions of the contract which stand in the way of justice being done, and refers the case to the court to be arbitrated upon by your lordship. It is, of course, not a submission to the award of your lordship; but the order in council waives the disability clauses of the contract, and so we have a right, not perhaps to loss of profits, but a right to be indemnified as upon the contract to the extent to which we made preparations to execute the contract according to the original specification.

*W. M. German, K.C.*, followed for the suppliants.

*F. H. Chrysler, K.C.*, for the respondent, contended that there was no liability on the part of the Crown to provide spoil grounds other than those mentioned in the specification. It is not a matter for which the suppliants can be paid under the specification. They are paid for the excavation, and they must find a place to deposit it.

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As to the claim for changing the scows, that is clearly a claim outside the contract. There can be no allowance here in respect to that.

*A. B. Aylesworth*, *K.C.*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (December 2nd, 1901) delivered judgment.

The claim put forward in the petition of right filed in this case arises out of a contract made on the twelfth of January, one thousand eight hundred and ninety-one, between the suppliants and Her late Majesty, whereby they undertook, for the prices mentioned in a schedule embodied in the contract, to complete within a time therein fixed all the dredging and other work connected with the deepening and widening of section two, Rapide Plat Division of the Williamsburg Canals. From the specification annexed to the contract it will be seen that it was in the contemplation of the parties thereto that the material excavated or dredged out in the execution of the work should, unless otherwise specially provided for, be deposited in Heagle's Bay and in Stata's Bay. After the work had been in progress a few months a complete change in the plan of disposing of the material excavated or dredged was made. It was decided to use such material in widening and strengthening the south bank of the canal, and not to fill in Heagle's Bay and Stata's Bay, but to leave these bays as reservoirs for surplus water for the canal. That was a change which under the fifth clause of the contract the engineer had a right in the manner therein mentioned to make. The direction should have been given in writing and the engineer should at the same time have fixed in writing the additional price, if any, to be paid to the contractors, or at least to have given some direction or decision by which such price might be determined as the work

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progressed. But that was not done. The contractors without any writing or any arrangement which they might then have insisted upon as to the extra cost of the work by reason of the change, did as they were bid, and now their claim would be barred but for the order in council by which the Crown in this case waives certain defences which under the contract it might otherwise have invoked.

One item of the claim is an amount of five hundred dollars which the suppliants paid for certain spoil grounds on which to deposit and waste a part of the material taken out by them. These grounds they obtained for their own use and benefit without any notice to or request of the Crown; and I see no reason why they should be indemnified for the amount so expended. It will also be seen that this part of the claim is not referred to in the order in council mentioned, and that nothing has in consequence been waived in respect thereof.

Another item of the claim has reference to the cost of converting certain dump scows the suppliants had into deck scows in order to execute the work in the manner originally contemplated, and then converting them from deck scows to dump scows to carry out the work in the manner rendered necessary by the change in plan mentioned. The expense to which the suppliants were put in this connection amounted in all to three thousand six hundred and twenty-eight dollars and sixty-five cents, and this amount was wholly lost to them. If the change in plan that was made had constituted a breach of the contract this amount might have been recoverable as part of the damages. But there was no breach of the contract. The change was one of the things provided for, and I do not see any ground on which the amount can be allowed as a specific item in the suppliants' claim. It will also be observed that this item does not form part of the claim stated in the order in council. It is, however, a

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matter that may be taken into account in estimating the allowance, if any, that should be made to the suppliants for the increased cost to them of the work by reason of the change that was made. It is something that the engineer ought to have taken into account when the change was made, and which may now, I think, be taken into consideration in connection with the remaining item of the claim.

Of the material taken out by the suppliants during the progress of their work 335,895 cubic yards, according to their estimate, and 330,735 according to Mr. Rhéaume's figures, was deposited on and over the south bank of the canal. Of this quantity, whichever is correct, 82,117.26 cubic yards was returned in the estimates and paid for under item six of the schedule of prices at thirty cents per cubic yard therein fixed as the rate for "earth provided, delivered and spread "in a satisfactory manner to raise towing-path where "required." The suppliants contended that the balance of the quantity mentioned should be returned and paid for at the same rate. But I do not agree with that contention. The engineer, when the change referred to was decided upon and made, ought in a business-like way to have come to some agreement with the contractors as to what proportion of the material to be so disposed of would be returned under this item, and what should be allowed for at a fair extra price, if as alleged the change increased the cost of the work, and if no agreement could be affected he ought then to have exercised the power the contract gave him to determine the matter and have communicated his decision to the contractors. And the problem now before the court is, it seems to me, under the petition and the order in council mentioned, to go back to that point and to come to some decision as to how much of the quantity of material deposited on and over the south bank of the canal ought to be paid for under item six of the schedule of prices, and as to the balance,

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what, if any, extra or additional price should be allowed for handling the material in that way instead of the way contemplated when the contracts were entered into. Mr. McAuliff puts the additional cost at an average of ten cents per cubic yard. The amounts are however large, and the questions to be determined are from that standpoint important. Before disposing of them, it will, I think, be convenient and proper to have a reference to competent and impartial engineers. The questions to be referred will be (1) what proportion or quantity of the material deposited on and over the south bank of the canal by the suppliants ought to be allowed under item six of the schedule of prices; and (2) whether anything, and if anything, what should be allowed in respect of the balance of such material to cover any increased cost of handling it as it was handled instead of its being disposed of in the way originally contemplated.

I shall be glad if the parties would each submit for my consideration the names of three or four engineers whom they think to be competent and indifferent between the parties. The referees when appointed will in no sense represent either of the parties. They will, for the purposes of the reference, be officers of the court and appointed by it. Possibly to save time and expense the same referees may be appointed for this case and for that of *Poupore, and others* v. *The King*, (1) in which a similar question to that first stated is at issue.

December 17th, 1901.

*W. M. German K.C.* for the suppliants;

*F. H. Chrysler K.C.* for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now delivered judgment.

The parties, by their respective counsel having appeared to discuss the further steps to be taken in

(1) Reported *post*.

this matter, and it being agreed between them that the judge of the court should himself determine the quantities and prices to be allowed, without the expense and delay of a reference, the following quantities and amounts are allowed, that is to say: 103,075 cubic yards (as calculated by Mr. Rhéaume in addition to the 82,117.26 already allowed and paid for) as earth provided, delivered and spread in a satisfactory manner to raise towing-path where required, at thirty cents per cubic yard, as per schedule of prices.....$ 30,922.50

145,542.72 cubic yards at 10 cents per cubic yard..... 14,554.27

$45,476.77

The 145,542.74 cubic yards are made of by deducting the sum of.. ..... 82,117.26

and..... ..... 103,075.00

185,192.26

from the total as given by Mr. Rhéaume and mentioned in my notes of reasons for judgment..... 330,735.00

Difference..... 145,542.74

There will be judgment for the suppliants for forty-five thousand four hundred and seventy-six dollars and seventy-seven cents ($45,476.77), and the costs will follow the event.

*Judgment accordingly.*

Solicitors for suppliants: *German & Petit.*

Solicitors for respondent: *Chrysler & Bethune.*

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Jan. 7.

NEW BRUNSWICK ADMIRALTY DISTRICT.

No. 73.

MILES L. MUNSEN AND ELMER D. TINGLEY. ..... } PLAINTIFFS;

AGAINST

THE SHIP *COMRADE*.

No. 75.

GEORGE SAUNDERS ..... PLAINTIFF.

AGAINST

THE SHIP *COMRADE*.

No. 76.

JAMES MORTON DICKSON AND ALMON DICKSON..... } PLAINTIFFS;

AGAINST

THE SHIP *COMRADE*.

*Maritime law—Actions in rem—Wages—Equality—Priority—Costs—Pro rata payment of subsequent claims.*

*Held*, following the *Saracen* (6 Moo. P. C. 56), that when claimants against a fund in the registry are of equal degree, the court will give priority to the diligent creditor.

2. Where the parties are not of equal degree, and one claiming subsequently has a legal priority over another, such priority will be protected if he make his claim before a decree has passed for distributing the fund, but not afterwards.

3. Where two claims for seamen's wages were prosecuted to judgment before two similar claims were allowed by the court, the costs of the prosecution of the first two claims were ordered to be paid out of the fund in the registry in full in preference to the last two claims. In respect of the latter it was directed that they should be paid in full if the balance of the fund permitted it, if not they were to be paid *pro rata*.

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MUNSEN v. COMRADE.

SAUNDERS v. COMRADE.

DICKSON v. COMRADE.

Argument of Counsel.

THESE were three actions *in rem* for the recovery of seamen's wages.

The facts are stated in the reasons for judgment.

October 19, 1901.

*Dr. Stockton*, for the plaintiffs *Munsen* and *Tingley* :

In this case my clients have a claim for seamen's wages. They were prompt in pressing their claims and obtained a decree of the court assessing the amounts due; and under that decree the vessel has been sold and the proceeds brought into the Registry. No application was made by other parties to the court to stay final judgment, or to ask that the decree be conditional upon other claimants ranking according to priority of claims. The costs must first be paid out of the fund in court, (1). The *prior petens*, or one first getting a final decree, if, *in pari conditione* with competing claims, ranks next after the claims for costs. (He cites *The Margaret* (2); *The Saracen* (3); *The W. F. Safford* (4); *The Clara* (5). See also, *The Markland* (6). The case of *The Desdemona* (7) in no way conflicts with the authorities cited. In the latter case there was no final judgment or decree. It was a case of *primum decretum*, by which the court put the plaintiff in possession of the vessel where the proceedings were in pain, no appearance having been given for the owner. The authorities, it is submitted, fully support the contention of the plaintiffs, that as their claims are for wages, and are *in pari conditione* with all competing claims, the judgment in their favour must be paid in full. After payment of the costs of suit

(1) See *William & Bruce's* Adm. Prac, p. 468; *The Immacolata Concezione*, 9 P. D. 37.

(2) 3 Hagg. 240.

(3) 6 Moore, P. C. 56.

(4) Lush. 71; 29 L. J. Ad. 109.

(5) Swa. 1.

(6) L. R. 3 A. & E. 340.

(7) Swa. 158.

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MUNSEN v. COMRADE.

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DICKSON v. COMRADE.

Argument of Counsel.

bringing the funds into court, the balance of the fund, if any, must be paid according to the priorities among the other claimants.

December 3, 1901.

*G. H. F. Belyea* for the plaintiff *Geo. Saunders*, whose claim amounted to $211.93, filed an affidavit of insolvency of owner and captain, being all the parties responsible to him for his wages, and contended that the court should administer funds on equitable principles by first paying all the costs of the party bringing the vessel into court, and then dividing the remainder *pro rata*.

The cases cited by Dr. Stockton have nothing to show to the court that there was not sufficient property outside of the ship to pay claims, and the equitable jurisdiction of the court not being invoked, they are distinguished from this case.

That *Saunders* being in court before decree made in the first claim, the court must recognize his equitable right to payment on equitable principles as in insolvent estates.

The fact of a decree being had in the first claim should not debar *Saunders* from participating in proceeds of sale, as the vessel had been attached previous to decree and he was, therefore, before the court; and, according to practice, the decree in first claim was asked for and obtained without notice, and notwithstanding the second suit in court. We are all here now before the court and the proceeds of sale are still in court.

(Cites *The Markland* (1), *The Saracen* (2), *The William F. Safford* (3).

*J. K. Kelley* for the plaintiffs *J. M. Dickson* and *A. Dickson*. My clients are seamen whose claims amount

(1) L. R. 3 A. & E. 340. (2) 6 Moore P. C. 56.
(3) Lush. 69.

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to $278.72. The court, while created by a statute of the Parliament of the Dominion of Canada, is governed by the general rules applicable to the court when it was one of the system of Ecclesiastical Courts of England, and where there is no express rule will adjudicate upon principles of equity and natural justice. The doctrine that the *prior petens* should be paid in full, *in eâdem conditione*, does not apply to seamen. The proceeds of the *res* having been brought into court will be administered for the benefit of all seamen claiming for wages, as a court of equity would administer an insolvent estate. The master and owner of the *Comrade* being insolvent, the seamen cannot have recourse to them, but must rely for payment out of the *res*. It is established by the *Saracen* (1) that the court has power to administer equity. The costs of the *prior petens* and officials' fees it is admitted should be paid in full; but the principal should rank *pro rata* with the claims of the other seamen whose actions for wages have been brought later in time but before a decree for distribution of the funds has been made in the first suit. The *William F. Safford* (2) is relied on by text book-writers as the authority for the general rule cited in *Williams & Bruce* (3), that parties being *in pari conditione* the first successful suitor is paid in full. A judgment in a case is authority for nothing more than the legal issues decided. The *William F. Safford* decided nothing more than: (*a*) That seamen's wages should be paid in full; (*b*) That a bottomry bond given under circumstances as in that particular case will be paid next; (*c*) That necessaries rank after these. The *raison d'être* for the proposition laid down in *The Saracen* that the *prior petens* should be paid first, is that diligence should be rewarded. This argument is fully

(1) 6 Moo. P. C. 56. (2) Lush. 69.

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met by conceding the payment of costs, leaving the balance of the proceeds or the *res* as assets in the hands of the court for administration. "If different demands are of the same nature, priority in beginning the suit will not give priority in payment if the other demands are brought to the attention of the court before a decree in the first suit brought is rendered." (1) The court will take judicial notice of its records, therefore, the argument that a *caveat* should have been filed to have brought the other claims to notice of the court does not apply. The *caveat* is used where no other suits are pending at the time of decree in first suit. The court will not make an order prejudicial to the interests of one suitor against another claiming from the same fund without giving all claimants a hearing, and if without full information a prejudicial order is made the court, having power to control its own orders, will vary an order or decree in the interest of justice. In the cases of *The Markland* (1), *The Saracen* (2), *The William F. Safford* (3), the matter of the payment of seamen's wages otherwise than in full over other claimants, was not before the court; and it is not possible to say what the court would have decided had the funds been insufficient to pay all the seamen in full. In all these cases the *prior petens* was not a seaman.

MCLEOD, L. J. now (January 7, 1902) delivered judgment.

In this case an action *in rem* was commenced against the ship *Comrade* by Miles L. Munsen and Elmer D. Tingley, seamen, for wages, on September 19, 1900. The ship was arrested but no bail was given and no appearance was filed, and on October 12, 1900, the

(1) L. R 3 A. & E. 340; Parsons' Admiralty, p. 234.

(2) 6 Moore P. C. 56.

(3) Lush. 69.

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plaintiffs obtained leave to proceed *ex parte* and set the cause down for trial and it was tried on the 19th of October, being undefended, judgment was given for the plaintiffs and their claims assessed as follows,—Munsen's at $116 and Tingley's at $89; and the ship was ordered to be sold, and on the 27th of October she was sold by the Marshall for $600, which money is now in the Registry.

On the 26th of September, 1900, Geo. Saunders, another seaman, commenced an action *in rem* for wages, the summons and warrant were served on the 29th September and filed on the 2nd October. No appearance was entered. On the 11th October James M. Dickson and Almon Dickson, seamen, issued a summons *in rem* for wages. No appearance was entered. Two other claims were made, one for necessaries supplied the ship and one for repairs made on her, but as she did not sell for enough to pay the costs and wages due the seamen it will not be necessary to consider them.

On the 3rd of December, 1900, Dr. Stockton, the counsel for Munsen and Tingley, moved to have their taxed costs and also the amount of their claims paid out of the fund. And on the same day the claim of Geo. Saunders was assessed at $211.93, that of Jas. M. Dickson at $169.17 and Almon Dickson at $130. When Dr. Stockton moved to have the plaintiffs' costs and claims paid, Mr. Kelley and Mr. Belyea, representing James M. and Almon Dickson and Saunders, whilst admitting that the plaintiffs' costs were a first lien on the fund and entitled to be first paid, claimed that the parties for whom they appeared being seamen and having an equal maritime lien for wages with the plaintiffs were entitled to rank *pro rata* with them on the balance of the fund for their claims.

The question then is, whether I have a right to direct that these parties, being of equal degree, have a right

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to rank equally on the fund now in the Registry. In *The Saracen* (1) it was decided that when claimants were of equal degree the court would give the priority to the diligent creditor, that is, to the one obtaining the first judgment and that decision appears to have been followed since in all cases where the parties were of equal degree.

It is also held that when they are not of equal degree, but when the party subsequently claiming has a legal priority over the other, his priority will be protected if he makes application before the money has actually been paid out.

The first question is, has there been a final decree? I think there has been. The plaintiffs have had the ship seized, a decree for sale made and the ship sold, and the proceeds brought into the Registry and their own claims assessed, and all that now remains for them is to reap the fruits of their diligence by having the money paid over to them.

If an application were made to the court before a decree is made, the court would, so far as it could facilitate the proceedings, impose such conditions as might be necessary so that the parties might share proportionately. In this case no application was made until after decree was made in favour of the plaintiffs, and I think I cannot now deprive them of the benefits of their diligence.

The order of distribution will be:—

(*a*) Payment of plaintiffs Munsen and Tingley's taxed costs.

(*b*) Payment of plaintiffs' claims.

(1) 6 Moore P. C. 56.

(c) Payment of claims of Geo. Saunders, James M. Dickson and Almon Dickson if there is sufficient to pay them in full, if not, they will be paid *pro rata*.

*Judgment accordingly.*

Solicitor for plaintiffs Munsen and Tingley: *A. A. Stockton.*

Solicitor for plaintiff Saunders: *G. H. V. Belyea.*

Solicitor for plaintiffs J. M. and A. Dickson: *J. K. Kelley.*

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Mar. 4.

DAVID FINDLAY AND WILLIAM FINDLAY ..... } PLAINTIFFS;

AND

THE OTTAWA FURNACE AND FOUNDRY COMPANY (LIMITED) ..... } DEFENDANTS.

*Industrial Design—Cook stove—Imitation — Infringement —Injunction—Cancellation of conflicting design.*

The plaintiffs were registered owners of an industrial design for a cook stove, called the "Royal Favorite, 9-25," which, as a special article of their manufacture, had become well known to the trade. The defendants procured one of the said stoves, caused a model to be made of it, and with some minor alterations, chiefly in the ornamentation, manufactured a stove called the "Royal National, 9-25," and subsequently registered it as an industrial design. In an action by the plaintiffs for infringement and for an order to expunge defendants' design from the register, the weight of evidence established that the defendants' design was an obvious imitation of that of the plaintiffs.

*Held*, that the defendants should be enjoined from infringing the plaintiffs' design, and that the registration of that of the defendants should be expunged from the register.

THIS was an action to restrain the infringement of the plaintiffs' industrial design for a cooking stove, and to expunge from the register a design registered by the defendants.

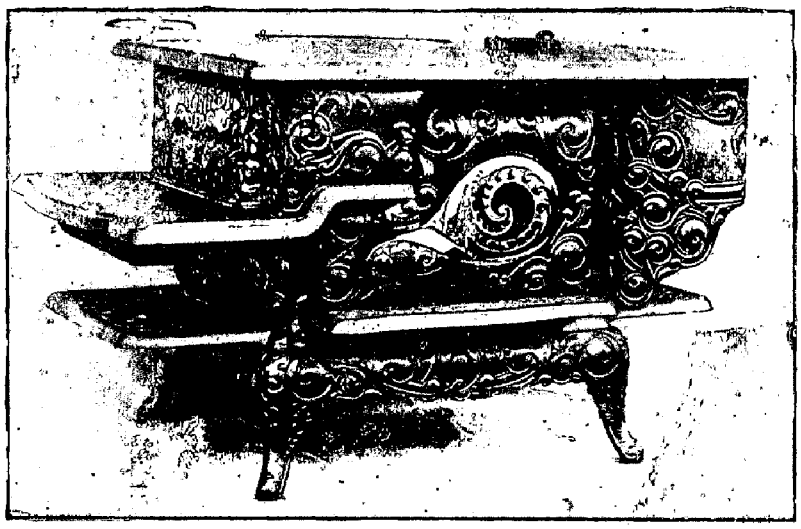
March 1, 1902

The case was tried at Ottawa, argument being postponed until March 4th, 1902.

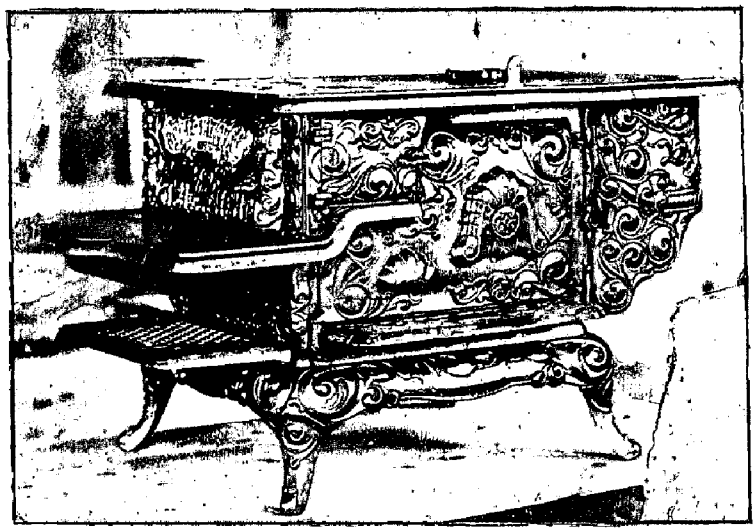
The facts of the case were as follows:—

The plaintiffs were doing business as manufacturers of stoves at Carleton Place, Ont., and had registered an industrial design in the Department of Agriculture, at Ottawa, for a cooking stove which is now known to the trade as the "Royal Favourite, 9-25." The diagram marked "A" on the following page is a representation of the plaintiffs' stove.

"A"



"B"



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The defendants were an incorporated joint-stock company carrying on the trade and business of iron-founders and manufacturers of stoves in the City of Ottawa, Ont. A short time after they had commenced business, they procured a stove made by plaintiffs according to their registered design, took it apart and made a set of patterns of the parts. From these patterns the defendants made a stove known as the "Royal National, 9-25". They, however, made alterations in the ornamental scroll-work of the stove, and adopted a different medallion; they also made some minor alterations in the interior construction of the stove. The exterior top was, with the exception of the name, practically the same as that of the plaintiffs' stove. The diagram marked "B" on page 339 is a representation of the defendants' stove

The defendants' manager, being examined on discovery, described as follows the method his company pursued in preparing the model for their stove:

Q. Where did you get the stove?—A. We bought it from Burton Harum.

Q. Who is he and what does he do?—A. He is a stove dealer.

Q. In Ottawa?—Yes.

Q. Did he procure it at the request of the company, or did you happen just to buy it from him?—A. We asked him to buy a stove of that description.

Q. Did you ask him to buy the Findlay "Royal Favorite, 9-25"?—A. Yes.

Q. And he got the stove and supplied your company with it?—A. Yes.

Q. When was that?—A. I could not give you the date of it at the present moment.

Q. You say you do not remember?—A. I could not tell you the date, some time in the fall of 1901.

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Q. I am looking at a letter here from Findlay Brothers to the defendants of the 18th October last in which they draw attention to the fact that they learn that you had got one of the "Royal Favorite" stoves from B. Haram?—A. Yes.

Q. It would be about that time?—A. Yes, it would be about that time.

Q. Then, having got that stove what did you do with it?—A. We redressed it.

Q. Did you take it apart?—A. Yes.

Q. And what else did you do with it?—A. We made a set of patterns of it.

Q. Made a set of patterns of the parts?—A. Of a similar size.

Q. Made a set of patterns of the parts of the stove that you took apart?—A. Yes.

Q. Did you do anything in the way of altering the work upon the stove?—A. Yes.

Q. You did something?—A. Yes, considerable.

Q. That is, you made alterations in the scroll-work? A. Yes, and the interior.

Q. You made alterations in the scroll-work?—A Yes.

Q. And you put a medallion of a different pattern from that which was on the "Royal Favorite"? A. Yes.

Q. How did you make the alterations in the scroll-work?—A. We used parts of the scroll-work of our furnaces.

Q. I am not asking what scrolls you used, but how did you make the alterations on the iron, on the metal of the stove that you bought in order to make patterns of it?—A. Well, we simply took off and added in different places.

Q. I want to know how it was done? Did you file it off or saw it off?—A. Yes, we ground part of it off with an emery wheel.

Q. You ground part of the scrolls that were on Findlay's stove ?—A. Yes.

Q. And how did you put on the additions that you made ?—A. Well, we took patterns from our furnaces: we run those in lead or block tin, and cut out the lettering, and added in that way, running it in brass afterwards.

Q. And you attached that to the parts of the stove which you used as patterns in the same way ?—A. Yes.

Q. And then that made the completed pattern ?—A. Yes.

Q. With what was on before ?—A. Yes, brass parts were added.

Q. For instance, just to illustrate that, here are two stoves, exhibits attached to an affidavit filed on the 16th January last. Just one instance we will take, not to multiply evidence. On the fuel door you ground off this small scroll at the top of the door ?—A. I think we took this all off.

Q. You took off part of the scroll on the top of the fuel door, and then you added a piece like that, like what is on the "Royal National" stove exhibited on the same affidavit ?—A. Yes.

Q. That is an instance of the way you made the alterations ?—A. Yes.

Q. Then did you make any alterations on the inside of the stove ?—A. Yes, sir.

Q. That is, the mechanical construction of the stove inside you altered: is that what you mean, or was it merely in the shape of things that were inside ?—A The construction of all stoves is similar.

Q. Give me an instance of any alteration you made on the inside in the shape or pattern of what was there ?—A. The firebox linings. We altered them altogether in the back.

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Q. That is, you altered the pattern?—A. Yes; of course a fire-brick is a fire-brick in any stove.

Q. You made some differences in the pattern of the inside of the firebox?—A. And in the front of the firebox also.

Q. Inside?—A. Yes.

Q. On the top of the stove you did not make any alteration either in the figures or their position, of 9-25?—A. No.

Q. You left that exactly the same?—A. 9-25 is 9-25.

Q. You did not make any difference: you just used the top of the stove as a pattern, just as it was?—A. Yes.

Q. And on the inside parts of the stove you did not make any difference in the figures and letters that were there, "Roy." for instance, 9-25?—A. We have got "Royal".

Q. You left that there?—A. Yes.

Q. Just as it was?—A. Yes, sir.

Q. And these figures or letters—that is "Roy. 9-25"—you left them just exactly as they were upon the parts of the stove inside of the "Royal Favorite"?—A. Yes.

Q. You left it the same in your "Royal National?"—A. Yes.

Q. Who designed these changes that were made?—A. Mr. Baird, foreman of the shop, and myself.

Q. The general size and shape of the stove was the same?—A. Very much similar in size; there might be a fraction of an inch difference.

Q. It was intended to be: if you used one of them as a pattern, you would naturally make it exactly the same size as the one you used?—A. Yes, or pretty near it.

Upon the question of obvious imitation, and as to the liability of the public being deceived into buying the defendants' stove for that of the plaintiffs', the following evidence for and against that theory was submitted at the trial:—

*William Strahan*, a stove dealer in Ottawa of twenty years experience, stated that, in his opinion, there was so much similarity between the stoves that an ordinary customer might easily purchase the defendants' stove in mistake for that of the plaintiffs.

*Joseph Boyden*, whose experience in the business of buying and selling stoves in Ottawa covered a period of some twenty-five years, was asked:

Is the similarity such as from your experience a purchaser would be likely to take the one for the other, the "Royal National" for the "Royal Favorite".

"A. Well, I would decidedly say that if the two stoves were not present it would be a very difficult matter. For instance if the customer looked at one stove in my place, and we will say went to another dealer and looked at the other stove, it would be a very difficult matter for them to define, or tell, which was which".

*Frank Esmond*, a dealer in stoves of eighteen years experience, said, on direct examination, that the two stoves were practically the same. On cross-examination he expressed the opinion that even an ordinary customer who wanted to buy the "Royal Favorite" stove, and knew the design, might buy the "Royal National" for it.

*John C. Enright*, who had thirty-five years experience in the stove trade, said he thought that an ordinary purchaser, coming into a store and not observing the name, might mistake the "Royal National" for the "Royal Favorite." Leaving out the difference in the name and a difference in the ornamentation he did

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not think that there would be any difficulty in selling one stove for the other.

"Q. If you take off the name of the manufacturer, and the name of the stove, and have the two stoves standing together, it would be a difficult matter for anyone to tell?

"A. You take the hearth-plate off the "Royal Favorite," and the nickel medallion off the oven door, and change them around, it would be very hard to say which was which."

*Thomas H. Percival*, a manufacturer of stoves, thought that there was a very strong resemblance between the stoves in respect of design, dressing and construction. There was also, in his opinion, some similarity in the names. Some purchasers would be deceived by the similarity, others would not, in his opinion.

*Robert McAllen*, having a dozen years' experience in the stove trade, said that, assuming a dealer would act fairly and honestly in conducting a sale, the average customer would not be deceived into buying the "Royal National" for the "Royal Favorite."

*John Kerr*, who had from ten to fifteen years experience in buying and selling stoves, expressed the view founded upon his experience, that there were no incautious buyers of stoves. He thought that an average purchaser would not be deceived by any outward similarity in appearance of the two stoves in question into purchasing the defendants' stove for that of the plaintiffs.

Upon the question of originality of design in the plaintiffs' stove,—

*John Baird*, one of the defendants' employees, and having twenty-five years experience in stove-making, said that there was nothing new in the design of the plaintiffs' stove. "I cannot place anything in that stove that Mr. Findlay has registered that we cannot

in some other stoves find something very similar, if not the very same."

March 4, 1902.

The argument of the case now took place at Ottawa.

*W. D. Hogg*, K. C., for the plaintiffs, contended that there was a clear case of intentional imitation apparent upon the evidence. The plaintiffs' stove was deliberately taken to pieces and models prepared from it by the defendants. The two stoves are practically made from the same design.

[BY THE COURT.—You would contend that there is an obvious imitation by the defendants of the plaintiffs' stove.]

Yes.—The public is likely to be deceived into buying the defendants' stove for that of the plaintiffs', and even in the absence of fraud the defendants ought to be restrained under the authorities. (Cites *Harper* v. *Wright* (1); *Hecla Foundry Company* v. *Walker* (2); *Grafton* v. *Watson* (3); *Sen-Sen* v. *Brittens* (4).

On the question of jurisdiction, I think this court has a clear right to grant the remedy sought by the plaintiffs. While there may be some doubt upon the Trade-Marks and Industrial Designs Amendment Act, 54-55 Vict. ch. 35, there is certainly none under the Exchequer Court Amendment Act, 54-55 Vict. c. 26 sec. 4, which expressly gives the court jurisdiction in respect of actions for infringement of industrial designs as well as of those seeking to expunge registration, or to vary or rectify the register. That jurisdiction has never been taken away expressly or by implication.

*G. F. Henderson*, for the defendants, claimed that under the guise of an industrial design the plaintiffs were seeking the protection of a patent. There is the greatest difference between the two. The plaintiffs

(1) [1896] 1 Ch. 142.
(2) 14 App. Cas. 550.
(3) 51 L. T. 141.
(4) 68 L. J. Ch. 250.

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cannot prevent us from manufacturing a cook stove when all they have registered is an ornamental design for a cook stove. If we differentiate the ornamentation, we have a clear right to manufacture a stove of the shape and dimensions of that of the plaintiffs. All the witnesses say there is nothing new in the plaintiffs' stove, nor anything original for that matter in the ornamentation. These facts distinguish the case from *Harper* v. *Wright* (1); where the cathedral design of the stove was new. (*Re Clarke's Design* (2); *Payton* v. *Snelling* (3); *DeKuyper* v. *Van Dulken* (4); *Rollason's Design* (5).

So long as we do not imitate the ornamentation, the configuration of the stove in the opinion of the witnesses here is not an element of deception. (Cites *Le May* v. *Welch* (6); *Morton's Design* (7); *Holdsworth* v. *McRae* (8),

*W. D. Hogg, K.C.*, replied, citing *Saxlehner* v. *Apollinaris Co.* (9).

At the conclusion of the argument, the following judgment was delivered by the JUDGE OF THE EXCHEQUER COURT:

I do not think anything would be gained by reserving this case. It is largely a question of fact that is to be determined, and the question has been very fully discussed. I have no doubt that I have jurisdiction in the matter, and I think it clear that the plaintiffs have a registered design in respect of which they are entitled to protection.

As to the law bearing on the case, it is, I think, to be found in the cases mentioned during the argument,

(1) [1896] 1 Ch. 142.
(2) 13 Cutl. P. C. 358.
(3) 17 Cutl. P. C. 57.
(4) 4 Ex. C. R. 71.
(5) 15 Cutl. P. C. 447.
(6) 28 Ch. D. 24.
(7) 17 Cutl. P. C. 171.
(8) L. R. 2 H. L. 380.
(9) 66 L. J. Ch. 533; [1897] 1 Ch. 893.

those referred to *In re Melchers* (1), that is *Harper* v. *Wright*, *Holdsworth* v. *McCrea*, *The Hecla Foundry Coy's* case; and the case of *Oliver* v. *Thornley* (2), and other cases that have been referred to on the argument.

Then as to the question of imitation, it seems to me, that the stove the defendants are making, the "Royal National", is, as it is now manufactured, an obvious imitation of the plaintiffs' "Royal Favorite" for which the latter have a registered design. I do not think I am called upon to express any opinion as to whether or not the defendants might make a stove similar in dimensions and shape to the "Royal Favorite" that would not be an imitation of the "Royal Favorite". The only question here is whether the "Royal National" is an imitation or infringement of the plaintiffs' registered design, and I think it is. I confine myself to that issue, and I hold myself free to deal, upon its merits, with any other case that may arise.

Now as to the remedy,—I think the plaintiffs are entitled to an injunction against the manufacture and sale of the "Royal National" stove in the form in which it has been manufactured, and with the design adopted by the defendants. I do not say that the defendants are not entitled to manufacture a stove to be called the "Royal National", only that they are not to manufacture it in the form and with the design shown in evidence in this case. I agree with Mr. Henderson that if an injunction should be granted there should also be an order to expunge from the Register of Industrial Designs the defendants' registration of the "Royal National". There will be such an order.

On the question of the disposition to be made of the "Royal National" stoves already manufactured by

(1) 6 Ex. C. R. at p. 101. (2) 13 Cutl. P. C. 490.

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the defendants, I understand the parties to say that it is possible that they can come to an agreement as to that; but if they are not able to do so there will be a reference to the Registrar to ascertain how many there are of such stoves, and the question of the disposition to be made of them will be reserved until after his report is made.

I think the plaintiffs are entitled to their costs, to be taxed.

*Judgment accordingly.*

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

Solicitors for defendants: *McCraken, Henderson & McDougal.*

IN THE MATTER OF THE PETITION OF RIGHT OF

HENRY TUCKER.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1902

*March 20.

*Demurrer to petition of right—Claim for services rendered as Commissioner under R.S.C. c. 115—Payment—Public office.*

A person appointed under the provisions of chapter 115, *Revised Statutes of Canada*, as a Commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown cannot recover against the Crown payment for his services as such Commissioner, there being no provision for such payment in the said enactment or otherwise.

2. The service in such a case is not rendered in virtue of any contract but merely by virtue of appointment under the statute.

3. The appointment partakes more of the character of a public office than of a mere employment to render a service under a contract express or implied.

DEMURRER to a petition of right asking payment of a sum of money for services claimed to have been rendered as a Commissionner, appointed under chapters 114 and 115 of *The Revised Statutes of Canada*, to report upon the alleged misconduct in office of a servant or officer of the Crown.

The Petition of Right was as follows:

1. That your Suppliant was admitted to the practice of law as an Advocate and Barrister, in the month of January, in the year 1885, and during all the times hereafter mentioned, he was, and still is a practising Advocate and Barrister in and for the Province of Quebec, residing in the City of Montreal.

2. That by instrument in writing under the signature of the Hon. Andrew G. Blair, Minister of Railways and Canals, your Suppliant was appointed a Commis-

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sioner under chapters 114 and 115 of *The Revised Statutes of Canada*, said instrument being in the words following, to wit:

"The undersigned, Minister of Railways and Canals, "hereby nominates and appoints you, Henry Tucker, "Barrister, of Montreal, P.Q., a Commissioner, under "chapters 114 and 115 of the Revised Statutes of "Canada, to investigate and report upon all charges "of active political partisanship, or of improper con- "duct of any kind in his office, which have been "preferred against G. Herbert Simpson, Superinten- "dent of the Grenville and Carillon Canal, Town of "Carillon, County of Argenteuil, or which may here- "after be preferred against him, and remitted to you "by me."

"And you are, as such Commissioner, by virtue of "said Chapters, authorized and empowered to execute "and perform all acts in and by the said Chapters "authorized to be done, in holding the said investiga- "tion into the charges aforesaid."

"Dated at Ottawa, this 27th day of November, "A. D., 1897."

"(Signed) ANDREW G. BLAIR,

"*Minister of Railways and Canals.*"

3. That at the City of Montreal on the 17th January, 1898, by letter addressed to the said Minister of Railways and Canals, your Suppliant accepted the said Commission, and from the said 17th January, 1898, until the 12th May, 1898, your Suppliant employed a large portion of his time in investigating the matters referred to him under said Commission.

4. That in connection with the said charges, one Labelle had previously been sent by the said Department of Railways and Canals to make a private report to the Department, and also previously to your Suppliant's appointment, a large amount of correspondence

had been had by the said Department with different persons in the said County of Argenteuil, and a large number of affidavits had been taken and supplied to the said Department, all of which are now in the possession of the said Department of Railways and Canals at Ottawa.

5. That previously to commencing his own investigations, your Suppliant had to peruse and collate the report of the said Labelle, and the said correspondence and affidavits, which took a great deal of time, care and attention.

6. That in connection with said investigation your Suppliant was obliged to spend a great deal of time away from his office in Montreal, in the said County of Argenteuil, and other places, interviewing different persons, in correspondence, and in examining numerous witnesses under oath, and prepared a report of his proceedings under said Commission, the whole of which he remitted to the Department of Railways and Canals at Ottawa.

7. That your Suppliant performed a large amount of work in interviewing different parties and in taking information from the parties who were prosecuting said charges, and in travelling, which does not appear by any voucher.

8. That the nature of the service rendered by your Suppliant in said investigation were judicial as well as inquisitorial, requiring a knowledge of law and the rules of evidence.

9. That a statement of said services was rendered by your Suppliant to the said Department of Railways and Canals, on or about the said 12th day of May, 1898, and which is now in the possession of the Department of Railways and Canals at Ottawa.

10. That the said services rendered as aforesaid are well worth the sum of $800.00, which your Suppliant

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is entitled to have and recover for the reasons aforesaid, with interest from the 12th day of May, 1898.

WHEREFORE the said Suppliant prays that His Majesty be ordered and adjudged to pay unto the Suppliant the sum of $800.00 with interest from the 12th day of May, 1898, and costs *distraits* to the undersigned Attorney.

To the Petition of Right a demurrer was filed by the Crown as follows:

The Honourable David Mills, His Majesty's Attorney-General for the Dominion of Canada, on behalf of His Majesty: Demurs to the whole of the Suppliant's Petition of Right and says that the same is bad in law on the ground that the Petition does not allege, nor do the facts set out or disclose any contract between the Petitioner and the Crown either express or implied, or any other matter giving rise to any obligation or cause of action against the Crown.

January 13, 1902.

The case was heard at Ottawa.

*E. L. Newcombe*, *K. C.*, in support of the demurrer, argued in substance as follows:—The demurrer filed on behalf of the Crown alleges that there is no contract or cause of action against the Crown arising upon the facts set out in the petition of right. So that the question before your lordship is a very simple one, viz: Whether the facts alleged, and which are admitted for the purposes of this demurrer, give rise to any obligation on the part of the Crown to pay the money claimed, or any sum of money, to the suppliant.

The suppliant alleges that he was employed by the Minister of Railways and Canals, by virtue of and n execution of certain powers alleged to be reposed in him, to make a certain investigation into the conduct of an officer or servant of the Crown. Those are pract-

ically all the facts upon which the suppliant relies, and I take it that the only ground upon which he undertakes to support the petition is that of contract. Now it is not a statutory action, and there is no remedy at common law. There is no express contract. Then can the suppliant say there is an implied contract here? I say that there is no power reposed in the Minister which would give rise to any contract or promise by which the Crown would be obliged.

He cites *Feather* v. *The Queen* (1); *Windsor & Annapolis Ry. Co.* v. *The Queen* (2); *Tobin* v. *The Queen* (3).

There was no sum of money placed at the disposal of the Minister or the Crown to pay the suppliant.

[BY THE COURT:—Was there any special grant out of which the suppliant might have been paid?]

No. But the principal point which I desire to present to the court is this, namely, that if the matter between the suppliant and the Minister is anything at all, it is a statutory appointment, and is not a contract. The appointment is statutory, but there is no provision in the statute for the payment of the person executing the appointment or commission. In other words there is no statutory action. The statutes governing the question are chapters 114 and 115, *Revised Statutes of Canada*. Chapter 114 enables the Governor in Council to appoint a commissioner; that is where the matter is of general importance. Chapter 115 provides for the appointment of a commissioner for a more particular purpose. In chapter 115 the Minister is authorized, under the authority of the Governor in Council, to appoint an officer to investigate and report. The commission in this case could not have been issued but for the statute, and the commissioner's powers, and the provision for his payment must be found

(1) 6 B. & S. 257. (2) 11 App. Cas. 607.
(3) 16 C. B. N. S. 310.

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within that statute. He cites *Comyns' Digest*, (1); *Todd's Parliamentary Government in England*, (2); *Chitty's Prerogatives of the Crown* (3), *The King* v. *Bower* (4), *Bacon's Abridgement*, (5). Then as to the power of the Crown to issue a commission of the kind referred to in the petition of right, see 19 *Am. & Eng. Ency. of Law*, Vo. 'Public Offices,' (6); *Buckley v. Edwards*, (7).

I put the case upon the ground that the employment was given in execution of a statutory power on the part of the Government, and whether the party to whom the commission issued would be compelled to execute it is not the question. If there is no provision for the payment of the officer, no statutory appropriation for it, he cannot come into court and succeed in obtaining compensation for his services.

If the suppliant had put his declaration in the form of the common law counts, viz: for work done, etc., at the request of the Crown, possibly we could not have demurred, but upon the facts alleged in the petition, clearly the Crown is not responsible in respect of the remedy sought by the suppliant.

*S. P. Leet, K.C.*, contra: The cases cited by counsel for the Crown, are all cases decided under American law and with reference to peculiar State or municipal constitutions and I submit that that they do not apply to British and Canadian institutions, nor to a class of public servants such as the suppliant was. While under our law there are important distinctions between the rights of the Crown and those of the subject, the right of the Crown to avail itself of the property or service of its subjects without remuneration does not appear to be one of those which has ever

(1) Vol. 7, p. 61
(2) Vol. 2, p. 434
(3) P. 81.
(4) 1 B. & C. at p. 587;
(5) Vol. 6, p. 420.
(6) P. 525.
(7) [1892] A. C. 387.

been formally asserted by the Crown, and so far as the cases quoted by counsel for the Crown and my research go, it has never before been pleaded by the Crown in defence to an action by a subject.

When we come to look at the case in this court of *Hall v. The Queen* (1) we get down to something outside the broad domain of prerogative law and find a case in point. That case is authority for the proposition that where the Crown has received the benefit of services rendered at the request of its officer, acting within the scope of his duties, the law implies a promise on the part of the Crown to pay the fair value of the same.

As to the question of there not being any special appropriation for the payment of the commissioner appointed under the statute in question, I submit that that question is covered by section 16 of *The Petition of Right* Act (R. S. C. ch. 136). That section reads as follows :—

"The Minister of Finance and Receiver-General shall pay out of any moneys in his hands for the time being lawfully applicable thereto, or which are thereafter voted by Parliament for that purpose, the amount of any moneys or costs which had been so certified to him to be due to any suppliant."

If the claim is one for which a petition of right will lie it is not necessary that any appropriation should have been previously made to satisfy a judgment rendered thereon.

In order to determine whether the services rendered would impose a liability irrespective of the question of whether any appropriation had been made, we must look to the nature of the office created by chapter 114 of *The Revised Statutes of Canada*, and of the services intended to be rendered thereunder. Chapter 115 is

(1) 3 Ex. C. R. 373.

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only an amplification of chapter 114. Chapter 114 enacts that when the Governor in Council deems it expedient to cause an inquiry they may confer powers upon the "Commissioner or person, etc." Chapter 115 gives the "Minister presiding over the department" the right to appoint under the authority of the Governor in Council. The appointment in question was clearly under chapter 115 for investigating and reporting upon the conduct of a person in the service of the Department of Railways and Canals, and is therefore connected with the administration of that department. Within the meaning of the judgment in the case of *Wood* v. *The Queen* (1) it was "work of a kind that might properly be executed by the officers and servants of the Department." That case decided that where the contract was executed, the written contract provided for by the statute was not necessary in order to entitled the suppliant to recover for his services. As to the character of the employment, the relation of the suppliant towards the Crown was that of a servant or employee rather than that of an officer, and the question of whether or not a special appropriation was made for this particular service is not material. (He cites *Chitty on Prerogative*, (2); *Comyn's Digest*, (3); *Bacon's Abridgement*, (4); *Doutre* v. *The Queen* (5).

*E. L. Newcombe, K.C.*, replied, citing *Throop on Public Officers*, (6).

THE JUDGE OF THE EXCHEQUER COURT now (March 20th, 1902) delivered judgment.

The question raised by the demurrer in this case is whether or not a commissioner appointed under chapter

(1) 7 S. C. R. 634.
(2) P. 344.
(3) Vol. 5, p. 188.
(4) Vol. 8, (d) 78.
(5) 9 App. Cas. 745.
(6) P. 443

115 of the *The Revised Statutes of Canada* (1) can recover from the Crown compensation for services rendered by him as such commissioner, no provision having been made therefor by Parliament, and there being no arrangement or agreement with the Crown or the Minister in respect thereto.

The commissioner in this case was an advocate and barrister for the Province of Quebec; but he was not employed as a barrister or advocate, but was appointed by the Minister of Railways and Canals, under the statute referred to, a commissioner to investigate and report upon all charges of active political partizanship or of improper conduct of any kind in office which had been preferred or which might be preferred against G. Herbert Simpson, Superintendent of the Grenville and Carillon Canal, and remitted to the commissioner by the Minister.

The commissioner's right to compensation depends upon his appointment as a commissioner, and not upon any employment as an advocate or barrister, and the question is not concluded by the case of *The Queen v. Doutre* (2).

If there were nothing more in the case than the employment of the suppliant by the Minister to render some service to the public, whether as an advocate or otherwise, there would, I think, be a good deal to be said in favour of the view that a promise should be implied against the Crown to pay the suppliant for such service, and that he might recover therefor upon

(1) The Minister presiding over any department of the civil service of Canada, may appoint at any time, under the authority of the Governor in Council, a commissioner or commissioners, to investigate and report upon the state and management of the business, or any part of the business, of such department, either in the inside or outside service thereof, and the conduct of any person in such service, so far as the same relates to his official duties.

(2) 9 App. Cas. 745.

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a *quantum meruit*. (*Wood* v. *The Queen*, (1); *Hall* v. *The Queen*, (2): *The Queen* v. *Henderson*, (3); *Doutre* v. *The Queen*, (4).

But here the appointment was made under a statute in which there is no provision for compensation for any service that might be rendered by the commissioner, and in accepting the appointment, he must, I think, be taken to have relied upon the honour and good faith of the Crown and of the Minister, and not upon any legal obligation on the part of the Crown to pay for his services. It is true of course that the duties of the commissioner were of a temporary nature and that in this respect the appointment lacked one of the usual characteristics of a public office; but in other respects it partook of that character rather than of a mere employment to render a service under a contract express or implied. In fact it is clear that the service was not rendered in virtue of any contract, but by virtue of the appointment under the statute, and no provision being thereby or otherwise made for the payment of the commissioner for his services as such commissioner, no promise on the part of the Crown to pay therefor is to be implied from the appointment and from the rendering of such services.

To come to this conclusion it is not necessary to hold the view that the commissioner was bound to accept the office or position of commissioner without compensation for his services. I do not think that he was under any such obligation. Much less was he under any obligation to incur the necessary expenses of executing the commission without an indemnity therefor. But no claim is made for any such expenses and no question in respect thereof arises upon the petition filed. The suppliant was, I think, free to

(1) 7 S. C. R. at p. 637.
(2) 3 Ex. C. R. 373.
(3) 28 S. C. R. 425.
(4) 9 App. Cas. 745.

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accept or refuse the office or position of commissioner as he saw fit, and to stipulate for payment for the service to be rendered. But having accepted it without any stipulation as to compensation, and no provision therefor being made by the statute or otherwise, he must, I think, as has already been said, be taken to have relied upon the good faith of the Crown and Minister.

It was contended for the Crown that the commissioner could not recover anything for his services even if there had been a promise to pay unless money had been appropriated by Parliament for the service. I am not satisfied that the contention could be supported, but as it is not necessary at present to determine the question I content myself with referring to the case of *Collins* v. *The United States* (1), in which it was held that the provision of the United States Constitution Art. 1, s. 9, cl. 7 that "no money shall be drawn from "the treasury but in consequence of appropriations "made by law" is exclusively a direction to the officers of the treasury, and that it neither controls courts, nor prohibits the creation of legal liabilities (2).

It was mentioned by counsel during the argument, and I may, I think, add that the real controversy between the parties is as to the amount of compensation to be paid. The suppliant is unwilling to accept what the Crown is willing to pay; the Crown is unable to accede to the suppliant's demands, and the parties having been unable to accommodate their differences, or to come to terms, the suppliant has filed his petition and the Crown has demurred. The parties are at present at arm's length, and the question is one of legal obligation, or no legal obligation, on the part of the Crown to pay the suppliant for the services he rendered as a commissioner.

(1) 15 Ct. of Cls. 22.

(2) 19 Am. & Eng. Enc. of Law, 534.

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On the facts set out in the petition I think there is no such legal obligation, and there will be judgment for the respondent upon the demurrer to the petition.

*Judgment accordingly.*

Solicitor for suppliant: *S. P. Leet.*

Solicitor for respondent: *E. L. Newcombe.*

BETWEEN

FREDERICK JOHN HAMBLY.....PLAINTIFF; 1902

AND Mar. 20.

ALBRIGHT & WILSON, LIMITED....DEFENDANTS.

*Patent for Invention—Process for manufacturing phosphorus—Importation and non-manufacture—The Patent Act, sec. 37—Interpretation.*

A patentee is not in default for not manufacturing his invention unless or until there is some demand for it with which he has failed to comply, or unless some person has desired to use or obtain it and has been unable to do so at a reasonable price; and where the invention is a process only the patentee satisfies the statute and the condition of his patent by being ready to allow the process to be used by anyone for a reasonable sum.

*The Anderson Tire Co. of Toronto* v. *The American Dunlop Tire Co.* (5 Ex. C. R. 100) referred to.

2. The effect of section 31 of *The Patent Act* is to make the patent void only as to the interest of the person importing or causing to be imported the article made according to the process patented; and importation by a licensee will not avoid the patent so far as the interest of the owner is concerned.

3. *Semble:* That the importation of an invention made in accordance with a process protected by a patent is an importation of the invention,—

*Sed Quære* whether the provision of section 37 of *The Patent Act* requiring the manufacture in Canada of the invention patented, after the expiry of two years from the date of the patent, applied to the case of a patent for an art or process?

THIS was an action to obtain a declaration avoiding Canadian letters patent numbered 65698 for improvements in the manufacture of phophorus.

The facts are stated in the reasons for judgment.

January 15 and 16, 1901.

The case was heard at Ottawa.

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*H. Aylen, K.C.* and *A. W. Duclos*, for the plaintiff; *F. S. Maclennan, K.C.*, and *C. A. Duclos*, for the defendants.

March 9, 1901.

Reasons for Order of reference

On this date THE JUDGE OF THE EXCHEQUER COURT made an order referring the case for inquiry and report, touching certain matters in issue, to the Registrar of the court. The reasons upon directing such order are as follows :—

The plaintiff is employed as chemist by the Electric Reduction Company, which carries on a considerable business in the manufacture of phosphorus at Buckingham, in the Province of Quebec, and against which the defendants have brought an action for infringement of the patents hereinafter referred to. The defendants are the owners of the Canadian patent numbered 65698 for improvements in the process of obtaining phosphorus. The patent mentioned is a reissue of patent numbered 61494, and that in turn a reissue of patent numbered 32355, granted on the 19th of September, 1889, to James Burgess Readman, of Edinburgh, County of Midlothian, Scotland, Doctor of Science, for an alleged new and useful improved process for obtaining phosphorus "by subjecting "materials containing it to heat generated by an elec- "tric current within the furnace chamber containing "the materials and applied directly to them in the "manner" set out in the specification attached to the letters patent.

The action is brought to obtain a declaration that the letters patent numbered 65698 are null and void, on the grounds, (1) that the reissue was made contrary to law and is bad; (2) that there has been importation of the invention contrary to the provisions of section 37 of *The Patent Act*; (3) that there has been a failure

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to manufacture in accordance with the terms of that section.

The defendants, as appears from the answers to certain interrogatories submitted to them, acquired a sole license dated the 10th of February, 1892, under patent number 32355. Neither the terms of that license, nor the conditions on which it was granted, nor the time during which it was to run, are stated by the defendants, but it appears that on the 26th day of May, 1898, Dr. Readman, in consideration of one dollar, assigned to the defendants "all his right, title and interest in and to the Patent of Canada No. 32355."

Now with reference to the manufacture of the invention, it is admitted that neither Dr. Readman nor the defendants have ever manufactured phosphorus in Canada. The only person or company that has done that is the Electric Reduction Company, and they have established a considerable business, so that they supply not only the home market, but export considerable quantities to the continent of Europe. The owners of the patent have satisfied themselves, and think that they have satisfied the provisions of *The Patent Act* by giving notice by a few insertions each year in two newspapers published at Montreal, that they were willing to grant licenses for the use of the invention, or otherwise to supply the same, or to comply with the provisions of the statute. It is contended for them that the provisions as to manufacture and importation do not apply to a patent for a process, and in any event the provision as to manufacture is satisfied if they are ready at all times to manufacture it, or to permit it to be manufactured for any one desiring to obtain it. The notices to which I have referred were given for the years 1893 to 1897, both inclusive, in the name of Dr. Readman, though it would appear that having in 1892 given the defendants a sole license under the

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patent, he was not, so far as the evidence now before the court shows, in a position to grant any one the license that he offered by his notice.

As to importation one clear case is made out of the importation into Canada early in 1898 of thirty cases of phosphorus. This phosphorus was ordered for Messrs. Eddy & Co., by Messrs. Bellhouse, Dillon & Co., of Montreal, from the defendants in England, in the latter part of the year 1897, and it being then too late to ship from there, the defendants wrote that they had told Mr. Ricker, of New York, that when Eddy & Co. were open to buy he had better arrange to supply them either from stock in New York, or from their new Niagara Works. The order was filled from the Niagara Works, the phosphorus being there manufactured according to the process protected by the patent in question. Although in their letters the defendants refer to the works at Niagara, which are carried on by "The Oldbury Electro-Chemical Company" as their works, they now say that the latter company is an American company incorporated under the laws of the State of New York, and the active management is in the hands of the American directors who have absolutely no interest in the Canadian patent, the subject of this suit, nor in the defendant company, and the defendant company hold no shares in the Oldbury Electro-Chemical Company, although it is true that some shares in the latter company are held by individual shareholders in the defendant company. The suggestion is that the shareholders of a company holding a Canadian patent may either with or without bringing in other persons—for that can, I think, make no difference—form themselves into another company, which having as such company no interest in the patent, may, without danger to its validity, import as they like into Canada—the invention protected by the patent. If that could

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be done, and courts would shut their eyes to the real nature of the transaction, the provision of the Act as to importation would of course become a dead letter. But we have not come to that yet, and in this case the defendants must, I think, within the meaning of the statute be held to have caused the phosphorus in question to be imported into Canada.

At present I refrain from dealing further with the important questions involved in this case. I think I should have more definite and precise information as to what the defendants' real interest in the patent was between the years 1892 and 1898. They may have some bearing upon the validity of the notices given in Dr. Readman's name, if such notices are held to be a compliance with the statute, and it will have an important bearing on the result, if a conclusion should be reached that because of the importation mentioned the patent is void in respect of the defendants' interest at that time.

There will be a reference to the Registrar of the court to enquire and report what the nature and extent of the defendants' interest in patent numbered 32355, and in any reissue thereof, were between the 10th day of February, 1892 and the 26th day of May, 1898, and any commission to take evidence out of Canada, that may be necessary, may issue.

It is possible that the defendants should be directed in any event to bear the cost of this inquiry, because of the reserve and economy of information with which they have seen fit to answer the interrogatories submitted to them; but I will reserve that question until after the enquiry and report are made.

January 29, 1902.

The Registrar now made his report, which was as follows:—

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Whereas by a judgment of this court hearing date the 9th day of March, 1901, it was, among other things, ordered that there be a reference to L. A. Audette, the Registrar of this court, to inquire and report what was the nature and extent of the defendants' interest in patent numbered 32,355, and in any reissue thereof, between the 10th day of February, 1892, and the 26th day of May, 1898.

And whereas the reference was proceeded with on the 25th day of May and on the 7th day of December, 1901, in the presence of H. Aylen, Esq., of counsel for the plaintiff, and F. S. Maclennan, Esq., K.C., of counsel for the defendants, and upon hearing read the evidence adduced, the Commission returned and filed in this court on the 2nd day of December, 1901, and upon hearing what was alleged by Counsel respectively, the undersigned begs leave to report as follows:—

Dr. Readman, the inventor, says that the first dealing with the Canadian Patent No. 32,355, in issue in the present case, was a preliminary agreement with F. Walton, as trustee with an interested company, by which he gave him the necessary power-of-attorney to sell and assign the said patent. There was also the preliminary syndicate that he had in Edinburgh, and which was ultimately disposed of to F. Walton in 1890. However, Dr. Readman himself says after he executed that power-of-attorney to Walton on 7th January, 1890 he had no further interest in the Canadian patent. He considered he had by that deed sold and parted out and out with all his interest in the Canadian patent.

Then on the 23rd October, 1891, Walton sold to the Phosphorus Co.

On the 10th February, 1892, the Phosphorus Company executed the deed or license which consti-

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tutes the defendants' title from that date to the date of the clear and distinct assignment bearing date the 26th May, 1898. The deed of the 10th February, 1892, did not vest the property in the defendants for all purposes; the Phosphorus Company retained some beneficial and equitable interest in the Patent.

The part Readman took in the deed of the 26th May, 1898, was only for greater certainty, as Walton's name did not appear in the Canadian registries, where Readman's name was still retained, notwithstanding the above mentioned deed.

Therefore I have the honour to report that the defendants' interest in Patent No. 32,355 between the 10th of February, 1892, and the 26th of May, 1898, was that acquired under the license bearing date the 10th February, 1892, from the Phosphorus Company, which retained some beneficial and equitable interest in the same, as it more fully appears by the said deed; and that Readman had no interest in the said Patent during the period mentioned, he having parted out and out with all interest in the same in 1890, and that, besides the defendants, the only other parties who had any interest in the said Patent during the period mentioned were the Phosphorus Company which retained the several rights and interests mentioned in the deed of the 10th February, 1892.

In witness whereof I have hereunto set my hand this 28th day of January A.D. 1902.

(Sgd.) L. A. AUDETTE,
*Registrar and Referee.*

February 27th, 1902.

The argument of the motion by defendants to confirm the referee's report was now heard.

*H. Aylen, K.C.*, in support of the motion: This is an action brought by way of statement of claim to cancel certain letters patent which the defendants claim

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to be the owners of, first, because of non-manufacture within Canada; secondly, of wrongful importation into Canada; and thirdly, because the patent in question is a reissue patent, and was not issued on the application of the original owner, but was issued without his preparing the specifications and without his making the affidavit that the reissued patent represented his invention. Also, because the reissued patent had been granted by inadvertence and mistake.

The question of non-manufacture was considered at the trial, and the only proof of attempted manufacture consisted of evidence that notices were published in Montreal just a few days before the two years limited under the 37th section had expired.

*F. S. Maclennan, K.C.*, for the defendants.

The whole case is now open for rehearing, and I imagine that the defendants have the right of reply.

[BY THE COURT:—You may go on now with defendants' argument.]

The patent in question as issued is our client's own property. There is no doubt about that fact.

Now, my first proposition is that section 37 of *The Patent Act* is not applicable to the case of a process patent. I submit that the construction of that section plainly excludes the manufacture of a process.

Looking at section 7 of *The Patent Act*, we find that the subject matter of a patent in Canada may be for an art, or it may be for a process. It may be for a machine, or for some article produced by a certain machine; something that has an existence of its own apart from the process. On the other hand the process is something that in itself cannot be manufactured. It is a process whereby something new is produced, or whereby something old is produced by a a new method. Looking at the language of section 37, sub-section (*a*) of *The Patent Act*, which has reference to the manufac-

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ture of the patented article, we find that unless the patented article is manufactured within the terms of the statute, viz: that the patentee must commence and afterwards carry on the manufacture of the invention patented, the patent will be void. Now, I submit that there could not be a manufacture of a method or a process. And, therefore, it must be said that by fair construction of section 37 the owner of a process patent is not to lose his rights by reason of non-manufacture.

Assuming for the sake of argument that a process patent is within the language of the 37th section, I submit that it must be shown that there was a demand made upon the patentee for the process, and that they did not, or were not in a position, to furnish it. Now I think the evidence demonstrates that this phosphorus is the same as ordinary phosphorus in the market. Our invention does not claim to produce a phosphorus better than the ordinary merchantable quality. We simply produce an old article by a cheaper method. If we are asked to sell anything under our patent it would have to be the process itself. Now there has been no demand on us for the purchase of the process. There is no evidence at all that we have refused to do anything with respect to our invention, that is upon us by the provisions of section 37.

[BY THE COURT:—By your invention you say that you simply enable the public to get phosphorus at a cheaper rate?]

Yes; and I submit that the object and meaning of section 37 seems to be to encourage and protect Canadian labour by compelling the patentee to manufacture his invention at some factory or establishment in Canada. Surely these words are inconsistent and incompatible with any application to a process patent.

Assuming that the court should come to the conclusion that the patentee should be ready to manufacture

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or sell this process, I rely upon the fact that the plaintiff has failed to prove that we ever failed to comply with the demand of the purchaser. The evidence for the defendants is that nobody ever applied to purchase it, and the plaintiff admits that neither he nor his company ever applied. The evidence shows clearly that no person ever came to us or anybody representing us to purchase the process.

[BY THE COURT:—The notice of the application for the reissue of the patent was given by whom? Was it given for Readman or Albright?]

That notice was given on behalf of Readman; but I might say there is nothing in the law requiring such a notice to be given.

[BY THE COURT:—No, but it is a method adopted to satisfy the law.]

Readman was the owner so far as the Patent records showed at that time. But it is true that Readman says that he did not know anything about this notice.

[BY THE COURT:—Then probably if the notice was not given by one having the proper interest in the patent, we may get back to the fact that there was in reality no notice at all.]

Assuming that to be so, no notice was necessary to be given at all. And there is the further fact to be borne in mind that nobody applied to purchase the process and nobody was refused.

[BY THE COURT:—Were not the Albrights the people who ought to have been ready to sell the invention?]

It was the Phosphorus Company. The Referee's report really amounts to that. It was in this way, the Albrights gave a power-of-attorney to Walton about 1892. The Phosphorus Company was formed to acquire the rights of all these parties. Walton

assigned the British rights in 1891 to the Phosphorus Company; and undertook, by deed, to be ready under the directions of the Phosphorus Company, to assign to third parties. In 1892 the Phosphorus Company gave a license to us for the use of the Canadian patent, that is to say the Phosphorus Company gave Walton a direction to assign the Canadian Patent to Albright & Wilson, who are now the actual owners of the patent. This direction was given by the Phosphorus Company to Readman, who was then the actual owner of the patent, to assign the patent to the defendants in 1898. The patent was placed under the control of the defendants in 1898. In May, 1898, the part that Readman took in it was for greater certainty only, he being the legal owner.

[BY THE COURT:—Is there really anything to show that this was Albright's notice, though given in Readman's name?]

I think it was undoubtedly their notice. Albright & Co. were the only people who had the right to grant a license. That fact being on record, I submit that they would be presumed to have given the notices. The fact that they were given in Readman's name was because he was on record as the owner of the patent. But at all events I submit that even if there is no notice at all we are in no worse position so far as the statute is concerned, because the notice is not a matter required by the statute It does not improve our position or give us judicial support.

Under the case of *Barter* v. *Smith* (1), even if the provisions of section 37 apply, it would not be necessary for the defendants to do more than to be in a position to supply any demand made upon them for their invention. The case of *Barter* v. *Smith* (1) is a leading one and was affirmed in the Ontario Court of

(1) 2 Ex. C. R. 455.

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Appeal, and afterward in the Supreme Court of Canada. The principle there laid down was also affirmed in *Anderson Tyre Co.* v. *American Dunlop Tyre Co.* (1); and also by Sir John Thompson in his opinion in the Departmental case of *The Royal Electric Co.* v. *The Edison Co.* (2). I specially refer to where Sir John Thompson says that the importation to avoid the patent must be of the invention for which the patent is granted. The statute must be construed strictly, because the patentee is penalized—it is a penal remedy—and the patentee must be clearly brought within the law before he can be adjudged liable to have his patent voided.

Moreover the action here is not for the purpose of cancelling our license. The license is void now, and we have all the rights of a full assignment.

[BY THE COURT:—One has to make up his mind what was the interest. Was it that of a licensee or an assignee?]

With reference to the English authorities and the English statute I desire to say that there might be an infringement of a process patent in England which would not be an infringement in Canada. I refer to section 33 of the English Patent Act of 1883, and I say that a patent granted in the form prescribed in the first schedule of the Act would not be the same as a patent granted under our Act. I submit that a grantee's rights under a Canadian process patent for an old product are greater than those of a grantee under the English Act.

[BY THE COURT:—Why?]

Because it depends upon the terms of the grant and the terms of the patent. If the grant is different in England, and cases have been determined there in regard to the special statutory provisions prevailing there, then

(1) 4 Ex. C. R. 82. (2) 2 Ex. C. R. 597.

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the cases will not apply here. I am endeavouring to point out that the English patent is very much broader than the Canadian patent. The patentee there gets the whole benefit, commodity and advantage of the patent.

[BY THE COURT:—Does he not have that in this country ?]

But the language of the English Act is wider (He cites *Elmslie* v. *Boursier* (1). That judgment is based entirely upon the words "giving the whole, profit, commodity, benefit and advantage to the patentee," and not upon the general provisions "to make, exercise and vend."

There is a difference between this case and the case of *Auer Incandescent Light Mfg. Co.* v. *O'Brien* (2), because in that case it was decided that the process was the only way of making the patented invention. (He cites section 20 of *The Patent Act*; *Von Heyden* v. *Neustadt* (3); *Saccharin Corporation* v. *Anglo, etc. Works* (4); *Badische Anilin* v. *Levinstein* (5). As I said before, the *Auer Light Case* (2) is different because the product could only be made by that particular process at that time; and by the evidence of Mr. Dillon in this case it is impossible to tell the phosphorus produced by the patented process from that produced by any older method; the only result being phosphorus obtained by a cheaper process. Therefore, I say that even if there were importation of phosphorus manufactured by the process abroad it would not be an importation within the meaning of Section 37 of *The Patent Act*. Then again we submit that if it be held to be an importation of the patented invention, the importations were too small in quantity to effect an avoidance of the patent, under the authorities of *Barter* v. *Smith* (6) and cases affirming

(1) L. R. 9 Eq. 217 at p. 222
(2) 5 Ex. C. R. 243.
(3) 14 Ch. D. at p. 232.
(4) 17 Cutl. R. P. C. 307.
(5) 4 Cutl. P. C. at p. 462.
(6) 2 Ex. C. R. 455.

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that case. The importation of thirty cases of phosphorus was an inconsiderable quantity under the ruling in these cases, and did not displace appreciably Canadian labour.

Furthermore, we submit that it was not an importation in any sense, because the sale was made abroad in a foreign country and the goods were delivered abroad to a vendee who was not the defendants; so it could not be said in any sense that if they were imported into Canada they were imported by the defendants. On the contrary they were imported, if at all, by third parties. The most the defendants had to do with it was that they informed an intending purchaser of phosphorus that they could get the order filled from New York or Niagara Falls. Now the defendants did not know the law, although I suppose they were bound to know it; but this goes to show *bona fides*, and the absence of any intention on their part to violate the law. They were led into it in that way. The importation into Canada of thirty cases would not be such as would displace Canadian labour within the policy of the Act. (He cites *Saccharin Corporation* v. *Reitemeyer* (1).

I wish to point out further that *The Patent Act*, sec. 37, as it then existed, was interpreted in *Barter* v. *Smith* in the year 1877. Section 37 was then section 28, and it has since been re-enacted three times, namely, in 1886, 1890 and 1892. The presumption then is, under the authorities, that the legislature has adopted the interpretation and construction placed upon it in the case of *Barter* v. *Smith* and in subsequent cases in the same line. In support of such a presumption being drawn, I would refer to the case of *Greaves*

(1) 69 L. J. Ch. 761.

v. *Tofield* (1); *Barlow* v. *Teal* (2); *Ex parte Campbell* (3); *Hardcastle on Statutes* (4).

I submit that it was the interest of a licensee only that could be bound by the importation complained of. The document which is in evidence does not contain apt words upon which to assign a full grant in the patent. It cannot be said to be an assignment, because nothing short of words of grant will make a document of this kind anything more than a license. The report of the Referee is that the interest of our people was that of licensees.

[BY THE COURT :—Is the instrument limited as to time?]

It is for the full life of the patent. When the patent dies the license terminates. Your lordship will see that it refers to foreign patents as well, patents in Norway, Sweden, France, etc. While the defendants had the right to sub-let they had not the right to assign. They had no power to make a grant within themselves, and so were not owners until they obtained a regular assignment. (He cites *Heap* v. *Hartley* (5); *Edmunds on Patents* (6); *Waterman* v. *McKenzie* (7); *Pope* v *Gormully* (8). I wish especially to direct your lordship's attention to *Gayler* v. *Wilder* (9). See also *Robinson on Patents* (10); *Guyot* v. *Thomson* (11).

As to the question of costs, in any event the costs of the reference should not be allowed against us, because my learned friend had the right to take a commission to discover the character of our interest. He did get the answer that we were licensees; he could have done that by commission and the costs of

(1) L. R. 14 Ch. D. 563.
(2) 15 Q. B. D. 403.
(3) L. R. 5 Ch. App. at p. 706.
(4) 3rd Ed. p. 156.
(5) 42 Ch. D. at p. 469, 470.
(6) 2nd ed. p. 300, 301 & 363.
(7) 138 U. S. 252.
(8) 144 U. S. 248.
(9) 10 How. at pp. 477, 498.
(10) Vol. 2, secs. 806, 807 & 808.
(11) [1894] 3 Ch. 388.

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the reference would not have been necessary. The license was produced and filed on the 25th of May, which was before the commission was issued, and admissions were put upon the record to the effect that our people were then licensees and equitable owners, and that goes further than the evidence for the plaintiffs had gone. I do not think that we should be held responsible for the costs of the commission to England.

*C. A. Duclos*:—There is one point upon which my learned friend Mr. Maclennan did not touch, viz: the validity of the reissue of the patent as such. There are two reissues of the original patent. The first reissue specifications were substantially the same as the original, the difference not being material. My contention is that the first reissue is absolutely the same as the original patent, covers exactly the same invention, and was perfectly innocuous and probably useless. As to the second reissue, your lordship will remember the circumstances. The second reissue was not at the instance of the owner of the patent. It was instigated and brought about by the Department; it was the Commissioner himself who demanded that the first reissue should be cancelled under threat of proceedings by *scire facias* to set the patent aside. The correspondence leading up to that reissue is perfectly clear upon that point.

Now this reissue is also objected to in form as well as in substance. It is said that the oath is not in form and that the specifications were not signed by the inventor. There is nothing in the statute which calls for the oath. Neither the oath nor the signature are necessary under the statute. [He refers to Form 82 in the Patent Pamphlet issued by the Department of Agriculture, and section 52 of *The Patent Act.*]

I can see a distinction between the effect of non-manufacture and that of importation. I can see that

the section could not apply to a process patent so far as non-manufacture is concerned, and yet might be held to apply in the case of importation. I look upon the manufacture required in section 37 as a qualified manufacture. We are not called upon to exploit the invention as they have it in the French law. Upon a *ratio materiæ* this could not apply to a process patent. Now, the object of the legislature was to secure in Canada the benefit of the invention. Anyone who wanted phosphorus could make it and could buy it perfectly freely. The chemical phosphorus is just as good as other phosphorus. The only benefit arising under our invention was the producing of it in a cheaper way. Section 37, in such a case, only contemplates a person going to the owner and asking him to make the phosphorus for him, because it is only a qualified manufacture we are called upon to carry out.

Although there is no statutory necessity to give the notice to which allusion has been made, when it is given it takes away any objection of the kind that the purchaser, or intending purchaser, may not know where to apply to obtain the invention. And where it is given at all it must be presumed to have been given in the interests of the then owner of the patent. I think that is the only use of the notice. The effect of it is to say that the owner has been always ready to sell or license to anyone who desires to have it.

As to importation, the proof in this case does not show that the importation was by the defendants (He cites *Badische Anilin* v. *Basle Chemical Works* (1). This case explains what is meant by "causing" importation to be made. I do not think, upon the facts in evidence, that the court could say that the defendants had caused any importation within the

(1) 67 L. J. Ch. at p. 143.

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meaning of section 37. The goods were delivered f. o. b. at Niagara Falls, and the whole transaction was complete outside of Canada. And Bellhouse Dillon & Co. were in no sense the agents of the defendants. Their agency had ceased before this transaction. At the most it could only be said that if there were any importation at all, it was the importation of a licensee, and the licensee may be likened to the legal position of a lessee. The lessee is not permitted to destroy the property, nor is a licensee. The licensee is bound to protect the property. It would be disastrous to the owner of the patent if, for instance, a licensee in order to avoid the payment of royalties, was able to do some act which would have the effect of destroying the patent. That power ought not to be reposed in a mere licensee.

There is no other country where an enactment in all terms identical with this 37th section is in force. The law of France is more similar than any other laws; but there it is necessary for the patentee to "exploit" or work the patent. The French law is more onerous upon the owner of the patent.

*H. Aylen, K.C.*, for the plaintiff:

The owner of the patent is required to manufacture within the meaning of the Act. The Act requires him to supply the subject of the patent to the public. Defendants admit that they never made efforts to manufacture in Canada, so they would have to import it to supply the demand. And the notice is bad, because Readman had no authority to give it. He had no interest in the patent. On the other hand Readman knew nothing about the giving of the notice. It is difficult to imagine how Evans could give the notice for the defendants when neither the defendants nor the Phosphorus Company knew anything about

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it. (He cites *Barter* v. *Smith* (1).) Clearly here Mr. Taché points out why the clause corresponding to the 37th section now was introduced into the then Act, namely, for protecting the Canadian public and for protecting Canadian labour.

Stress has been laid in this case on the fact that the proportion of Canadian labour displaced is very small. But the facts are different here from the facts in the case of *Barter* v. *Smith*. It was held in the *Anderson Tyre Case* (2) that the article was introduced not for commercial purposes, and that only about fifteen cents worth of labour had been displaced. In *Barter* v. *Smith* it is not right to say that Mr. Taché's opinion was supported or affirmed by the Supreme Court in *Smith* v. *Goldie* (3). It is true that Mr. Justice Henry did refer to Mr. Taché's remarks with approval; but that was only *obiter*, and the other judges did not pass upon it, and so it is hard to say that on the question mentioned Mr. Taché's views were approved by the Supreme Court. (He refers to *Von Heyden* v. *Neustadt* (4)

Canadian labour must have been displaced by this importation when the Electric Reduction Company have been sued by the defendants for infringement of the patent. My learned friends have referred to the French law. The courts in France can exercise a discretionary power as to how far an imporation has infringed the law, but that is not the case under our statute.

Surely the notice is no compliance with the statutory requirements to manufacture. Surely a man ought not to be excused by showing that although he did not manufacture, he held himself ready to let somebody else do it for him. Phosphorus was formerly manufactured abroad, and now Canada has become an

(1) 2 Ex. C. R. at pp. 480, 481.
(2) 5 Ex. C. R. 100.
(3) 9 Can. S. C. R. 46.
(4) 14 Ch. D. at p. 702.

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exporter of phosphorus. There was a demand for cheap phosphorus under electrical process, and we have employed Canadian labour to the extent of forty thousand dollars a year. Clearly this importation was for commercial purposes.

As to the necessity of an affidavit on the part of an inventor for a reissue, I would refer to section 23 of *The Patent Act*. The first reissue is entirely different from the original. Their affidavit amounts to this on the first reissue, namely that Readman did not get what he was entitled to. And this proves that there was a mistake made. But Readman says that he was never consulted about it.

[BY THE COURT:—Is there a difference between the original patent and the reissue?]

The first re issue says there should be an exclusion of all gases.

The fact is that the Minister has decided that the first reissue was granted through inadvertence and mistake. My interpretation is that the Minister decided that the first reissue was obtained through misrepresentation, and he ordered its surrender. I submit that he had no right to make a second reissue, although he seemed to say to them that he would give them what they had before, that is the original patent. I say that if the Minister took a bond he would not have been in a better position; and I say that the Minister had no right to give it to them back after they had made a bad reissue. The defendants were the Phosphorus Company as well as Albright, Wilson & Co. The defendants controlled the works at Niagara Falls, and the license was a transfer in substance and in fact. (He cites *Frost on Patents* (1).

If the monopoly is the grant, what is the interest of the defendants? The royalty is the price, in the civil

(1) P. 344.

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law, of a sale. The vendor tacitly warrants that he has a title in the thing sold. There would be a transfer with warranty subject to the payment of the price. If the licensees are troubled in the property, the payment of all damages suffered by them would have to be taken out of the royalty. The English law is different, and the maxim of *caveat emptor* applies. The motive spring of all these royalties was protection; in case the patent was set aside in any country all the damages should come out of the royalty. (He refers to *Guyot* v. *Thomson*, (1) cited by counsel for the defendants)

If the owners of the patent do not sue, when requested to do so by the licensees, then the licensees can sue in their own name. Now as all these parties are merely nominal, that is, that Albright & Wilson and the Phosphorus Company are really the same people, all the transactions are between the defendants acting under different names. This transfer to them by assignment would amount to what is called "consolidation" in the civil law, which occurs when a man is the beneficial owner and joins to that the legal ownership. Now it would be inequitable for a licensee and an assignee, being one and the same person, to do something that would avoid the patent in the capacity of licensee, and then consolidate his titles, and say that as assignee he should not be bound by his acts as licensee. (Cites *Ridout on Patents.*) (2):

*F. S. Maclennan*, in reply;—I do not see how your lordship can review the action of the Minister of Agriculture in granting a reissue.

[BY THE COURT:—If he had jurisdiction, I do not think a court could go into the question.]

We say we were entitled to a reissue. I have cited a number of cases as to reissue, and they show that a

(1) [1894] 3 Ch. 388. (2) P. 186.

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reissued patent is exactly in the same position as an original patent. As to the notice I might say that no one has been shown to be prejudiced by reason of the form in which the notice was given. Under the decision in the *Saccharin Corporation* v. *Reitmeyer* (1) our clients cannot be connected with the importation, because the sale and delivery took place in the United States.

So long as the words of the license do not amount to a grant it is not an assignment and must be treated as a license.

As to the identity of existence between these corporations, the fact that some persons were shareholders in both companies does not make the corporations identical.

THE JUDGE OF THE EXCHEQUER COURT now (March 20th, 1902) delivered judgment.

As stated on a former occasion, the action is brought to obtain a declaration that letters-patent numbered 65698 are null and void on the grounds (1) that the reissue was made contrary to law and is bad; (2) that there has been an importation of the invention contrary to the provisions of section 37 of *The Patent Act*; and (3) that there has been a failure to manufacture in accordance with the terms of that section.

With regard to the first ground on which the declaration is asked, it appears to me that the Commissioner had jurisdiction to grant the reissue, and that his decision should be accepted as conclusive of the questions now raised as to the reissue. (*The Auer Incandescent Light Manufacturing Co.* v. *O'Brien* (2).

With regard to the third ground on which it is sought to impeach the patent it is certain that neither the patentee, nor his assignee, The Phosphorus Com-

(1) 69 L. J. Ch. 761. (2) 5 Ex. C. R. 283.

pany, nor the defendants, its licensees, ever had any intention of manufacturing phosphorus in Canada in accordance with the process for which the patent was issued, or otherwise. This is clear from the evidence of Mr. John William Wilson, a director of the defendant company taken under commission. He states that from a manufacturer's point of view the consumption of phosphorus in Canada has never been sufficient to justify the defendants in putting up works to work the Readman patent for Canada alone; that they believed they were well enough placed by their own works not to do so, although they had been pressed once or twice by the Phosphorus Company to do so. By the expression "our works," which Mr. Wilson uses, I understand him to mean the defendants' works in England, and possibly also those that were put up in the United States at Niagara by The Oldbury Electro-Chemical Company, to which the defendants in some of their letters refer as "their works." Mr. Wilson also stated that obviously it would be no advantage to the defendants to manufacture in Canada unless there was a demand there; that they preferred to supply Canada from their other works, and that up to the end of 1896 they supplied the Canadian trade from England with phosphorus manufactured under their process chemically which had nothing to do with the patent in question.

By the 37th section of *The Patent Act*, the provisions of which constituted one of the conditions on which the patent was granted, it is provided that the patent and all the rights and privileges thereby granted shall cease and determine and the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives or assignee, within that period or any authorized extension thereof, commence and after such commencement

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continuously carry on in Canada the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada. Now this provision presents the difficulty that the language used is not apt or appropriate where the invention is an art or process, as it may be. One does not construct or manufacture a process, and no one can obtain a process or cause it to be made for him at a manufactory or establishment. In the present case the phosphorus made by the process for which the patent issued is the same as that made chemically. The invention is useful because phosphorus may be made more cheaply in the way discovered by the patentee. The only advantage that can possibly accrue to the people of Canada, for the grant given, is that during its existence they may get phosphorus cheaper than they otherwise would, and that after the grant has terminated the invention may be free to all. The only way that advantage could be secured in the present case, without allowing the importation of phosphorus made in accordance with the process protected by the patent, would be to impose upon the patentee or his assignees the obligation to make it, or cause it to be made, in Canada, according to that process, so that anyone desiring to do so could obtain it at a reasonable price. But as stated there is the difficulty, and it is a real one, that Parliament has not so provided in apt and clear terms.

Then there is this further difficulty that in earlier cases arising upon this provision it has in substance been held by Dr. Taché and others that a patentee is not in default for not manufacturing his invention, unless or until there is some demand for it with which he has failed to comply; unless some person has desired to

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use or to obtain it and has been unable to do so at a reasonable price; and that where the invention is a process only the patentee satisfies the statute and the condition of his patent by being ready to allow the process to be used by any one for a reasonable sum. (*Barter* v. *Smith* (1), *The Toronto Telephone Manufacturing Co.* v. *The Bell Telephone Co. of Canada* (2). Now, Dr. Taché's views are entitled to great consideration, and whether one agrees therewith or not, he cannot get away from the fact on which Mr. Maclennan relies, and to which I alluded in *The Anderson Tire Co. of Toronto, Limited* v. *The American Dunlop Tire Co.* (3); that these provisions of *The Patent Act* have since his decisions been re-enacted on several occasions without anything to indicate any dissent by Parliament from the view that had been taken of such provisions. I do not myself profess to be satisfied with the result as illustrated by the present case, in which the only use made of the patent has been to aid the defendants in holding in their hands the trade in phosphorus within Canada, without any intention of manufacturing phosphorus here, or of giving the people of Canada the advantage of having it made by the cheaper process for which the patent was granted.

But the construction put upon the provision in question has been received and acted upon for too long to be now disturbed, except by an amendment of the provision, if Parliament should deem any amendment necessary. Accepting the construction that has been put upon this provision, imposing on a patentee the obligation to manufacture to be correct, the defendants here are not in default.

Then as to importation contrary to the statute, one case of the importation of phosphorus made by the

(1) 2 Ex. C. R. 455. (2) 2 Ex. C. R. 524.
(3) 5 Ex. C. R. 100.

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process for which the patent was granted, has been made out, with which the defendants were connected I think in such a way that it can with propriety be said that they caused the importation to be made. I am also of the opinion that the importation of phosphorus made according to the process mentioned is, within the meaning of the 37th section of *The Patent Act*, an importation of the invention. But that does not make the patent void; but void only as to the interest of the person importing or causing to be imported. At the time of the importation proved in this case the legal title to the patent was in Dr. Readman, while the Phosphorus Company was the beneficial owner, subject to an exclusive license to the defendants to manufacture phosphorus in Canada upon, among other terms, one for the payment of a royalty of one penny per pound on all phosphorus so manufactured. Afterwards and before this action was commenced Dr. Readman, at the request of the Phosphorus Company, assigned the patent to the defendants. By that assignment, which was made on the 26th of May, 1898, the legal title to the patent was vested in the defendants, and the license became merged therein. Apparently this was done for the mutual convenience of the Phosphorus Company and the defendants, and without any intention by the former to give up its claim to the royalty on any phosphorus manufactured in Canada. This action is brought to have the patent declared null and void, which under the circumstances cannot be done, and even if it were thought that some other relief than that prayed for might be granted, nothing would be gained by declaring the patent void as to the defendants' interest at the time of the importation mentioned; for that would be to still leave them the owners of the

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patent either in their own right or in the right of the Phosphorus Company.

There will be judgment for the defendants, and they will be allowed their costs, except those of the reference to the registrar, in respect of which each party will bear his own costs.

*Judgment accordingly.*

Solicitors for plaintiff: *Aylen & Duclos.*

Solicitors for defendants: *Macmaster, Maclennan & Hickson.*

NEW BRUNSWICK ADMIRALTY DISTRICT.

BETWEEN

1902 CLARENCE McGREGOR ROBERTS.....PLAINTIFF;

Jan. 8.

*against*

THE SHIP "*PAWNEE.*"

*Admiralty law—Collision between steamer and sailing vessel—Undue speed —Rule 16—Liability.*

Two vessels, a steamer and a sailing schooner, were making for the harbour of St. John, N.B., at noon, on a certain day. The steamer had passed the whistling buoy, off Partridge Island, and was sailing a N.W. by N. course. The schooner was running about N. with a fair wind, which was very light. A thick fog prevailed. The steamer's speed was between four and five knots, when those on board heard three blasts from a fog-horn on the schooner for the first time. This indicated to those on board the steamer that the schooner was about four points off their bow, and that she was sailing free in a northerly direction. Upon hearing the blasts the steamer continued upon her course at the same speed. Ten minutes after she first heard the blasts the steamer struck the schooner on the starboard side, with her bow about midships, and stove her in, the schooner sinking in a few minutes.

*Held*, that under rule 16 of the Regulations for Preventing Collisions at Sea, it was the duty of the steamer upon hearing the fog-signals to stop her engines, so far as the circumstances of the case would permit, and then navigate with caution until the danger of collision was over. The steamer was, therefore, wholly responsible for the collision.

THIS was an action for damages by collision between a steamer and a sailing vessel near the entrance of the harbour of St. John, N.B.

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

July 25th, 1901.

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The case was heard at St. John, N.B.

*H. H. McLean, K.C.*, for the plaintiff: When the steamer first heard three blasts of the fog-horn on board the schooner it was her duty to stop until she had ascertained where the schooner was and her course. The captain of the steamer admits he knew from the sound that the schooner was running free; he also admits that he knew there was danger of running into the schooner. (*The Heather Belle* (1); *The Zambesi* (2); *The Lancashire* (3); *The Kirby Hall* (4); *The John McIntyre* (5); *The Dordogne* (6); *The Ebor* (7); *The Lord Bangor* (8); *The Rondane* (9); *The Cathay* (10); *The Frankland* (11); *The Campania* (12). All these cases establish that it was the duty of the steamer to slow down her speed so that she would be in a position to stop, after sighting the schooner, in time to prevent a collision.

*C. J. Coster*, for the ship, contended that the authorities cited by counsel for the plaintiff only applied to cases where vessels were approaching each other, and under a specific rule in that behalf. The evidence is that the schooner was sounding three blasts, showing that she was going in the same direction as the steamer, and that she was sailing free. If a steamer were obliged to stop every time a horn was heard, she would be stopped all the time in foggy weather, and would run great danger of being run down by other vessels. *The Marpesia* (13).

(1) 3 Ex. C. R. 40.
(2) 3 Ex. C. R. 67.
(3) [1894] A. C. 1.
(4) 8 P. D. 71.
(5) 9 P. D. 135.
(6) 10 P. D. 6.
(7) 11 P. D. 25.
(8) [1896] P. D. 28.
(9) 69 L. J. Adm. 114.
(10) 81 L. T. N. S. 391.
(11) L. R. 4 P. C. 529.
(12) 83 L. T. N. S. 511.
(13) 8 Moo. P. C. N. S. 478; L. R. 4 P. C. 212.

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The accident was inevitable so far as the steamer was concerned, and had the schooner hauled her wind when she first sighted the steamer, they would have run up alongside of each other and little damage would have been sustained by either. (*The Calcutta* (1); *The Argentino* (2); *Marsden on Collisions at Sea* (3).

*H. H. McLean, K.C.*, replied.

McLEOD, L.J. now (January 8th, 1902,) delivered judgment.

This is an action brought by the plaintiff, as owner of the schooner *Roland*, registered at Parrsboro, N S., for damages occasioned by collision with the steamer *Pawnee*, on July 17th of last year, by which the schooner and her cargo were lost.

Three actions were brought against the steamer, one by the plaintiff, as owner of the schooner; one by Joseph A. Likely, as owner of the cargo; and one by the seamen on board the schooner for their personal effects; but on the hearing the cases were consolidated and tried as one case. The collision took place about noon on the 17th of July last, near the whistling buoy, off Partridge Island. The steamer was on her way from New York to St. John in ballast. The schooner was coming from Parrsboro to St. John loaded with coal. Both vessels were making for St. John. The steamer had passed the whistling buoy and was sailing a N.W. by N. course. The schooner was running about north with a fair wind, which was very light, and there was a thick fog. The steamer struck the schooner on the starboard side, with her bow about midships, stove her in and she sank in a few minutes. At the outset I may say that there is no evidence that shows that the schooner was in any way at fault. She

(1) 21 L. T. N. S. 768. (2) 14 App. Cas. 519.
(3) 2nd ed. pp. 354, 380.

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was sailing with the wind, which was very light, and she was going very slow, having not much more than steerage way, and would not answer her helm quickly. She was supplied with a good mechanical fog horn, which was kept continually blowing, giving three blasts at proper intervals. The steamer was blowing her whistle, which was heard on board the schooner. The question I have, therefore, to consider is whether the steamer was in fault, either in running at too great speed under the circumstances, and whether she violated the rule in not stopping when she first heard the schooner's fog horn. As so much depends on the action of the steamer after the schooner's horn was heard, I will first refer to some of the evidence of those on board the steamer taken on behalf of the defendant. Captain Cartwright, the captain of the steamer, was examined, and part of his evidence, by question and answer, is as follows:

"Q. Before the accident did you hear any fog horn "blowing?—A. Yes, we heard a sailing vessel's horn "blowing, giving three blasts sometime previous to it, "about ten minutes before the accident. Q. After that "did you hear three blasts again?—A. When we saw "the schooner right ahead, three at the same time. "Q. You say the schooner was then how far off?—A. "About a hundred yards distant. Q. The fog, you say, "was very thick?—A. Very dense. Q. As soon as you "saw the schooner what did you do—what order did "you give?—A. Stopped the engines." And he further says that he ordered the engines full speed astern, but the steamer struck the schooner. He further answered as to the schooner: "Q. How was the schooner sail-"ing?—A. Sailing with the wind free. Q. Had she "come up in the wind would the accident have been "lessened?—A. I imagine had the schooner taken quick "action, and put her helm down and hauled her wind,

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"we might have gone alongside of each other, and "might not have done serious damage."

As to this, as I have already said, the wind was very light, and the schooner had not much more than steerage way and would not answer her helm quickly. The captain of the schooner, however, in his evidence, says that so soon as he saw the steamer he ordered his mate, who was at the wheel to put it hard to starboard, and that he saw the order obeyed, and the mate, in his evidence, corroborates this and says that he obeyed and put the wheel hard to starboard. The captain of the steamer further answers in his cross-examination as follows:—

"Q. You heard the schooner's horn, you say, about "ten minutes before the collision?—A. Yes, heard it "the first time. Q. You heard it off your port bow?— "A. It seemed to me a little before the beam on the "port side. Q. You heard the schooner blowing three "blasts?—A. Yes. Q. That would indicate that she "was running free?—A. Yes. Q. And you would "know, of course, that there was danger of running "into her?—A. Yes. Q. Now, did you give orders to "slow down the speed you were going at after you "heard the schooner's horn?—A. At that time we did "not. She was going slow. Q. She was going at the "same speed she had been through the morning?— "A. She had been for half an hour or so. Q. I think "you will see by the engineer's log that a long "time before that she was going at full speed?—A. "Going slow. Q. Going slow would be six knots?— "A. No, we were going slow all the morning. I was "on the bridge. I was on the bridge from eight "o'clock, part of the time we were going full speed, "and another part of the time we stopped the ship "altogether to get soundings."

Griffith Jones, the first officer of the steamer, was also called, and, after saying that the collision occurred just after they had passed the whistling buoy, and that they heard the whistling buoy at Partridge Island. In his direct examination—by, question and answer, he says:—

"Q. Did you hear the sound of a fog horn?—A. Yes. "Q. About that time?—A. Well I heard three blasts "about ten minutes before the accident occurred. Q. "You were on the lookout, were you?—A. I was on "the lookout. Q. Who was with you on the lookout? "—A. Another man. Q. What was his name?—A. A "seaman, Antonio Masco. Q. He was with you?—A. "Yes. Q. You say you heard three blasts about ten "minutes before the accident occurred, when did you "next hear any blasts?—A. Just the time we collided. "Q. How far ahead was the schooner *Roland* when "you first sighted her?—A. Just about a hundred "yards. I should think it would not be any more any "how. Q. The fog was very dense?—A. Very dense "at the time."

And again he says:

"Q. The first time you heard the fog horn, you "say, was about ten minutes before the accident.—A. "Yes, about ten minutes before the accident. Q. "Where did the sound seem to be coming from, what "direction?—A. I should think the sound was a little "on the port before the beam and bow, from there on "to the forepart of our beam. The beam is like this "(indicating). The wind was coming in that direc- "tion on the port side."

He further says, in answer to a question:—

"How long after you saw her before you came into "collision?—A. It was instantly, just there and then. "Q. Just as soon as you saw the schooner you came "into collision?—A. She was about a hundred yards "off in a few seconds."

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Antonio Masco, the seaman referred to by Jones, says :—

" Q. How long before the accident did you hear any " whistles, and when did you hear them ?—A. Fog " whistles ?—A. Yes ? A. We heard the schooner first " time. Q. What was she blowing ?—A. Three horns " —three blasts. Q. And how long before the accident " did you hear her when you first heard the three " blasts ?—A. Before. Q. How long before ? A. About " ten minutes. Q. And then when did you hear the " blasts again after the first time ?—A. The second " time ? Q. Yes, where was the schooner when you " heard them again ?—A. On the port bow. Q. That " is the first time you heard them ?—A. Yes. Q. First " time she was on the port bow ?—A. Yes. Q. Well, " then, did you hear her again yourself a second time ? " A. Yes, a second time we heard, and we struck. Q. " How far off was the schooner when you heard them " the second time ? – A. Not half the length of the ship. " We heard the whistle and saw the schooner, and at " the same time struck together."

Morris Rowlands, the second officer of the steamer, also says that he heard a horn giving three blasts about nine or ten minutes before the collision ; that the blasts seemed to be about four points off the bow. That hearing them he knew the vessel was sailing free, in a northerly direction. The captain of the steamer, and all the men on board, who were called as witnesses, say that the steamer was going slow, not more than two and a half or three knots an hour ; and, that on hearing the schooner's fog horn the first time they did not stop, and made no change in the speed or course of the steamer. The plaintiff and men on board the schooner, who were called as witnesses, say she was going five or six knots an hour, and they form this opinion by the speed at which she seemed to be going when they first

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saw her, and the quickness with which she struck after she was first sighted. The pilots, who were out in their boats at the time, who were called as witnesses, saw her just before she struck the schooner, and they say they thought she was going four or five knots an hour. They also say they heard the schooner's fog horn regularly blowing—giving three blasts at a time. The first contention by the plaintiff is that the steamer, when the schooner's horn was first heard, should have been stopped so as to ascertain the whereabouts of the vessel blowing. After having carefully considered the evidence, I think the steamer violated the rules in not stopping her engines when she first heard the fog horn. I can find, from the evidence, no reason for her not doing so. The rules are plain—when a steamer and sailing vessel are proceeding in such directions as to involve a collision, the steam vessel must keep out of the way; and by rule 16 a steam vessel hearing a fog signal of a vessel, apparently forward of her beam, 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 the danger of collision is over. The steamer heard the fog horn of the schooner on her port side, apparently forward of her beam, ten minutes before the collision occurred. Three blasts were given, by which she knew the vessel was sailing free, in a northerly direction. Her own course was N.W. by N., and there was, at all events, danger of a collision. The captain of the steamer admits that in his cross-examination, and in answer to the question: "You would know, of course, that there was danger of running into her?" he says, "Yes." And he also says that he did not give orders to slow down speed as she was going slow. And no change in the speed course or management of the steamer appears to have been made after the fog horn was first heard,

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until she came right up to the schooner. I think it is absolutely clear that the steamer's engines should have been stopped when the fog horn was first heard, and efforts made to ascertain the position of the vessel. The fog was dense, and those on board the steamer could not see the vessel, but they knew there was one in the vicinity, and that if they kept on their course there was, at all events, danger of a collision; and the fact that there was danger was the reason why the engines should have been stopped, and, if necessary, reversed. There seems to have been no reason why they could not have been stopped. The captain says that he stopped at different times in running, to take soundings, and it seems to me, even without the rule, knowing there was a sailing vessel in front of them, and that there was danger of a collision, he should have stopped and taken precautions to avoid a collision. The authorities are numerous, but Mr. Coster claimed that they refer to cases of vessels approaching each other. That is true, but it is not necessarily when vessels are sailing toward each other, but when vessels are sailing in such a direction as to be liable to come together and there is danger of a collision. In *The Lancashire*, Lord Herschell says, (1), "that "there being this dense fog, with the two vessels "approaching one another, although by the sound of "the whistle it seemed to those navigating the *Lanca-* "*shire* that the other vessel was coming in a direction "which would take them clear, nevertheless they "ought not to have assumed that that state of things "would certainly continue, and they ought to have "stopped from time to time, and so made sure that "they would not approach the other vessel at too "great a speed, and that the risk of the collision "would have been in that way avoided." It seems

(1) [1894.] A. C. at p. 4.

to me that this language applies with great force to to the facts in the present case. There was a dense fog, the schooner's horn was heard on board the steamer, and the captain knew that on his then course there was danger of a collision, and it was his duty to take, at once, precautions to prevent it by stopping his way until he had ascertained the position of the vessel. In the *John McIntyre* (1), it is said by Bret, M. R.: "It may be laid down as a general rule "of conduct that it is necessary to stop and reverse, not "indeed every time that a steamer hears a whistle or "fog horn in a dense fog, but when in such a fog it is "heard on either bow and approaching, and is in the "vicinity, because there must then be a risk of col-"lision." And this is quoted with approval by Lord Watson in *The Ceto* (2). The *Kirby Hall* (3) is to the same effect. In this case Sir Robert Phillimore, in holding the *Kirby Hall* to blame for not stopping when she heard the whistle, says, at p. 78, "We have "arrived without hesitation at the conclusion that "the *Kirby Hall* is solely to blame by reason of not "stopping her way in the water when the whistle "of the *City of Brussels* was heard the first time, "instead of going ahead without knowing where "the *City of Brussels* was, or what she was doing; "and we wish to state, with as much emphasis as "possible, that those in charge of a ship in such "a dense fog as was described in this case, should "never conjecture anything when they hear a whistle "the sound appears to come from a vessel in "such close proximity as was the case here, whether "approaching them or not." In the present case the *Pawnee* heard the fog horn on her bow and knew, or should have known, that there was danger of a col-

(1) 9 P. D. at p. 136. (2) 14 App. Cas. at p. 687.
(3) 8 P. D. 73.

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lision, and should have stopped her way, and, if need be, reversed and taken time to ascertain where the vessel was. There was further reason for stopping the engines. The schooner's horn was kept blowing all the time. The various witnesses, who were out in small boats, say they heard it giving the three blasts regularly. The steamer heard it once and did not hear it again for about ten minutes, and then she was just on the schooner. If she had stopped when she first heard it, she could have heard more distinctly, and the attention of those on board would have been called to it, and they would have had an opportunity to locate the position of the schooner. In the *Rondane* (1), the court, in giving judgment, holding that the *Rondane* should have stopped when she first heard the whistle, says, at p. 115, "The object, of course, "is clear, namely, to give the vessel which stops her "engines an opportunity of hearing better than she "otherwise would do; and, also, to specially call the "attention of those on board to the matter, so that they "may be more acute to hear a second whistle and "locate it if possible." In this case the steamer, on hearing the fog horn the first time, made no effort to locate it, but continued in her course. Her duty, I think, in the fog, on first hearing the horn, was to have stopped her engines for the purpose of locating it. I think, therefore, the steamer violated the rule. I also think, from all the evidence, that the steamer was going at a greater rate of speed than two and a half or three knots, as stated by the captain and those on board. The entry of the rate of speed in the mate's log-book, from six o'clock that morning until twelve noon, the time of the accident, gives the speed at six knots each hour, except the last, which is five knots. He explains that by saying that it is just an esti-

(1) 69 L. J. Adm. 114.

mate of the rate of speed through the hour, but the pilots who saw her coming just before the accident, say that she was going at least four or five knots an hour. And there is the further fact, that I think is some evidence, that she was going at a greater rate of speed than two and a half or three knots. The captain says when he first saw the schooner she was about 100 yards off and he immediately ordered the engines stopped and reversed, and he further says that going at the rate of two and a half or three knots an hour the steamer would entirely stop in about two lengths of herself. Now, the evidence is that when she struck the schooner she pushed her through the water and sunk her in a few minutes. I think the force with which she struck the schooner shows that she must have been going at a greater rate of speed than the captain says, and corroborates the evidence given by the plaintiff's witnesses as to her rate of speed. For these reasons I must pronounce the *Pawnee* to blame. As to the damage, the only difficulty is as to the value of the schooner herself. The plaintiff claims she was worth $5,000 to him. She was thirteen years old, but in good repair and well fitted, he claims, to do the kind of business he was doing, and he called several witnesses, some of whom had seen her and they all placed her value at between $4,000 and $5,000. The defendant also called witnesses as to value. I think only one of them, Mr. Ewing, had seen the schooner, but they all said a vessel of that age would not be worth over $1,500 or $2,000. So that, in coming to a conclusion as to the amount of damage, I must do the best I can with this evidence. I think, however, from the evidence that the schooner was in a good state of repair and was well fitted for the business she was doing, and she was destroyed through the fault of the steamer, and I should put such reasonable dam-

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ages as would make the plaintiff whole. I will therefore award $4,000 for the schooner; the freight was $90. For the personal effects I allow $550. I deduct the fog-horn and some small items. I therefore award the plaintiff in this action $4,640. In the suit of Joseph A. Likely I award the sum of $668.28 for the cargo. In the suit of Crowell, Morris and Porter, seamen, for personal effects, I award the sum of $59, according to their several statements filed, with costs, but the costs to be taxed as one suit from the date of the consolidation, which was on the first hearing in July 25th, 1901.

*Judgment accordingly.*

Solicitor for the plaintiff: *H. H. McLean.*

Solicitor for the ship: *C. J. Coster.*

THE NOVA SCOTIA ADMIRALTY DISTRICT.

THE DOMINION COAL COMPANY, (LIMITED) ..... } PLAINTIFF ; 1902 Feby. 4.

AGAINST

THE STEAMSHIP "LAKE ONTARIO."

*Admiralty Law—Collision—Ship at Anchor—Anchor-light—Lookout—Weight of Evidence—Credibility.*

A collision occurred between the *A. L. T.*, a ship at anchor, and a steamship, the *L. O.*, proceeding in charge of a pilot to her dock, within the harbour of Halifax, N.S., at night in the month of January. The weather was blustering, and intermittently clear and cloudy. On arriving at the quarantine grounds the *L. O.* had signalled, by guns and whistles, for the medical officer of the port, and then proceeded up the harbour on the east side of George's Island. After passing the northern line of George's Island the *L. O.* changed her course westerly toward her berth, and in proceeding thereon passed between the lights of two vessels anchored on the northern side of that island. While doing so she suddenly came upon the *A. L. T.* lying at anchor, collided with and sank her. The only person on board of the *A. L. T.* was a caretaker, and while admitting that he was not on deck at the time, he swore that a proper anchor-light was burning on his ship. His statement as to the anchor-light was corroborated by the captain of a fishing schooner lying close by, and that of some boatmen and labourers on the wharves. On the other hand the pilot of the *L. O.*, the captain and first and third officers, boatswain and boatswain's mate, and four of the seamen, all swore positively that there was no light on the *A. L. T.* while they were approaching her, and that she was not seen by any one until their lookout called that there was something ahead. The evidence further showed that both the officers and crew were alert at the time of the accident, and anxiously working the ship through anchored vessels in the darkness and blustering weather.

*Held*, that the state of facts as substantiated by the evidence for the owners of the *L. O.* must be accepted as correct, and that being so, the collision and subsequent loss were wholly attributable to the *A. L. T.* in not keeping a proper light and lookout.

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THIS was an action *in rem* for damages for collision.

The facts are stated in the reasons for judgment.

June 26th, 1901.

The case came on for hearing at Halifax, N.S.

*H. Mellish* and *F. F. Mathers* for plaintiff;

*A. Drysdale, K.C.*, and *W. H. Fulton* for the ship.

MACDONALD, (C.J.) L.J. now (February 4th, 1902), delivered judgment.

The collision from which this action resulted occurred in the harbour of Halifax, on the 26th January, A. D. 1900, about 10.15 p. m. of that day. The wind during the evening was squally with occasional showers of snow and its course varied during the evening from S. W. to N. W. While some of the witnesses declared the atmosphere to be clear at the time of the accident, the recollection of others made it dark with blustering winds. During the evening named several vessels were anchored in the harbour around the Northern side of George's Island. Among these was anchored the *A. L. Taylor*, a coal barge owned by the plaintiffs. Many, if not all, of these vessels had their regulation lights burning; and it is admitted that the defendant steamship struck and sank the *A. L. Taylor*. Substantially, the only question in this case is whether at the time of and shortly before the collision the *A. L. Taylor* had her regulation lights burning, as alleged by the plaintiffs and denied by the defendants. About 9 or 9.30 p.m. of the day referred to the R. M. S. S. *Lake Ontario* entered the harbour of Halifax, and on coming to the Quarantine Grounds between McNab's Island, made the usual signals for the Port physician. After waiting for sometime for a reply to her signals the steamer proceeded up the harbour on the East side of Geoge's Island toward her berth at Deep Water. The steamer,

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after passing the northern line of George's Island, changed her course westerly toward Deep Water, and in proceeding passed between the lights of two vessels anchored as I have said on the Northern side of the island. While passing between these lights she suddenly came upon the *A. L. Taylor*, which, the steamer alleges, had no anchor, light displayed, and before the way on the *Lake Ontario* could be stopped she struck the *A. L. Taylor* on the port side about opposite the foremast. The question for decision, the only question, is whether the *A. L. Taylor* had her lights burning and a competent and sufficient lookout on board duly attending to his duties at the time the *Lake Ontario* struck her, or a sufficient time before the actual contact to give the defendant vessel warning of the danger in her path.

The chief witness called for the plaintiffs was McGillivray, who had been in the employ of the plaintiffs as master of the barge while engaged in transporting coal from Cape Breton to Halifax. His health broke down and he had to abandon his usual employment; and the plaintiffs when they determined to keep the barge as a coal hulk anchored in the harbour, charitably gave him the place of lookout or caretaker of the vessel.

Article Eleven of the Regulations of 1894 provides that a vessel under 150 feet in length (as this vessel was) when at anchor "shall carry forward where it can "best be seen, but at a height not exceeding 20 feet "above the hull a white light in a lantern so constructed "as to show a clear uniform and unbroken light visible "all around the horizon at a distance of at least one "mile." See also Article Twenty-nine which says: "Nothing in these rules shall exonerate any ship or "the owner or master or crew thereof from the conse-"quence of any neglect to carry lights or signals or of "any neglect to keep a proper lookout."

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When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light the onus is on her to justify her conduct. She cannot be excused when it is shown that she has not a sufficient lookout. The vessel at anchor is also bound to keep a competent person on watch, whose duty it is to see that the anchor light or lights are properly exhibited and to do anything in his power to avert or minimize a collision—if that person acts in error of judgment, when placed by the colliding vessel in a position of difficulty calling for instant decision, he is entitled to favourable consideration, and it must be shown that any alternative course would have prevented or mitigated the collision.

It is no excuse for not carrying lights, that they were being trimmed or went out by accident (1). The evidence in this case cannot be said to be free from contradictions. Few cases of collision, so far as my experience has enabled me to express an opinion, can be said to be free from difficulties arising from causes altogether outside any indisposition on the part of the witnesses to tell the truth, and we cannot, I think, have much difficulty in arriving at the true facts in this case. The two principal witnesses for the plaintiffs are McGillivray, the watchman, and McLean, the master of an American schooner, which was anchored close to the *A L. Taylor* on the evening of the accident. The former makes it quite clear that his duties, as look-out and caretaker of the vessel of which he was in charge, sat very lightly upon him, and were performed in the most perfunctory manner. It is indeed a misuse of the term to call this witness a lookout or anchor watch in the sense in which the word is used in the decisions and the text books. He left the ship through the day to go ashore to get his meals, and to attend to any other

(1) Marsden on Collisions, 4th ed. p. 391 and cases there cited.

duties that required his attention. He had a bed in the cabin in which he slept, and perhaps occasionally throughout the night made an observation of the light. It was indeed impossible that he could have kept the watch contemplated by the rules and decisions of the courts, unless he could walk about the streets all day and about the decks of his ship all night. His duty could be performed only by a constant and careful lookout and watch; and if such a lookout had been kept on the night of this accident, it is impossible to say the collision would have occurred. The *Lake Ontario* it appears while at quarantine, only one or two miles from the *A. L. Taylor*, fired guns and blew her whistles till they were heard all along the water side, and if McGillivray had been on the lookout, or if any lookout had been kept on the ship, it appears to me impossible that the *Lake Ontario* could have approached her without being observed. When he seeks to establish the important fact in the cause in the face of strong contradiction, he cannot complain if, in view of the facts proved, his evidence be received with much reserve.

The next witness is the master of the American fishing schooner. This witness is evidently a smart, intelligent person, and he swears positively that he saw the anchor-light of the *A. L. Taylor* burning up to the time of the collision. I need not go over the evidence, but one observation is very obvious, that is, why the plaintiffs should not have corroborated this important witness when they had the material abundantly at hand, according to his story. He states on his direct examination that he was performing the duty of lookout on board of his own vessel on the evening in question, because his crew were ashore; but it turned out on further enquiry that not less than six of his crew were on board with him all the evening, three of them lying asleep in the cabin aside him

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and three or four others in the forecastle. It strikes me as unusual that, with so many of his men at hand, the master should be so anxiously performing their duty; and that not one of these men should have been called to corroborate the witness, or explain why they could not do so. The other witnesses were the boatmen and labourers about the wharves on the water, front. I have no doubt that these men have stated what they believe to be true, but their opportunities of observation were not such as to enable us to rely with much certainty on their testimony. They could only speak of the position of the *A. L. Taylor* from observations made from the wharf during the day time, and considering the character of the weather on the night of the accident and the distance of these men from the place of collision, wide margin should be left, I think, for possible error or mistake. The only other evidence for the plaintiff necessary to refer to is that of Capt. Marks, of the ferry-boat crossing the harbour, and my only observation on his testimony is that while I am sure he is incapable of saying what he does not believe to be true, it is quite probable that on the all-important fact of the light and its condition at the time of the collision, he may be in error; at any rate it must be carefully compared with the mass of testimony from men on the spot before we accept Capt. Marks' testimony as conclusive. This is the evidence for the plaintiff, and undoubtedly a *prima facie* case is made. On the part of the defence the following witnesses were called, namely: Bayers, the Port pilot, who took in the ship; the master, and the first and third officers of the *Lake Ontario*, Webber, boatswain, and Weishman, boatswain's mate, Anderson, Vaughan, Latham and Hughes, able seamen, all of the *Lake Ontario*. The pilot complains that when his ship approached the light of the vessels anchored on the

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north side of George's Island, going dead slow, he was an opening between two of the lights, and advised that the steamer take her course towards her wharf. This course was adopted, and although he was on the bridge with the captain of the ship and the third officer, and keeping a sharp lookout ahead until the collision, he says there was no light on the *A. L. Taylor*, nor was she seen by anyone till the lookout hailed that there was something ahead. The helm was immediately changed and the ship put full speed astern, but it was too late, and the collision occurred. This version is corroborated in every particular, as a perusal of the evidence will verify. All these witnesses are at least the equals of those for the plaintiff in intelligence, and their positions of trust in their ship justify us in assuming them to be men of as good character and regard for the truth as those who testified on behalf of the plaintiff. All these people were on the spot. They were anxiously working their ship through anchored vessels and a blustering, dark evening to their wharf. The whole crew were on deck and lookout duly placed. They all swear positively that there was no light on the *A. L. Taylor* when the collision occurred, or while the *Lake Ontario* approached her before the collision. They must have seen the light if there was one burning, as testified by the witnesses for the plaintiff. There is no reason why they should not, as in their case the reason that might excuse mistake, that is distance, could not apply to them; nor do I believe that these men, either officers or seamen, could be influenced to prevent the truth by the mere fact of their employment on board the defendant ship, which at any rate may only continue till the return of the ship to England. I think, therefore, that I must accept the account of the disaster given by the defendants' witnesses. I must do so, or find all these wes-

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THE DOMINION COAL COMPANY v. THE STEAMSHIP LAKE ONTARIO.

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pectable men guilty of perjury, and that I am not prepared to do. I need not discuss the question suggested by plaintiffs' counsel that the *Lake Ontario* was in fault in coming up to her wharf by the east side of George's Island. The facts, as proved, are against the contention, and there is no regulation, general or local, to support it. I find the collision and consequent loss occurred solely through and by the fault of the *A. L. Taylor*, and the action will be dismissed with costs.

*Judgment accordingly* (1).

Solicitor for plaintiffs: *F .F. Mathers*;

Solicitor for the ship: *W. H. Fulton.*

(1) REPORTER'S NOTE:—An appeal was taken to the Supreme Court of Canada, and on the 9th of May, 1902, judgment was rendered dismissing the appeal with costs.

BETWEEN

JUDSON M. GRIFFIN AND WILLIAM E. BRINKERHOFF... } PLAINTIFFS;

1902
April 21.

AND

THE TORONTO RAILWAY COMPANY AND MICHAEL POWER. } DEFENDANTS.

*Patent of Invention—Infringement—Improvements in truing up car wheels —Combination—Invention—Utility.*

The plaintiffs were owners of Canadian letters patent numbered 63,608 for improved abrading shoes for truing up car wheels. The improvement consisted in the use of an abrading shoe in which there were a number of pockets filled with abrading material. Between the pockets were spaces or cavities to receive the material worn from the wheel, the spaces having openings in them to facilitate the discharge of such material. Prior to the alleged invention abrading shoes had been used in which there were similar pockets filled with abrading material; and other shoes had been used in which there were similar spaces or cavities. The plaintiffs' abrading shoe, however, was the first in which these two features were combined, or used together.

*Held*, that there was invention in the idea or conception of combining these two features for the purpose of truing up car wheels.

2. That the invention was useful.

THIS was an action for infringement of Canadian letters patent No. 63,608 for improvements in abrading shoes for truing up car wheels.

The defendant company before trial withdrew its defence and suffered judgment to be entered against it.

March 24th and 25th, 1902.

*J. G. Ridout*, for plaintiffs;

*W. Cassels, K.C.*, for defendant Michael Powers.

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GRIFFIN v. THE TORONTO RAILWAY COMPANY.

Statement of Facts.

*J. G. Ridout*, for the plaintiffs, cited *Frost on Patents* (1); *Toronto Auer Light Co.* v. *Colling* (2); *American Dunlop Tire Co.* v. *Goold Bicycle Co.* (3); *Smith* v. *Goodyear Dental Vulcanite Company* (4); *Consolidated Brake-Shoe Co. v. Detroit Steel and Springs Co.* (5); *Webster on Patents* (6).

*W. Cassels, K.C.*, for the defendant Power cited *Hill* v. *Wooster* (7); *Wisner* v. *Coulthard* (8); *Burt* v. *Evory* (9); *Hunter* v. *Carrick* (10); *Curtis* v. *Platt* (11); *Carter* v. *Hamilton* (12).

*J. G. Ridout* replied.

THE JUDGE OF THE EXCHEQUER COURT now (April 21st, 1902) delivered judgment.

This action is brought for the infringement of letters-patent number 63,608 for improvements in abrading shoes for truing up car wheels. The defendant, the Toronto Railway Company, has withdrawn its defence, and judgment has, with its assent, been given against it. Of the defences set up by Michael Power, the other defendant, only three were relied upon at the hearing of the case, namely (1) that there was no invention; (2) that the alleged invention was not useful; and (3) that the defendant had not infringed.

The alleged improvement consisted in the use of an abrading shoe adapted for truing up car wheels in which there were a number of pockets filled with abrading material, and between such pockets so filled, spaces or cavities provided with openings to facilitate the discharge of such material.

(1) 2nd Ed. pp. 469, 470.
(2) 31 Ont. R. 18.
(3) 6 Ex. C.R. 223.
(4) 93 U.S. 486.
(5) 47 Fed. Rep. 894.
(6) Vol. I. p. 30.
(7) 132 U.S. 693.
(8) 22 S.C. R. 178.
(9) 133 U.S. at p. 357.
(10) 11 S.C. 302.
(11) L.R. 3 Ch. 134.
(12) 23 S.C.R. 172.

Prior to the alleged invention abrading shoes had been in use in which there were such pockets filled with abrading material; and other shoes had been used in which there were spaces or cavities similar to those mentioned. But the plaintiffs' abrading shoe was the first in which these two features were combined or used together. It is argued that there was no invention in combining or using these two features in the same shoe, and I am ready to concede that when one had once grasped the idea or conception that that was an advantageous and useful thing to do, and that in that way a better abrading shoe could be secured, no invention would be required to carry out the conception. But that does not conclude the matter, and in my view there was invention in becoming seized of the idea or conception mentioned.

I am also of opinion that the invention was useful. On the question of infringement one is not to overlook the fact that in such a case as this the construction of the patent is not in any way to be extended. But construing it narrowly, the defendant has, I think, infringed it.

There will be judgment for the plaintiffs against the defendant Michael Power, and the costs will follow the event.

*Judgment accordingly.*

Solicitor for plaintiffs: *John G. Ridout.*

Solicitor for Defendant O'Brien: *James Bicknell.*

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April 21.

IN THE MATTER OF THE PETITION OF RIGHT OF

WILLIAM CHAPELLE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Gold mining in Yukon District—R. S. C. c. 54, sec. 91—Interpretation—61 Vict. c. 6—62-63 Vict. c. 11—Royalty—Imposition of tax—Powers of Governor in Council.*

The provisions of section 91 of *The Dominion Lands Act* (R. S. C. c. 54) requiring that all orders or regulations made under the Act by the Governor in Council shall be laid before Houses of Parliament within the first fifteen days of the session next after the date thereof, is directory only, and the failure to comply with such provision does not invalidate any such order or regulation.

2. The effect of the provision of the said section requiring that any order or regulation made under the Act shall, unless otherwise specially provided in the Act, have force and effect only after the same has been published for four successive weeks in the *Canada Gazette*, is that such order or regulation does not come into force until one week after the fourth publication of the same.

3. There is no authority to be found in *The Yukon Territory Act* (61 Vict. c. 6, as amended by 62-63 Vict. c. 11) enabling the Governor in Council to change or alter the date upon which an order or regulation made, under the provisions of *The Dominion Lands Act*, shall come into force.

4. The suppliant by right of discovery, under the provisions of *The Dominion Lands Act* and *The Dominion Mining Regulations* of 1889 made thereunder, obtained a grant of a certain gold mining claim in the Yukon District in December, 1896. His grant, *inter alia*, gave him, for the term of one year from its date, the exclusive right to all the proceeds realized therefrom; and the rights which it conferred upon him were, it was declared, those laid down in the *Dominion Mining Regulations*, and no more, and were subject to all the provisions thereof whether the same were expressed in the grant or not. During the currency of the original grant an order in council was passed making grants of gold mining claims in the district generally subject to a royalty. Afterwards,

namely, on the 7th December, 1897, the suppliants grant was renewed in the same terms as those expressed in the original grant.

*Held*, that the terms of the renewal should be construed by reference to their meaning in the original grant; and that the renewal was not subject to the royalty imposed by the order in council.

5. The operative words of the order in council imposing the royalty were "a royalty shall be levied and collected."

*Held*, that the expression quoted contained apt words for the imposition of a tax, but that such a tax could not be levied without legislative authority therefor.

6 The evidence showed that the suppliant had paid the amount of the royalty claimed by the Crown under protest, and in the belief that payment was necessary to protect his rights.

*Held*, that he was entitled to recover it back.

PETITION OF RIGHT for the recovery of the amount of certain royalties, alleged to have been illegally exacted from the suppliant as grantee of certain gold mining claims in the Yukon Territory of Canada.

The facts are stated in the reasons for judgment.

January 31st, February 1st, 2nd, 3rd and 4th, 1902.

The case now came on for trial at Ottawa.

*E. D. Armour, K. C.*, for the suppliants:

Whatever may be said of the character of the instrument under which we claim title, whether it be regarded as a grant of the minerals, or a sale of the minerals, or whether it is a lease or a license, in every view it leads to the same conclusion, viz., that where rights have been acquired by discovering the claim, staking it, and performing those conditions which the Crown regulations require, such rights could not by any subsequent regulation by the Crown be derogated from or injuriously affected.

Take the interpretation put upon the instrument by the Crown itself:—"The interest of a free miner in "his mineral claim shall, save as to claims held as "real estate, be deemed to be a chattel interest, equiva-

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Argument of Counsel.

" lent to a lease for one year; and thence from year to " year, subject to the performance and observance of all " the terms and conditions of these Regulations (1)." I would adopt that, for the sake of argument, not as a legislative declaration of what the prior interests were, but as a view that the Crown has chosen to take of the transaction between the parties here. Arguing it, then, upon that hypothesis what I submit is that having acquired these claims in 1896 or 1897, whichever may be decided to be the the exact date, the suppliants became entitled to a chattel interest, to the possession of the land, the right to build upon it for mining purposes, and the right to all the minerals that they discovered during the continuance of their grant. Then, looking at it in view of the interpretation put upon the instrument by the Crown, let us consider the incidents of a lease from year to year. How long does it continue? When does it begin? When does it end? If in each year of the tenancy it is a new grant, if the parties are at large and open to contract again, then the Crown might very well undertake to impose new terms; but if, on the contrary, it is a mere extension or renewal of the original lease, then all the rights arising thereunder continue in full force and effect until the lease is put an end to either by a forfeiture, surrender, or notice to quit. (*Sherlock* v. *Milloy* (2); *Preston on Conveyancing* (3). The original contract is not only for the first year, but for the first, second and third and every year until determined by operation of law. (*McKay* v. *Mackreth* (4); *Oxley* v. *James* (5).

There is another view of these matters taken in England, and that is that a grant of the minerals, or the right to work the minerals in a certain piece of

(1) Vide *The Dominion Mining Regulations* of 1889.
(2) 13 C. L. T. 370.
(3) Vol. 3, pp. 76, 77.
(4) 4 Doug. 213.
(5) 13 M. & W. 209.

land is a sale of the minerals. (*Gowan* v. *Christie* (1). But there can be no doubt under the authorities that the grant remained just exactly the same under the extension as it did under the original period for which it was made.

Now possibly there is a difference between our law and the civil law with respect to the formality necessary to protect the rights of the parties upon the expiry of a lease which is sought to be renewed. It may be that under the civil law the original grant would altogether cease to exist, but surely in a country in which the common law was in force, if there had been any intention of making a man surrender the original and take a new grant, it would have been easy to express it. The regulations of 1889 provide that all the grantee has to do is to relinquish his old receipt and take a new one, but there is no new contract. The provisions of section 77 of the regulations of 1889 imply that the original rights of the grantee would extend beyond the first year. They are: "Any miner, or miners, shall be entitled to leave of absence for one year from his or their diggings, upon proving to the satisfaction of the superintendent of mines that he or they have expended on such diggings in cash, labour or machinery, an amount not less than $200 on each of such diggings, without any return of gold or other minerals in reasonable quantities for such expenditure." Thus during the continuance of the grant a man may be absent for a year. If the contention is to prevail that the rights only continue for a year then such a provision as the one quoted would be ridiculously inconsistent.

Furthermore, there is no provision in the suppliant's grant reserving the right to the Crown to change the terms thereof. Then, again, what inference is to be

(1) L. R. 2 Sc. App. 273.

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drawn from the provision in section 4 of the regulations of 1889 that the claimant's legal representatives and his assignee get the same rights as he himself has? A mere license is generally personal and ends with the death of the licensee; it is not assignable except upon specific provision therefor. None of the reservations made by the Crown include any right paramount to that of the suppliant which would enable the Crown to alter the contract or grant at will. Therefore any attempt to deal with it in this way is invalid. (*Bainbridge on Mines* (1); *Lord Hatherton* v. *Bradburne* (2); *Taylor* v. *Evans* (3).

Now a timber-license is an entirely different thing from a license or grant to take minerals For instance, by section 2 of chap. 32 of the *Revised Statutes of Ontario*, the Commissioner of Crown Lands is authorized to grant timber-licenses subject to such conditions and regulations and instructions as may from time to time be established by the Lieutenant-Governor in Council, thus clearly reserving the right to allow the contract by subsequent regulations. That is a very different state of things to that which exists with reference to mining rights granted under the provisions of *The Dominion Lands Act* (4). In section 68 thereof it is expressly provided that leases of timber-berths shall not extend beyond the term of one year; but when we come to the provisions regulating mining rights in Dominion lands we do not find any such restriction; and if Parliament had intended that a mining licensee or lessee should have an equal right only with the lessee of timber, it is almost impossible to come to any other conclusion than that Parliament would have repeated the limitation in section 68, so

(1) 5th Ed. pp. 282, 283, 288, 289.
(2) 13 Sim. 599.
(3) 1 H. & N. 101.
(4) R. S. C. c. 54.

that the lessee of mining rights should not have any interest extending beyond a year, (*Burns* v. *Nowell* (1).

The Crown occupies in respect of the miners, and of the claims set apart for mining, two positions (*a*) the position of a contractor, grantor or lessor; and (*b*) the position of a legislator It may pass laws, that is to say, it may make regulations, which we will assume, for the sake of argument, have the force of law. It is authorized to make contracts with the miners for the passing of interests in the lands set apart for mining. But I contend that where the Crown occupies a dual position like this, it is utterly impossible for it to do something in one capacity which it may afterwards render nugatory by the exercise of powers proper to the other capacity. It cannot enter into a contract and then legislate it out of existence. It may legislate for the future, but not in respect of existing rights. (*Re Canadian Pacific Railway Company and the City of Toronto* (2).

Possibly the most complete answer to anything the Crown might say with regard to the right to exact these royalties from the suppliant is that there never was any intention whatever of reserving a royalty under either the regulations of 1889 or those of 1897, because no such thing was then in existence, or contemplated.

Again, if the order in council of the 16th August, 1897, did not come into force until after the renewal of the grant, then there is no room for argument; but if it is contended that our grant ran from a later date and subsequent to the coming into force of the order in council of 1897, then we say it was merely a renewal of the original grant and was not affected by the royalty. The regulations could not be construed

(1) 5 Q. B. D. at pp. 453, 454. (2) 23 Ont. A. R. at p. 254; 26 S. C. R. at p. 688.

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to be retroactive unless they were authorized to be so made by Parliament. Parliament, of course, has the power to legislate retrospectively, but there is no such inherent power in the Governor in Council The proper rule of interpretation as applied to this case is that the regulations look to the future. (*Hollyman* v. *Noonan* (1).

With regard to claim No. 7 above Discovery that was renewed after the order in council of 29th September, 1897, came into force, and as to that the suppliant relies upon the grounds that the order in council was invalid, that it was abandoned and the regulations of 1888 substituted therefor, those being prospective only and not retrospective. The suppliant further contends in this behalf that, at the time of the renewal, the Crown had not changed the contract, and that the Gold Commissioner, at Dawson, had no authority to give him any other contract than the one which gave him the exclusive right to all the proceeds realized from the claim. He had no power to make any new reservation from the grant.

*J. Travers Lewis* followed for the suppliant:

The regulations for 1897 were required to be published for four successive weeks in the *Canada Gazette* before they came into force. The earliest possible date that they could do so would be the 11th September, 1897. Bearing this in mind, Chappelle's grant issued on the 9th September. It cannot, therefore, be seriously argued that these regulations affect us. (*In re Coe and Pickering* (2); *In re Miles and the Township of Richmond* (3); *In re Brophy and Gananoque* (4).

The amount of the royalty was exacted from us; it was made of necessity and by compulsion to protect our rights. It was in no sense a voluntary payment.

(1) 1 App. Cas. 595 at p. 606.
(2) 24 U. C. Q. B. 439.
(3) 23 U. C. Q. B. 333.
(4) 26 U. C. C. P. 290.

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We are therefore not precluded from recovering it back. Clearly the suppliant, having paid the royalty, is the proper party to recover it. (*Green* v. *Duckett* (1); *Great Western Railway Co.* v. *Sutton* (2); *Mayor of New Windsor* v. *Taylor* (3); *Greene* v. *Smith* (4); *Adams* v. *Irving National Bank* (5); *Tripler* v. *Mayor of New York* (6); *Radich* v. *Hutchins* (7); *Swift Company* v. *United States* (8); *Oceanic* v. *Tappan* (9); *Preston* v. *City of Boston* (10); *Brisbane* v. *Dacres* (11); *Astley* v. *Reynolds* (12); *Little* v. *Bowers* (13); *Boston and Sandwich Glass Co.* v. *City of Boston* (14); *Amesbury Woollen and Cotton Manufacturing Co.* v. *Inhabitants of Amesbury* (15); *Healey* v. *United States* (16); *United States* v. *Ellsworth* (17).

*The Solicitor-General of Canada:*

The lands that are dealt with by what have been called "grants" in these cases are part of the Crown domain. As such they could not be dealt with by the Governor in Council without the authority of Parliament. But it is not necessary to argue that when Parliament delegates its authority to the Crown, and that authority is exercised by the Governor in Council and sub-delegated to another person, it can only be exercised by the person to whom it is delegated, subject to any restriction imposed by the delegating authority. It is analogous to mandate in the Civil Law; that is to say that the mandatory has the power to do certain things only within the limits fixed by

(1) 11 Q. B. D. 275 at p. 281.
(2) L. R. 4 H. L. 226.
(3) [1899] A. C. 41; and [1898] 1 Q. B. 186.
(4) 13 N. Y. App. Div. 459.
(5) 116 N. Y. at p. 611.
(6) 125 N. Y. at p. 625.
(7) 95 U. S. 210.
(8) 111 U. S. 22.
(9) 16 Blatch. 296.
(10) 12 Pick. 7.
(11) 5 Taunt. 143.
(12) 2 Str. 916.
(13) 134 U. S. 547.
(14) 4 Metc. 181.
(15) 17 Mass. 461.
(16) 29 Ct. of Clms. 115.
(17) 101 U. S. 170.

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the authority of the mandate. Nothing more has been done here than that.

The position here is simply this, that what is argued by the suppliant to be a reissue or renewal of an old grant is in law and fact a new and substantive grant. The dealings between the suppliant and the Commissioner on the 16th August, 1897, merely amounted to an application by the suppliant for a new grant to be issued to him on the 7th December, 1897. At that time the land was not in the power of the Crown to grant, there was the previous grant outstanding which did not expire until the 7th December.

[BY THE COURT.—Might the grantee not surrender, and take a new grant?]

I am not prepared to admit that he could under the regulations. Of course, as a general rule, a man who benefits by a grant may abandon it; but when you have something which you receive as the bounty of the Crown, that which is given you subject to certain conditions, I am doubtful whether such could be surrendered. But be that as it may, I submit with confidence that it is not a necessary inference that if a man relinquishes his title and that title is replaced by another, the new title is of the same character as the former. Having, as we think, established that there was a new grant on the 7th December to the suppliant, we further contend that it ought to be construed by reading into it the regulations in force at that time, viz., those of 21st of May, 1897, as amended by the order in council of July and August, 1897. By the order in council of 29th July, 1897, the royalty objected to is provided for, and the effect of that order in council is to be read into the grant of 7th December, 1897. The gold mines in the Yukon are the property of the Sovereign. Not only was the gold in these locations the property of the Sovereign, but the loca-

tions themselves, the surface rights were also the property of the Sovereign. Therefore, this grant was properly made to Chapelle, the suppliant, subject to the payment of royalty on the output of the claim so granted to him. It is a pure question of contract, not the question of a tax or impost upon the subject. The matter having been in existence at the time the contract was entered into, no question as to whether the contract having been made, it could be altered by subsequent regulations, arises in this case. It is not a question, either, of a tax or impost. Here is the exact position between the parties. The Crown says: "I am possessed of this property within the limits of which there are to be found certain precious metals. I give you the right to take them during a prescribed time, subject to the obligation to yield and pay over to me a certain proportion of the precious metals extracted from the property." Surely, it cannot be disputed that this is a proper contract. Therefore, we are not concerned with the abstract question as to whether the Governor in Council can impose a tax.

The whole controversy may be stated in this form: First, is this new grant to be read as dated the 7th December, 1897? Secondly, if it is to be read as of that date, are you to read into it these regulations which provide for the royalty? Thirdly, if you so read them into the grant, are they not an integral part of the contract between the Crown and the subject? I submit that these questions must be answered in the affirmative and in the interests of the Crown.

*E. L. Newcombe, K.C.*, followed for the respondent;

I submit that under the *Dominion Mining Regulations* it was incompetent for the gold commissioner in 1897 to have issued the grant in the form the suppliant alleges. It was either a new grant with a reservation of the royalty, or it was *ultra vires*.

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With regard to cases cited by counsel for the suppliant as to the construction of the words "four consecutive weeks," they at best express the opinion of judges upon the meaning of language used by the legislature in particular cases. A judge is in no better position to interpret words of that sort than any other man possessing the same grammatical knowledge. But beyond all this I desire to remind the court that these regulations are auxillary to an Act of Parliament; in fact, it is a case where Parliament delegates legislative powers to the Governor in Council, and so the enactment (sec. 91 of *The Dominion Lands Act*) ought to receive a liberal construction.

There is another point in favour of the Crown, and that is that these grants are open to the construction that the regulations mentioned in them are the regulations governing from time to time, and not the regulations which happen to be in force at the time the grant is made. Now when the original grant was made, when the contract was first entered into, we find *The Dominion Mining Regulations* mentioned there, and it must be presumed that the parties were aware that these were subject to be varied from time to time.

The order in council of 21st May, 1897, is sufficient, without having to read into it any of the later regulations, to reserve the royalty. In a way it may be said that the grants issued in 1896 were "renewed" in 1897; that is, the grants of 1897 were similar as to the claim, the grantees, and the length of the term; but they are not, and never were renewals so far as containing any rights derived under the original grants are concerned. The receipt, grant, or whatever you may call it, is to be relinquished at the end of the term, and we contend that the grant is utterly exhausted and vacant at the end of the term. It is a distinct grant for the period of one year; and neither

in the instrument itself, nor in the regulations, is there any provision for the right of renewal conferred on the grantee.

Furthermore, this is a case of voluntary concession by the Crown, for which there is no valuable consideration; and the grant, or whatever the instrument may be called must be construed favourably to the Crown. Where there is any doubt as to how far the Crown has parted with its interest, there the Crown does not part with its interest *quoad hoc*. That which the Crown has not granted by express, clear and unambiguous terms, the subject has no right to claim under a grant or charter. (*Broom's Legal Maxims* (1); *Chitty's Prerogatives of the Crown* (2); *The King* v. *Mayor of London* (3); *Eastern Archipelago* v. *The Queen* (4); *Feather* v. *The Queen* 5).

The regulations are binding to the same extent as an Act of Parliament, because they are made under a power delegated by Parliament to the Governor in Council. When the condition prescribed for bringing them into force has been fulfilled, they are exactly in the same position as any part of the statute law. Everybody is presumed to know their provisions within the territorial jurisdiction of Parliament. The law does not yield to considerations of hardship.

With regard to the argument that the royalty is a tax or impost and that being such it was *ultra vires* of the Governor in Council, I do not propose to answer it. The suppliant has set up that argument only for the purpose of knocking it down. If he has not succeeded in doing so, it is for the court to deal with the question. But what we say is that the reservation of the royalty is a matter of contract and agreement

(1) 7th ed. p. 451.
(2) P. 393; 1 C. Rob. 230.
(3) 1 Cr. M. & R. at pp. 12, 13.
(4) 2 El. & Bl. at pp. 906, 907.
(5) 6 B. & S. at p. 283.

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between the parties under the grant which existed in 1898.

Upon the question of the voluntary payment of the royalty, I submit that the mere fact that money is paid under protest does not entitle the party to receive it back. There must be duress in order to entitle the party to succeed in his action. There was no duress in the circumstances under which this money was paid. (*Leake on Contracts* (1); *Chitty on Contracts* (2); *Railroad Company* v. *Commissioners* (3); *Phelan* v. *San Francisco* (4); *Brown* v. *McKinally* (5).

*E. D. Armour, K.C.*, replied: The property having passed by the original grant, the cancellation of the instrument itself would have no effect in re-vesting the property in the Crown and requiring us to take a new grant. *Ward* v. *Lumley* (6); *Ontario Industrial Loan Co.* v. *Odea* (7).

Section 91 of *The Dominion Lands Act* does not give regulations made under the Act the force of law. (*Institute of Patent Agents* v. *Lockwood* (8).

I desire to particularly refer to the phrase "There shall be levied and collected a royalty," &c., in the order in council of 29th July, 1897, in view of the opinion expressed by Strong C.J. in *Les Ecclésiastiques de St. Sulpice* v. *Montreal.* "Every contribution to a public purpose imposed by superior authority is a tax and nothing less (9)."

As to the question of voluntary payment of the royalty, surely the facts amount to duress, the suppliant is told that if he does not pay his claim will be cancelled The police are there. He is not in a position to reply if they forcibly take it, for there is no

(1) 3rd ed. p. 82 and cases cited.
(2) 13th ed. at p. 83.
(3) 98 U. S. 541.
(4) 120 Cal. at p. 5.
(5) 1 Esp. 279.
(6) 5 H. & N. 856.
(7) 22 Ont. A. R. 349.
(8) [1894] A. C. 347.
(9) 16 S. C. R. at p. 403.

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court or judge there, and the decision of the gold commissioner is final. Beyond all that, the regulations themselves provide that any breach thereof operates as a forfeiture of the claim. Surely, then, the payment was anything but voluntary. The royalty is a penalty which the suppliant did not contract to submit himself to, and the court will protect him against it. (*Sprigg* v. *Sigeau* (1).

THE JUDGE OF THE EXCHEQUER COURT now (April 21st, 1902), delivered judgment.

The petition is brought to recover from the Crown the sum of twelve thousand and sixty-six dollars, with interest. Of that amount the sum of one thousand six hundred and thirty-seven dollars was paid by the suppliant on the 17th of June, 1898, as a royalty on the product of claim numbered 3 A below Discovery on Hunker Creek, in the Throndiuck (Klondike) mining division of the Yukon district; and the sum of ten thousand four hundred and twenty-nine dollars was paid on the 16th July, 1898, as a royalty on the product of claim numbered 7, on Eldorado Creek, in the said mining division. The total production of gold on which royalty was paid at the dates mentioned was on Claim 3 A below Discovery on Hunker Creek, sixteen thousand three hundred and seventy dollars; and on Claim numbered 7, on Eldorado Creek, one hundred and four thousand two hundred and ninety dollars. The questions to be determined are: (1) whether the royalty was lawfully collected; and (2) if not, whether it was paid voluntarily and cannot now be recovered back.

It will, I think, be found convenient, in the first place, to confine one's attention to the case presented in respect of the royalty paid on the gold won from

(1) [1897] V. C. at p. 246.

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Claim numbered 3 A below Discovery on Hunker Creek. The suppliant in right of discovery and in accordance with *The Dominion Mining Regulations* then in force came into possession of this claim in December, 1896. These regulations and others which will be referred to were made under *The Dominion Lands Act* (1). By the 47th section of that Act, it is provided that lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by the Governor in Council by regulations made in that behalf. By the 90th section of the Act, the Governor in Council is given authority to make orders and regulations with reference to certain specified subjects, and generally for carrying out the provisions of the Act, and from time to time to alter or revoke any such orders or regulations and to make others in lieu thereof. By the 91st section of the Act, it is provided that every order or regulation made thereunder by the Governor in Council shall, unless otherwise specially provided in the Act, have force and effect only after the same has been published for four successive weeks in the *Canada Gazette*, and it is directed that all such orders and regulations shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof.

The first section of the regulations of 1889, to which reference has been made, provided that they might be cited as *The Dominion Mining Regulations*. By the second section it was provided that any person might explore vacant Dominion lands not appropriated or reserved by Government for other purposes, and might search therein, either by surface or subterranean prospecting, for mineral deposits, with a view to obtain-

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

ing under the regulations a mining location for the same; but no mining location or mining claim was to be granted until actual discovery had been made of the vein, lode or deposit of mineral or metal within the limits of the location or claim. Sections three to sixteen, both inclusive, had reference to quartz mining. Then by the seventeenth section it was provided that the regulations laid down in respect of quartz mining should, in certain particulars and where not otherwise provided, apply to placer mining. Section eighteen dealt with the nature and size of placer mining claims. Section nineteen prescribed the form in which an application for a grant for placer mining was to be made, and also the form of a grant. And here perhaps it is convenient to state that, without attempting to define it, I use the word "grant" herein as meaning the instrument to which that term is applied in these regulations. Section twenty provided that the entry of every holder of a grant for placer mining should be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time. By the twenty-second section provision was made for the sale, mortgage, or disposal of claims. By the twenty-third section it was provided that every miner should during the continuance of his grant have the exclusive right of entry upon his own claim, for the miner-like working thereof, and the construction of a residence thereon, and should be entitled exclusively to all the proceeds realized therefrom, but he should have no surface rights therein, and the Superintendent of Mines might grant to the holders of adjacent claims such right of entry thereon as might be absolutely necessary for the working of their claims, upon such terms as to him seemed reasonable. By the form of application given (Form H.) the applicant had, among other things, to declare under oath that to the best of his knowledge

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and belief he was the first discoverer of the deposit of minerals in the claim, or that it had been abandoned. The prescribed form of grant was as follows:

"FORM I.

"GRANT FOR PLACER MINING.

"No.... .

"DEPARTMENT OF THE INTERIOR,

"Dominion Lands Office,

"Agency, 1 .

"In consideration of the payment of five dollars being "the fee required by the provisions of the Dominion "Mining Regulations, sections 4 and 20, by (A.B.) of " , accompanying his (or their) application No. , "dated 1 , for a mining claim in (here insert "description of locality.)

"The Minister of the Interior hereby grants to the "said (A.B.) , for the term of one year "from the date hereof, the exclusive right of entry "upon the claim.

"(here describe in detail the claim granted)

"for the miner-like working thereof and the construc-"tion of a residence thereon, and the exclusive right "to all the proceeds realized therefrom.

"The said (A.B.) shall be entitled to "the use of so much of the water naturally flowing "through or past his (or their) claim, and not already "lawfully appropriated, as shall be necessary for the "due working thereof, and to drain his (or their) claim "free of charge.

"This grant does not convey to the said (A.B.) "any surface rights in the said claim, or any right of "ownership in the soil covered by the said claim; and "the said grant shall lapse and be forfeited unless the "claim is continuously and in good faith worked by "the said (A.B.) or his (or their) "associates.

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"The rights hereby granted are those laid down in "the aforesaid mining regulations, and no more, and "are subject to all the provisions of the said regula- "tions, whether the same are expressed herein or not

"*Agent of Dominion Lands.*"

By an order in council of the 24th of December, 1894, these regulations were amended with respect to the size of the claims in the Yukon District. And so the matter stood in December, 1896, when the suppliant first became possessed of mining claim numbered 3A below Discovery on Hunker Creek.

On the 21st day of May, 1897, His Excellency the Governor General in Council, after reciting that it was found necessary and expedient that certain amendments and additions should be made to the regulations governing "placer mining" established by order in council of the 9th of November, 1889, was pleased to order that for the latter certain regulations specified should be substituted for the governance of placer mining along the Yukon River and its tributaries. But so far as respects anything in issue here no change was made. By the fourteenth clause of these regulations it was provided, as by the 20th section of the regulations of 1889 it had been provided, that the entry of every holder of a grant for placer mining should be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time. Clause seventeen which dealt with the rights of the miner under his grant, was in the same terms as those used in the twenty-third section of the regulations of 1889, with the substitution of the words "Gold Commissioner" for the words "Superintendent of Mines," and the addition of a provision giving the Gold Commissioner authority to grant permits to miners to cut timber on a claim for their own use upon payment of the prescribed dues. And the prescribed

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form for a grant for placer mining (1) was the same as that given in the earlier regulations, with the exception that it was to be issued by the Gold Commissioner and not by the agent of Dominion Lands. Except perhaps to mention that it was provided that in cases wherein no provision was made by these regulations, those of 1889 should apply, it is not necessary to refer at any greater length to the regulations, or to the amendments thereof made by the orders in council of the 15th of July, 1897, and the 16th of August, 1897. By the terms of these regulations and the grant in the form prescribed by the Governor in Council the miner was entitled exclusively to all the proceeds realized from his claim.

The first provision as to the collection of a royalty on gold mined in the Yukon district occurs in the order in council of the 29th of July, 1897, which because of its importance in the proper determination of the questions in controversy should, I think, be given in full in its own terms. They were as follows:

"His Excellency, by and with the advice of the "Queen's Privy Council for Canada, is pleased to order "as follows:

"That the regulations governing the disposal of "placer mining claims along the Yukon River and its "tributaries in the North-west Territories, established "by order in council, be amended by providing that "entry can only be granted for alternate claims, known "as creek claims, bench claims, bar diggings and dry "diggings, and that the other alternate claims be "reserved for the Crown, to be disposed of by public "auction or in such manner as may be decided by the "Minister of the Interior; that the penalty for trespas- "sing upon a claim reserved for the Crown be the "immediate cancellation, by the Gold Commissioner,

(1) See Form 1, *ante* p. 430.

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" of any entry or entries which the person trespassing " may have obtained whether by original entry or pur- " chase for a mining claim, and the refusal by the " Gold Commissioner of the acceptance of an appli- " cation, which the person trespassing may at any time " make for a claim, and that in addition to such " penalty the Mounted Police *upon a requisition from* " the Gold Commissioner to that effect, may take the " necessary steps to eject the trespasser.

" That upon all gold mined on claims referred to in " the regulations for the governance of placer mining " along the Yukon River and its tributaries, a royalty " of ten per cent. shall be levied and collected by " officers to be appointed for the purpose, provided " that the amount mined and taken from a single " claim does not exceed five hundred dollars per week, " and in case the amount mined and taken from any " single claim exceeds five hundred dollars per week, " there shall be levied and collected a royalty of ten " per cent. upon the amount so taken out up to five " hundred dollars, and upon the excess or amount " taken from any single claim, over five hundred dollars " per week, there shall be levied and collected a royalty " of twenty per cent., such royalty to form part of the " consolidated revenue, and to be accounted for by the " officers who collected the same in due course; that " the times and manner in which such royalty shall " be collected, and the persons who shall collect the " same shall be provided for by regulations to be made " by the Gold Commissioner, and that the Gold Com- " missioner be and he is hereby given authority to " make such regulations and rules accordingly; that " default in payment of such royalty, if continued for " ten days after notice posted upon the claim in respect " of which it is demanded, or in the vicinity of such " claim by the Gold Commissioner or his agent, shall

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" be followed by cancellation of the claim; that any " attempt to defraud the Crown, by withholding any " part of the revenue thus provided for, by making " false statements of the amount taken out, may be " punished by cancellation of the claim in respect of " which fraud or false statements have been committed " or made; and that in respect of the facts, as to such " fraud, or false statement, or non-payment of royalty, " the decision of the Gold Commisioner shall be final."

By an order in council of the 18th of January, 1898, the regulations of May 21st, 1897, and subsequent orders in council governing placer mining along the Yukon River and its tributaries, were cancelled and other regulations substituted therefor. By the thirteenth section of the regulations then made it was provided that a royalty of ten per cent. on the gold mined should be levied and collected on the excess of the gross output of each claim over $2,500, where the royalty was paid at certain banking offices or to the Gold Commissioner or a Mining Recorder, and where paid otherwise on such gross output. By the thirty-first section provision was made for the cancellation of the claim in case of default in payment of the royalty, if continued after ten days' notice posted on the claim or in its vicinity, or for any attempt to defraud the Crown by withholding any part of the royalty or for making false statements as to the amount of gold taken out. By the provisions of section thirty-seven, and of the grant for placer mining (Form I) the terms of which were in that respect changed, the miner or grantee was entitled exclusively to all the proceeds realized from his claim, upon which, however, the royalty prescribed by the regulations was to be paid. By section forty the regulations of 1889, or such other regulations as might be substituted therefor, were to apply in cases for which no provision was made, in these regulations.

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The suppliant's grant of the mining claim numbered 3 A below Discovery on Hunker Creek bore date of the 7th of December, 1896. It was in the prescribed form, and among other things, gave him for the term of one year from its date the exclusive right to all the proceeds realized therefrom, and the rights which it conferred upon him were, it was declared, those laid down in *The Dominion Mining Regulations*, and no more, and were subject to all the provisions of the said regulations whether the same were expressed in the grant or not. On the 16th of August, 1897, there was issued to him a grant of the same claim and in the same form, for the succeeding year. It was issued at this time for his convenience. On this grant appears the impression of the stamp of the Department of the Interior, Yukon district, of that date, but otherwise the instrument is not dated. It was, however, the intention of the parties, at the time the grant was issued, that it should have effect and be in force for one year from the 7th of December, 1897, and for the purposes of this case it must, I think, be taken to have been issued on that date, and not in August of that year.

The suppliant continued in possession of his claim, and during the winter of 1897-1898 took therefrom the gold on which the royalty of one thousand six hundred and thirty-seven dollars mentioned was paid. That, I understand, to be the amount of the royalty collected on the excess of the proceeds realized over the sum of two thousand five hundred dollars, which sum, when this royalty was paid in the prescribed way, was to be deducted from the gross output. But nothing turns upon that. The important consideration is that the royalty was collected under and in accordance with the provisions of the regulations of January 18th, 1898; and it is conceded that it could not be lawfully

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collected thereunder unless the gold mined during the winter of 1897 and 1898 was liable to the exaction of the larger royalty prescribed by the order in council of the 29th of July, 1897. To that extent the parties are agreed, but the suppliant does not concede that the royalty could be lawfully collected under the regulations of January, 1898, even if the claim were held to be liable to the royalty prescribed by the earlier order in council. His contention as to that is that the order in council of July, 1897 having been cancelled no right to royalty accrued thereunder, and none could be collected thereunder or under the regulations of January, 1898. I mention that in passing, though in the view I take of the case it is not necessary to determine the question. It is clear as stated, that if no right to royalty had, by virtue of the order in council of the 29th of July, 1897, accrued in respect of the gold taken and to be taken from the claim in question during the year from December 7th, 1897, the royalty collected in respect thereof was not lawfully collected and should be returned to the suppliant.

That brings us to a consideration of the order in council mentioned, and of the question as to whether or not the mining claim now under consideration was at any time subject to its provisions. And first it will be convenient to consider some questions that were discussed as to the date when it came into force, although that is a matter of more importance in disposing of another branch of the case than in dealing with that now under discussion.

This order in council was published for the fourth consecutive week in the *Canada Gazette* of the 4th of September, 1897. It was received by the Gold Commissioner at Dawson on the 29th of September, 1897. The session of the Parliament of Canada next after the date thereof opened on the 3rd day of Febru-

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ary, 1898. It was laid before the Senate on the 17th of that month, and before the House of Commons on the 7th of March following. By an order in council of the 30th March, 1899, it was provided that certain regulations, of which this order in council may be taken to be one, should be held to have come into force upon the date when they were received by the Gold Commissioner. Then by another order in council, passed on the 30th of January, 1901, it was ordered and declared that the order in council of March 30th, 1899, did not refer to the order in council of July 29th, 1897, by which a royalty was imposed upon the output of mining claims in the Yukon Territory, and that the order in council last mentioned should be held to have come into effect upon the day upon which it was for the fourth time published in the *Canada Gazette*, namely, the 4th day of September, 1897. For the suppliant it was, among other things, contended that no effect should be given to the order in council of July 29th, 1897, because it was not laid before the House of Commons within the first fifteen days of the session of 1898 in accordance with section 91 of *The Dominion Lands Act*. But that contention cannot be supported as the provision referred to is directory only, and the failure to comply with it did not destroy or affect the order in council. It seems to be clear also that if, by virtue of the statute under which the order in council was passed, it came into force on a given date, that date could not without express legislative authority be changed or altered by an order in council passed subsequent thereto. It is suggested that such legislative authority is to be found in *The Yukon Territory Act* (1); but that Act does not, it seems to me, afford support either to the order in council of March 30th, 1899, or to that of January 13th,

(1) 61 Vict. ch. 6, amended 62-63 Vict. ch. 11.

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1900, neither of which are, or purport to be, ordinances made thereunder for the peace, order and good government of the Yukon Territory. The most that can, I think, be said is, that the former order in council might in certain cases be relied upon as a waiver by the Crown of some right that otherwise it would have acquired or been entitled to retain; and that by the latter order in council the Crown has declared, so far as it could then so declare, that such waiver should not extend to the order in council of July 29th, 1897, the date of the coming into force of which must be determined by reference to the 91st section of *The Dominion Lands Act*. By that section it is, as we have seen, provided that any order or regulation made under the Act shall, unless otherwise specially provided in the Act, have force and effect only after the same has been published for four successive weeks in the *Canada Gazette*. For the respondent it is argued that the order or regulation, in such a case, comes into force upon its fourth publication, although only three weeks intervene between the first publication and the fourth. For the suppliant, on the other hand, it is contended that the order or regulation does not come into force in the case mentioned until the end of the fourth week, that is, until one week after the fourth publication of the order or regulation; and that anything short of this is not a publication for four successive weeks. In support of that contention reliance is placed upon the cases of *In re Coe and Pickering* (1); *In re Miles and Richmond* (2); and *In re Brophy and Gananoque* (3). In my opinion the view for which the suppliant contends should prevail, and that so far as anything depends upon the date on which the order in council of July 29th, 1897, came into force, that date should

(1) 24 U. C. Q. B. 439. (2) 28 U. C. Q. B. 333.
(3) 26 U. C. C. P. 290.

be taken to be the 11th, and not the 4th of September, 1897.

Coming then to the order in council itself there are, it seems clear, only four grounds on which its provisions could be held to apply to the gold mined in the winter of 1897-1898 from the suppliant's claim numbered 3 A below Discovery on Hunker Creek: (1) That the royalty leviable thereunder was lawfully imposed as a tax or impost on all gold mined on claims on the Yukon River and its tributaries; or (2) That such royalty was imposed by virtue of some power or authority, so to impose it, in some way reserved to the Governor in Council at the time the grant was first made or issued; or (3) That the suppliant accepted the grant of 1897 knowing and intending that the gold mined thereunder should be subject to the payment of such royalty; or (4) That the suppliant must be taken to have accepted the grant of 1897 on condition that such royalty should be paid.

The fourth ground is that on which, in the main, the Crown rested this branch of its case. Of the other grounds, the first and second will be found to be the important ones, when the question of the collection of royalty on claim No. 7 on Eldorado Creek is under consideration.

If one examines the provisions of the order in council, he will see that, omitting the first paragraph, the language used is that which one would expect to find in a regulation to impose a tax or to levy an impost. The operative words are "a royalty shall be levied and collected" and these are apt words for the imposition of a tax. But such a tax could not be levied without legislative authority to support the order in council, and no attempt is made to sustain it on that ground. It is equally clear, I think, that when the grant was first made no authority or power was in any way

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reserved to the Governor in Council to derogate from the grant, or during its continuance to subject the gold mined thereunder to the royalty in question. And, on the facts as they appear in evidence, there does not seem to be any ground for finding that the suppliant accepted the grant of 1897, knowing and intending that the gold mined thereunder should be subject to the payment of the royalty mentioned. The grant was expressed in the same terms substantially as those used in the grant of 1896. It is true that in October or November of 1897 the suppliant, knew of the order in council imposing the royalty, but he did not, he says, think it applied to his claim, of which he was then in possession. It was not until March or April, 1898, that he learned of the contention that all claims, no matter when granted, were liable to the royalty, and at that date the regulations of January 18th, 1898, were in force, and the order in council of July 29th had been cancelled. The royalty was then being claimed under the later regulations, and this claim the suppliant resisted, so far as he was in a position to do so.

The questions arising upon the fourth ground mentioned are more difficult of solution. In considering them it will be necessary to refer to some matters already alluded to, and they cannot, I think, be properly determined without reference to *The Dominion Mining Regulations* of 1889, and to the grant issued thereunder to the suppliant on the 7th of December, 1896.

By the terms of the grant of December 7th, 1897, the suppliant was, as we have seen, entitled, among other things, to the exclusive right to all proceeds to be realized from the claim for the term of one year from the date thereof; but that right was in the last paragraph of the grant limited by reference to *The*

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*Dominion Mining Regulations.* The rights granted, so it was declared, were those laid down in the aforesaid mining regulations, and no more, and were subject to all the provisions of the said regulations whether the same were expressed in the grant or not. What then is to be understood by the expression "Dominion Mining Regulations"? No doubt when the form of grant, which we have in this case, was first used that expression meant the mining regulations of November 9th, 1889, and nothing more. But I am not prepared to say that afterwards, and when these regulations had been amended, or additions had been made to them, the same expression, occurring in the same form, would not come to have a wider and larger meaning that would include the provisions of the amending or added regulation. Not that the meaning of the expression "Dominion Mining Regulations" occurring in the grant would during the year for which it was given be changed or affected to the prejudice of the grantee, by any amendment or new regulation made during that year; but I do not see why the expression might not in one grant have one meaning and in another a different and larger or more restricted meaning. That view seems to present some difficulty; but the difficulty is not, I think, a real one. In each case one would be giving to the expression the meaning which the parties must be taken to have intended it to have at the time when the grant was issued. It is only saying that the same expression may at different times and by different persons be used in a different sense. And so if there was nothing more in the case than that, I should not see any great difficulty in coming to the conclusion that the words "Dominion Mining Regulations"; occurring in the suppliant's grant of December 7th, 1897, included the provisions of the order in

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council of July 29th, 1897. But we cannot, I think, get away from the fact that the grant of December 7th, 1897, was a renewal of the grant of December 7th, 1896, in which the expression mentioned meant primarily the regulations of November, 9th, 1889, and in the widest sense to be attributed to it, these regulations as amended by the order in council of December 24th, 1894. It is true that the grant of December 7th, 1896, was in terms limited to one year from that date. But one cannot read the regulations without seeing that it was in the contemplation of both parties to the grant that it might be renewed. Among other things supporting that view, it is, as we have seen, provided by the twentieth section of the regulations that the entry of every holder of a grant for placer mining must be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time. In practice the instrument described in the regulations as a grant is renewed, while by the regulations it is the entry that is to be renewed, and the receipt that is to be relinquished and replaced. But the meaning probably is the same. The miner's claim to a renewal, if not his absolute right thereto, on some terms, is recognized. It is not necessary to support the petition in this case to hold that he has a claim or right to renewal upon the same terms as those upon which the original grant was issued. On the contrary it may be, as appears to have happened in 1898, that the Crown might impose other terms, and grant the renewal on condition only that the grantee or miner acceded to such terms. I express no opinion as to that. But when it comes to deciding what the contract between the parties is (and in this aspect of the case it is to be considered as a matter of contract only) and it appears that an existing contract is renewed in the same terms, the inference that the

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same expression occurring both in the contract and in the renewal is used in both in the same sense, is, it seems to me, a very strong one. The onus of showing that the parties have used that expression in a different sense in the original grant and in the renewal is strongly upon the party that sets up that contention. It is very certain that the suppliant held this claim from September 11th, 1897, when the order in council imposing the royalty came into force, until the 7th of December, 1897, free from the obligation to pay the royalty; and the renewal having been granted to him in the same terms as the original grant, and without any agreement or understanding to the contrary, the renewal also should, I think, be held not to be subject to any such obligation. In my opinion the same meaning should be attributed to the words "DominionMining Regulations" in the first grant and in the renewal. That view gives, it seems to me, a proper and legitimate construction to the order in council of July 29th, 1897, as a regulation prescribing the terms and conditions upon which the mineral claims therein mentioned should thereafter be disposed of; but without any retroactive effect upon claims then already disposed of; except so far as might be agreed or assented to on the renewal of the grants therefor.

It is, however, argued for the Crown that in December, 1897, the Gold Commissioner had no authority to issue the grant in question without a stipulation that the gold mined thereunder should be liable to the royalty mentioned; and that if he issued it on any other terms or conditions his act was *ultra vires*, and the grant should now be set aside as having been issued improvidently. But is that really so? The grant was issued in the form at the time prescribed by the regulations then in force. In issuing it in that form the Gold Commissioner would not, in December,

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1897, have exceeded his authority. What the effect of a grant in that form would be, and whether the claim would under any circumstances be liable to the royalty are different questions. It may be, though it is not necessary now to decide that matter, that in December, 1897, the Gold Commissioner might have refused to issue the grant of the mining claim in question, unless the suppliant would agree to pay the royalty prescribed; or having issued the grant in August, he might perhaps have recalled it or taken steps to have it cancelled or set aside, unless the suppliant would so agree. But there is nothing of that kind in the case, and nothing is to be gained by considering what the rights of the parties would have been had that course been adopted.

With reference to the contention that the royalty was paid voluntarily and under such circumstances as to preclude the suppliant from recovering it back, it seems to me that it was not so paid, and that the suppliant is not precluded. The consequences of a refusal on his part to comply with the demands made upon him to pay the royalty would have been so disastrous, and any remedy that he might have had so uncertain and inadequate, that he had practically no choice in the matter. There was really nothing else to do.

For these reasons, I am of opinion that the suppliant is entitled to relief and judgment in respect of the sum of one thousand six hundred and thirty-seven dollars, paid for royalty on the gold taken in the winter of 1897-1898 from claim 3A below Discovery on Hunker Creek.

If the view already expressed as to the date when the order in council of July 29th, 1897, came into force, is a correct view, the claim set up for the recovery of the royalty paid on the gold mined from

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claim numbered 7 on Eldorado Creek stands in a stronger position than that which has been under consideration. The grant of that claim is to be taken to have been renewed or issued on the 9th of September, 1897, and the order in council did not come into effect until the 11th of that month. There are, therefore, no grounds except the first and second discussed in connection with the other branch of the case and disposed of in the suppliant's favour, for holding the gold mined under this grant to be liable to the royalty collected. But it appears that other parties may be interested in such royalty. And if that is the case, the suppliant is not entitled to recover back the full amount, without something being arranged or done to protect the Crown with respect to such interests. There, may, therefore, be a reference to the Registrar of the court to inquire and report as to what the suppliant's interests in the royalty so paid in respect of gold mined under claim numbered 7 on Eldorado Creek was, and whether any other person or persons has or have any, and if any, what interest therein.

The question of interest on the amount to which the suppliant may be found entitled is reserved pending the decision of a similar question now depending in the Supreme Court on appeal from this court.

The suppliant will be allowed the costs of his petition.

*Judgment accordingly.*

Solicitors for suppliant: *Lewis & Smellie.*

Solicitor for respondent: *E. L. Newcombe.*

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July 4.

TORONTO ADMIRALTY DISTRICT.

HENRY WINEMAN, THE YOUNGER...PLAINTIFF;

AGAINST

THE SHIP "*HIAWATHA.*"

*Collision—Fog—Immoderate speed—Mutual fault—Damages.*

In an action for collision where the court found both vessels in fault for moving at an immoderate rate of speed in foggy weather, and that such immoderate speed was the chief if not the sole cause of the collision, the owner of the damaged ship was allowed to recover only half his loss.

ACTION for damages by collision.

The case was tried at the City of Windsor on the 26th and 27th days of February, 1902, before His Honour Joseph E. McDougall, local judge in Admiralty.

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

The argument of counsel was submitted in writing, and filed respectively on behalf of the plaintiff and the ship on the 18th and 24th days of April, 1902.

*A. H. Clarke, K.C.* for the plaintiff:

The collision between the steamer *Hiawatha* and the sailing vessel *J. F. Card* on the 12th day of May, 1900, about 10 o'clock, p.m., which caused the damages complained of, was attributable to the improper navigation of the steamer and the negligence of those in command of her, and such improper navigation and negligence were fully established by the evidence adduced at the trial.

The steamer was at fault in that she did not, as required by Rule 19, keep out of the way of the sailing vessel and still more at fault in altering her course so as to cross that of the sailing vessel, which was properly keeping her course. The evidence establishes

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Argument of Counsel.

the fact that had the steamer kept her course the two vessels would, notwithstanding the speed and the fog, have safely passed each other on the starboard side and no collision would have occurred; the plaintiff's witnesses, and some, if not all, of the defendants witnesses agree upon this point. The following rule was laid down by the Privy Council in the case of the *Agra and Elizabeth Jenkins* (1): "If a ship bound to keep her course justifies her departure, she takes upon herself the obligation of showing not only that her departure was at the time it took place necessary in order to avoid immediate danger, but also that the course adopted by her was reasonably calculated to avoid that danger."

*A fortiori*, a steam vessel which is bound to keep out of the way of a sailing vessel cannot justify her going into its way without the clearest evidence of the necessity of such a course in order to avoid immediate danger, and also that the course adopted was reasonably calculated to avoid that danger.

Under navigation rules which make it the duty of a steam-vessel to keep out of the way of a sailing vessel when they are proceeding in such direction as to involve risk of collision and the duty of the latter to keep her course where a collision occurs between a steam and a sailing vessel and it is shown that the latter kept her course, the presumption arises that the steam-vessel was in fault and such presumption must form the basis of the judgment in a suit for the collision unless it is made clearly to appear that the accident was inevitable. *Squires* v. *Parker* (2)

How then does the *Hiawatha* justify her action in going into the way of the sailing vessel in direct violation of its duty to keep out of the way?

(1) L. R. 1 P. C. 501. (2) 101 Fed. Rep. 843.

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The only justification urged in the statement of defence and in the preliminary act filed on their behalf, as well as by the witnesses for the defence, for the *Hiawatha's* change of course, is that she was misled by a wrong signal from the *J. F. Card*, indicating that the latter was on the starboard tack, namely, a single blast of the fog-horn instead of three blasts which was the proper signal for the sailing vessel sailing as she was with the wind abaft the beam.

We submit that the evidence fails to establish the fact so relied on in justification, viz.: that the fog horn on the *J. F. Card* gave one instead of three blasts.

If it be true that the only signals from the sailing vessel heard on the steamer were one indistinct blast, and shortly afterwards one distinct blast both on their port bow, the steamer must have commenced to swing into the course of the sailing vessel before either of the two blasts was heard, otherwise the sound would have come from their starboard bow. This view contradicts the allegation that the change of course was due to a misunderstanding of the signals from the sailing vessel. The fact as sworn to by the wheelman that the *Hiawatha* was not a good steering ship is a reason that in such a fog the steamer should have proceeded at a much less rate of speed than she was observing at the time of the collision.

Even if the proper signals given by the sailing vessel were not heard or understood by the steamer, no fault in respect thereof can be charged to the sailing vessel. *Robertson* v. *Wigle* (the *St. Magnus*). (1)

The evidence shows recklessness and want of attention in the management of the steamer in the following respects: The outlook for some time prior to the collision heard fog signals of three blasts each, which he supposed were from a steamer going in the same

(1) 16 S. C. R. 720.

direction (but which may have been the *J. F. Card's* signals) and no abatement was made in the speed nor other precaution taken to avoid danger in that quarter, in direct violation of Rule 15, which reads as follows: "Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes go at moderate speed. A steam-vessel hearing apparently not more than four points from right ahead the fog signal of another vessel shall at once reduce her speed to bare steerage way and navigate with caution until the vessels shall have passed each other."

When the indistinct blast was heard some seconds before the collision, it was not reported by the look-out to the captain, and although the captain says he asked the lookout about it, the lookout says the captain moved back from the high canvas over the cabin, so he could not see him although from the height of canvas it was necessary in order to see an approaching vessel to look over the side.

No effort was made on hearing the signal to slacken the speed, stop or reverse, though the steamer was by Rule 21 expressly desired to do so.

The captain kept no proper lookout, he says the sailing vessel was not more than 100 feet away when he first saw her. If watching he should have seen her earlier, both he and Meade said a vessel could be seen the length of the ship (235 feet), or further, if there were lights. Captain Brown was able to see the green light and the loom of the *Hiawatha* before she changed her course, and there seems no reason why the green light and the loom of the sailing vessel should not have been seen at the same time, as the *J. F. Card's* lights were, according to the evidence, burning brightly.

The *Hiawatha* was going at an immoderate rate of speed and though no collision would have happened

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notwithstanding the speed, had she not changed her course, it was of the greatest consequence when she seeks to justify such change of course. The evidence of Engineer Butler shows that she was going from 7·5 to 7.7 miles per hour.

The following cases are cited with reference to 'moderate speed:' The *Zambesi* (1); the *Heather Bell* and the *Fastnet* (2); the *Campania* (3); the *Columbia* (4); the *Newport News* (5).

The failure of the *Hiawatha* to assist the sailing vessel when disabled is evidence that the collision was caused by the former's wrongful act. *Howell's Admiraly Practice* (6); *Esquimalt and Nanaimo Railway Co.* v. *The Cutch* (7).

Although the evidence is conflicting, we submit the natural probabilities support the story told by the plaintiff's witnesses. The story of those for the defence who say that nothing was seen or heard of the *J. .F Card* for fifteen or twenty minutes after the collision, that then they came in some mysterious way side by side, that even then Capt. Brown was not aware his ship was leaking, that no bell was sounded or other signal given on the *J. F. Card* notwithstanding her disabled condition in a thick fog expecting that at least the *Hiawatha* was near her, seems incredible. The steamer did not help the *J. F. Card* nor make any enquiry about her for nearly an hour after the first conversation, when the fact of her leaking was not yet known.

Capt. Ivers said in substance that the companies owning ships expected them to make time and did not give them credit for delays, and it was not therefore customary to strictly follow the rules of navi-

(1) 3 Ex. C. R. 67.
(2) 3 Ex. C. R. 40.
(3) [1901] P. D. 289.
(4) 104 Fed. Rep. 105.
(5) 105 Fed. Rep. 389.
(6) P. 251.
(7) 3 Ex. C. R. 262.

gation. This disregard of rules encouraged by the owners is, we submit, responsible for the collision in question in this action.

The defendants contend that the *J. F. Card* was running at too great speed in a fog, and that a good lookout was not kept on board the *J. F. Card.* The evidence did not bear out these facts, as the *Hiawatha* was sighted by the lookout on the *J. F. Card* sometime before the *J. F. Card* was sighted by the lookout on the *Hiawatha.*

As to speed we submit (*a*) that the speed of the *J. F. Card* was less than the speed of the *Hiawatha*, and therefore it is not for the latter to complain. (*b*) The speed of the *J. F. Card* was not the cause of, nor did it contribute to, the collision. (*c*) More latitude as to speed should be allowed to a sailing vessel than to a steamer for the reason, among others, that she cannot increase her speed to get out of the way as quickly as a steamer. In this particular case it was necessary in order to obtain steerage way to spread the top-sails which involved the spreading of the main sails as well. The *Zadok* (1); the *Elysia* (2); the *N. Strong* (3) and other cases cited in the *Chattahoochee* (4); *Marsden on Collisions* (5).

At the trial for the first time a fault was attributed to the *J. F. Card* principally by the experts, which apparently never occurred to the captain or the crew of the *Hiawatha* who gave the instructions for the statement of defence and preliminary act, viz.: That the *J. F. Card* could have avoided the collision after seeing the *Hiawatha* change her course by starboarding her helm and luffing up to the wind.

(1) L. R. 9 P. D. 117.
(2) 4 Asp. Mar. L. C. N.S. 510.
(3) [1892] P. D. 105.
(4) 173 U. S. 540.
(5) 3rd ed. p. 404.

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We submit that this fault not being in the record cannot be relied upon, and without prejudice to this objection, further submit that the hypothesis upon which this conclusion is based is not certain enough to enable any expert, however skilful, who was not present at the collision, to speak with any reasonable certainty.

We submit that the course taken by the captain of the *J. F. Card* was the proper one as he was present and knew from existing circumstances what was best to be done. He acted according to his best judgment in the agony of collision and cannot therefore be held guilty of contributory negligence even if he did not do the very wisest thing, as is contended by the defendants.

This rule is laid down in *The Cuba* v. *McMillan* (1), viz, that excusable manoeuvres executed in agony of collision brought about by another vessel cannot be imputed as contributory negligence on the part of the vessel collided with.

The following rule applied in the *Columbian* (2), is also applicable here "Where a steamer was confessedly and grossly in fault for a collision with a schooner by reason of her excessive speed in a fog at a place where she had reason to apprehend danger any doubts as to the fault in the schooner contributing to her injury will be resolved in her favour."

The *Isaac H. Tillyer* (3), also has this head note, "Testimony from a steamer clearly in fault for a collision with a sailing vessel, that the latter was guilty of contributing fault by changing her course, will be viewed with suspicion; and when the evidence from the sailing vessel is to the contrary and accords with the probabilities it will be accepted in preference."

(1) 26 S. C. R. 651. (2) 100 Fed. Rep. 991.
(3) 101 Fed. Rep. 478.

The plaintiff therefore claims to recover damages.

*W. D. Macpherson* for the defendants:—

We are struck at once in considering the evidence with the fact that the schooner knew of the presence of the steamer and sighted her lights and saw her, as they say. They change her course, rendering a collision inevitable, before the steamer had sighted the schooner or knew of her presence. Then why did the steamer's people not see the schooner earlier? We say it was because the schooner did not display the light required by Rule 12 of the Rules of Navigation and that she did not do so, we say, is the fault to which the collision must be attributed.

The steamer is entitled by law to presume that any schooner in these waters that night was being navigated in compliance with the law, and the law of the United States of America which is the only law applicable to the determination of the rights of the parties in this case, is succinctly set forth in the evidence of Mr. Oaks called by the defendants as an expert. Although it is argued that the *Hiawatha* in running at a speed of seven miles per hour, or thereabouts, was violating Rule 15, in so far as that speed is not moderate speed within the meaning of that rule; yet who can say that the collision would not have occurred if the *Hiawatha* had been running at moderate speed within the meaning of the rule? It is, therefore, clear that the schooner by not showing the torch knowingly permitted the steamer to get within a couple of hundred feet of her (equal in point of time to ten seconds), that the steamer could not stop her way in that space of time and then it was too late for the collision to be avoided. Is it conceivable that the steamer would not have avoided the schooner if she had known of her presence there, or had seen any possible way by which it might have been avoided?

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The evidence is clear that the steamer was manned with a capable crew; that the look-out was at his post, bright, alert, active and intelligent, indeed his evidence proved that he was the right man in the right place. The captain and second mate were on top of the pilot house, the wheelman was at his post, numerous other craft were in the vicinity, some going one way and some the other, and here was this schooner running free with every sail set and without displaying any torch. If she had shown her lighted torch when she first picked up the steamer's light two minutes before the collision, the steamer would have had about 2,400 feet notice of her presence or hereabouts; those on the schooner say that from the time her lights hove in sight, up to the moment of the collision they heard no signals of her whistle. As a fact the whistle which Brown says he heard four or five minutes before her lights were picked up was being continuously sounded, and it is inconceivable that her blasts were not heard by those on the schooner, particularly as the distance between the ships was momentarily rapidly decreasing; and it rests with the court to say whether the witnesses for the plaintiff in so deposing are untruthful and unreliable, or whether, in their desperate excitement, they did not notice or remember the signal blast, for the fact cannot be controverted for a moment that the steamer gave three loud blasts of her whistle at intervals of every minute for a long time prior, and at even shorter intervals up almost, to the very instant of the collision.

The essential point to be determined is which vessel is in fault and contributed to or caused the accident. The first fact to be found in this connection is that the schooner displayed no lighted torch; secondly, the steamer had a competent look-out; and thirdly, as he

swears he did not see the signal lights till the ships were within 200 feet of each other, then, according to the law of America, it will be held that the reason the signal lights were not seen was because, on account of the schooner's course, one was invisible and the other obscured by her jibs, and her list to starboard or from some other cause rendering it invisible to the steamer.

From the time the schooner heard the fog signal of the *Hiawatha* she was within the obligation of Rule 12. (The *Algiers* (1); the *Rhode Island* (2); the *Hercules* (3); the *Potsville* (4); the *Saratoga* (5).

The fact that the side lights of the sailing vessel were discovered from the steamship as early as a torch could have been, will not relieve the sailing vessel from the charge of negligence in failing to exhibit the torch. (The *Pennsylvania* (6).

The object of having a flare-up light or torch exhibited is to attract the attention of the other vessel, and when there is a possibility that the display of a flare up torch would have avoided a collision, a vessel is at fault for not complying with the statute.

And the burden of proof to show that such omission did not contribute to the collision is on the vessel failing to comply with the statutory requirements. (The *Frank P. Lee* (7); the *Samuel H. Crawford* (8); the *Excelsior* (9); the *City of Savannah* (10).

Where negligence is proven on the part of a colliding vessel, the court will not impute negligence to the other because it failed to see a light that was exhibited

(1) 28 Fed. Rep. 242.
(2) 17 Fed. Rep. 554.
(3) 17 Fed. Rep. 606.
(4) 24 Fed. Rep. 655.
(5) 37 Fed. Rep. 119.
(6) 12 Fed. Rep. 914.
(7) 30 Fed. Rep. 277.
(8) 6 Fed. Rep. 906.
(9) 12 Fed. Rep. 195.
(10) 41 Fed. Rep. 891.

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on the delinquent vessel. (The *Algiers* (1); the *Monmouthshire* (2); and the *Westfield* (3).

The above statements of law are equally applicable to the fog-signals said to have been given by the schooner; they were not heard on the steamer. An indistinct noise of some kind was heard about forty or fifty seconds before the collision, and one blast of a vessel's fog-horn about six or seven seconds before the collision. The reason the other blasts as given were not heard was because of the jibs on the schooner.

Experience shows that sound in a fog is easily deflected by such a cause as the jibs, and no doubt the sound in this case had a tendency to be smothered in the jibs upwards and backwards towards the foremast instead of forward, towards the steamer. The defendants, therefore, ask the court to hold as a fact that the horn blasts of the schooner were not sufficiently well given to be heard on the steamer till the distinct blast spoken of was actually heard some six or seven seconds before the collision.

The court will not excuse the schooner for not showing the torch on the plea that even if shown it might not have been seen; see Rule 28. (The *Negaunee* (4); the *Beryl* (5).

The steamer did all in her power to avoid the collision after the schooner was seen and is absolved in law from any blame. She was not at any time within the obligation of Rule 19 and the latter part of Rule 15, because when she became informed of the schooner's proximity the circumstances were special and Rule 27 became applicable. (The *Umbria* (6); the *Cayuga* (7).

(1) 28 Fed. Rep. 240.
(2) 44 Fed. Rep. 697.
(3) 36 Fed. Rep. 366.
(4) 20 Fed. Rep. 918.
(5) 9 P. D. 137.
(6) 166 U. S. 404.
(7) 14 Wall. 270.

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Argument of Counsel.

As to the plaintiff's argument that the only signal from the schooner heard on the steamer was one indistinct blast, and shortly after, one distinct blast both on their port bow—the steamer must have commenced to swing into the course of the sailing vessel before either of the two blasts was heard, otherwise the sound would have come from her starboard bow—the trouble with this argument is that it assumes a premise contrary to the fact and in consequence the conclusion cannot follow. The *Hiawatha* was at no time on a parallel course, and therefore would at no time get the schooner's signal over her starboard bow. We still claim that the probabilities are that the schooner was not giving the proper signals, otherwise they would have been heard.

No duty devolved upon the steamer until she knew of the presence of the schooner, which the schooner might have signified by showing her lighted torch, and those on the steamer did not hear even the indistinct noise until within a few seconds of the collision, and it is not admitted now, nor was it by the witnesses at the trial, that the first indistinct noise heard was in fact "the fog-signal of another vessel"; and the attention of the court is drawn to the fact that on the construction of this rule it is essential that the steamer shall in fact hear the fog-signal of another vessel.

When the distinct blast of the schooner's horn was heard on the steamer, the captain gave the order to "hard aport" the wheel and signalled the engineer to stop the engine. All the expert evidence at the trial was to the effect that what he did was proper under the circumstances.

Then as to Rule 21, how can it be argued that the steamer could have done more than she did, or that anything else would have been of the slightest avail to prevent the collision? Her way could not be

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stopped even appreciably within a minute, and that means twelve hundred feet.

Before a steamer can be convicted of fault for not keeping away, it must appear that those in charge of her have, or should have, information of something to keep away from. Aside from the incredible testimony of Brown there is no evidence to support the claim that had the *Hiawatha* kept her course she would have passed clear. On the contrary, the proof is explicit and positive that it was the manœuvre of the *Hiawatha* alone that saved the *J. F. Card* from being sunk.

The *Hiawatha* was going at an immoderate speed and for the American law on this point we refer to the *Chattahoochee* (1).

The first part of Rule 15 as to the general speed of ships in a fog applies equally to sailing vessels and steamers. *The Rhode Island* (2); also the *Johns Hopkins* (3); the *Wyanoke* (4); the *Harold* (5).

Then as to the speed of the schooner. This can only be arrived at approximately because it depends upon the wind, her cargo, the sail she was carrying, etc. The notarial protest states they were making about six and a half miles an hour. At the trial a very determined effort was made to reduce this to six miles an hour. It is inconceivable that she was not going faster as the lake was smooth, she had all her sails set and at least a ten mile an hour breeze to carry her along. Doubtless she was making seven or eight miles an hour, but we have the admission of six and a half. We submit that six and a half miles an hour, under the conditions of fog and darkness detailed in this case, is not moderate speed. Among the cases

(1) 173 U. S. Rep. 540 *et seq.*, particularly p. 548.
(2) 17 Fed. Rep. 554.
(3) 13 Fed. Rep. 185.
(4) 40 Fed. Rep. 702.
(5) 84 Fed. Rep. 698.

referred to by Mr. Justice Brown in his judgment in the *Chattahooche* case are the following: The *Virgil* (1); the *Victoria* (2); the *Itinerant* (3); the *Johns Hopkins* (4); the *Wyanoke* (5); the *Attila* (6); the *Zadok* (7); the *Beta* (8).

Therefore even though the court should be of the opinion that seven miles would be moderate, and that five miles or some less speed would have been moderate, yet the speed of the *Hiawatha* in this case for want of knowledge of the schooner's whereabouts on account of the non-display of the torch cannot be said to have been a contributing factor to the collision.

The precautions required by Rules 27 and 28 must be taken in time. (See *Marsden on Collisions* (9). It is quite clear that the reason the *Hiawatha* changed her course was, in the first instance, on account of hearing some noise which if it were a signal from the vessels fog-horn was a signal that a vessel was on the starboard tack; and on this basis her change of course, by porting her wheel some, was both proper and justifiable; and in the second instance, because for want of a torch, she did not know exactly where the vessel was, but could only navigate by the sound. As to the change of her course by the *Hiawatha* under the circumstances the law is stated by Mr. Justice Brown in the *Umbria* case (10).

But as it was in the power of the schooner to have avoided the collision according to the circumstances and according to the law she is solely responsible for not having done so.

The wheel of the schooner should have been put hard down. It is agreed that had the schooner put her

(1) 2 W. Rob. 201.
(2) 3 W. Rob. 49.
(3) 2 W. Rob. 236.
(4) 13 Fed. Rep. 185.
(5) 40 Fed. Rep. 702.
(6) Cook's Rep. 196.
(7) L. R. 9 P. D. 114.
(8) L. R. 9 P. D. 134.
(9) 4th ed. p. 384.
(10) 166 U. S. at pp. 410-411.

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wheel hard down, and at the same time manœuvred her sails properly, the collision might have been averted. The difficulty is that the master of the schooner who was her look-out at the time did not read the lights of the *Hiawatha*. Something more is required of a lookout than the mere seeing of lights. He must interpret their meaning, and his boat must be navigated accordingly.

The schooner, being within the obligation of the first part of Rule 15, and equally with the *Hiawatha* within that of Rules 27 and 28, should have done something to avert the collision. (The *General* (1)).

The duties of approaching vessels are reciprocal under American law. (The *Sunnyside* (2); the *Patria* (3); the *Pilot* (4)).

The law is to the same effect in Canada. (The schooner *Reliance* v. *The Conwell* (5). See also the *New York* (6); *Marsden on Collisions* (7).

Immoderate speed is the only possible fault that can be charged to the *Hiawatha* within the proof; and if a fault it can be fairly held no more than a remote cause and not a proximate cause. In any event it should be held no more a contributing cause than the speed of the schooner.

The schooner being within the operation of Rules 12, 27 and 28, was in fault (1) For not displaying a lighted torch: (2) For holding her speed after seeing the mast-head lights of the steamer: (3). If she could not then stop her speed she was in fault because her speed was too fast in a fog: (4) In not knowing that the steamer was on a course intersecting her own: (5) In not taking a course to starboard: (6) Having neglected taking a course to starboard when she should

(1) 82 Fed. Rep. 830.
(2) 91 U. S., 208.
(3) 92 Fed. Rep. 411.
(4) 20 Fed. Rep. 860.
(5) 31 S. C. R. 653.
(6) 53 Fed. Rep. 553.
(7) (4 ed.) p. 472.

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and safely could, she was in fault for not putting her wheel hard down when she says the steamer sheered to starboard: (7) After hearing the fog-signal of the steamer she was in fault for not having more men on deck.

If the schooner had displayed no lights and had blown no fog-signal the steamer could not be held the cause of the collision, and within the law of the cases cited the burden is on the schooner to show that her failure to exhibit a torch was not the proximate and sole cause of the collision. She has not even attempted to do this.

The case presented, therefore, is that of a steamer and a sailing vessel prosecuting, at night through a surface fog and a common thoroughfare, at substantially the same speed, intersecting courses, the sailing vessel informed of the steamer's approach for a period of ten minutes, and seeing her mast-head lights for seven or eight minutes, hearing no signal, displaying no torch, taking in no sail and holding her course and speed. The steamer faultlessly ignorant of the approach of the sailing vessel until the sound of some noise over her port bow, about forty seconds away, and between the interval between then and the collision porting her wheel some, and getting a distinct one blast signal from the same direction, six or eight seconds before the collision "hard aporting" her wheel when the coloured lights of the said vessel appeared. A head on collision by the sailing vessel with the port side of the steamer. The proposition under the circumstances that the steamer could do nothing but "port" and "hard aport," while the sailing vessel should have put her wheel hard down, is established by the great weight of testimony.

*A. H. Clarke, K.C.* replied:

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Reasons for Judgment.

MACDOUGALL, L. J., now (July 4th, 1902,) delivered judgment.

This is an action brought by the owner of the schooner *J. F. Card* to recover damages for a collision which occurred between the *J. F. Card* and the steamship *Hiawatha* on the night of the 12th of May, 1900, in Lake Huron, about ten or twelve miles south easterly from Thunder Bay light. Both vessels are of American Register, and the place of collision was in American waters. The *J. F. Card* was a two masted schooner, 137 feet long, 25½ foot beam; she was loaded with coal and bound for Beaver's Island, St. James, a port on Lake Michigan.

The *Hiawatha* was a steam vessel of 1,390 tons register, 234 feet long by 38 feet beam, and was on her way down Lake Huron, loaded with iron ore, bound for Sandusky, in Lake Erie.

The weather was very thick and foggy, a ten or twelve mile breeze was blowing about due south; and the schooner, with all her canvas set, was sailing on the starboard tack on a course N.N.W. making about six and a half miles an hour. The *Hiawatha*, her engine moving 68 to 70 turns to the minute, was going through the water at the rate of between seven and a half and seven and three-quarter miles an hour. Her master, in his evidence, thought seven miles an hour was her speed, but from the evidence of the engineer I find it exceeded seven miles an hour but was under eight miles an hour. The steamer's course, according to the wheelman, was S. quarter E. There was no sea to speak of. The fog was thick and close to the water, but about mast-head high was lighter, and the moon and stars could be seen from the deck of the schooner; but neither vessel could see the hull of another ahead at a greater distance probably than two or three hundred feet. The evidence of the witnesses on the schooner puts this distance a little greater.

The master says he saw the range lights of the steamer at a distance of about seven or eight hundred feet, and some of his crew, (one, the man on the look-out) thought from 500 to 1,000 feet; another witness thought the high range light of an approaching vessel might have been seen a couple of thousand feet, but that the hull or signal lights could not be made out nearly so far. On the other hand the wheelman on the steamer described the fog as much thicker and stated that at ten or ten thirty p.m. (the time of the collision) he could hardly make out from the wheel-house the boiler house of his steamer aft; and says he could not see ahead of him more than the length of the steamer, (234 feet). He added, it was about as thick a fog as he had ever seen on Lake Huron.

The schooner carried no light on her mast, but carried her red and green signal lights, placed forward on the fore rigging at a height between seven and a half and eight feet above the deck. The *Hiawatha* carried her range and signal lights in their usual positions.

The *J. F. Card* had been sounding fog-signals with a fog-horn at regular intervals. The pattern of her fog-horn was that in ordinary use by sailing vessels. The steamer was also giving regular fog-signals with her steam whistle. Both vessels were on a part of the lake much frequented by steam and sailing vessels, though the former were more numerous and more likely to be encountered than sailing vessels. The master and look-out on the *Hiawatha* had heard many steamer fog-signals in their immediate neighbourhood for some time prior to the collision with the *J. F. Card*.

Both the *J. F. Card* and the *Hiawatha* had men on the lookout. Just prior to the collision the master and look-out on the *J. F. Card* sighted both of the range lights of the *Hiawatha*, a point or a point and a

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half on their starboard bow. These lights were clear, and the steamer was apparently on a course which would have cleared the *J. F. Card.* In a very short interval the *Hiawatha's* green light also appeared but the range lights began to close, showing that the steamer was changing her course. The master of the *J. F. Card* states that he had heard the fog-signal from a steamer ahead of him some three or four minutes before he picked up the range lights of the *Hiawatha*. He swears he heard no signal from a steamer after that up to the time of the collision. After hearing the fog-whistle he kept the schooner on her course, sounding his fog-horn. A moment or two before the collision the *Hiawatha's* green light was shut out and her red light appeared; this indicated that the steamer was crossing his bow. He estimates that the *Hiawatha* was three or four hundred feet away when he first saw her green light; he thinks the collision took place within two minutes after he first saw the range lights on the steamer. The master of the *Hiawatha* states that the steamer was less than a hundred feet from the schooner when he first saw her; that just before seeing her he had given orders to the wheelman to put his wheel "hard aport" because he had heard a single blast signal ahead (this by the later events must have been from the *J. F. Card* before she loomed up); at the same instant he saw the schooner, and saw her red light and knew he was close upon her. The captain of the schooner, the moment he saw the red light of the steamer, and an instant before the collision, called to his wheelman to put his wheel "hard aport" for the purpose, as he states, of easing the shock of the collision which he saw was inevitable. On the *Hiawatha*, according to the wheelman, some six or seven seconds before the collision the master had ordered him to "port" a little and, two or three seconds

after the first order, to put his wheel " hard aport ". The wheelman thought that the *Hiawatha* had swung perhaps a point or a point and a quarter between the two orders. When the master of the *Hiawatha* sighted the schooner he signalled his engines to stop, but did not reverse as there was no time to do so before the vessels came together.

The vessels collided, and the *J. F. Card* was seriously injured but did not sink ; her jib-boom was left on the *Hiawatha's* deck, her bowsprit was broken off, part of her foremast went by the board and her stem scraped along the *Hiawatha's* port side. The contact swung her stern around to such an extent that when the vessels cleared the schooner was pointed west. The *Hiawatha* was not injured to any great extent, but her steam whistle had been carried away by the jib-boom of the schooner.

A good deal of argument was expended on the discrepancies in the time estimates made by the different witnesses. Some of the crew on the *J. F. Card* estimated the time between sighting the *Hiawatha* and the collision, all the way from two minutes to six or seven minutes. The captain of the *J. F. Card* thought perhaps two minutes only elapsed between first seeing the range lights of the *Hiawatha* and the collision, and the time between hearing the only fog-whistle he did hear and the collision would perhaps be not more than six or seven minutes. Now, let me point out that in no case can these time estimates be even approximately correct ; according to the evidence of both sets of witnesses the vessels, prior to the collision, were approaching each other at the rate of fourteen miles an hour ; the speed of the *J. F. Card* was six and a half miles or better, and the *Hiawatha* from seven to seven and a half miles an hour. This means that they were diminishing the space between

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them at the rate of 1,230 feet per minute. The master of the *J. F. Card* says that, using his best judgment, the *Hiawatha's* range lights were seen when that vessel was seven or eight hundred feet away; another witness estimates the distance between 500 and 1,000 feet, which would mean 750 feet. A third witness estimates somewhat more liberally and thinks the *Hiawatha* was perhaps 2,000 feet away. The *Hiawatha's* master and wheelman put the extreme distance from which they could see a vessel's hull or signal lights, say, 250 or 300 feet, or the range lights on a mast a little farther. Call this increased distance double that at which they could see the hull, or say 600 feet. Contrasting this with the speed it means that when the vessels were 600 to 800 feet from each other it would take but thirty or forty seconds to come together; or if a thousand feet, fifty seconds; or 1,200 feet, one minute. This shows that the estimates as to time must be discarded; they are the inaccurate conclusions of men who are not accustomed to measure the lapse of time by a watch. We have the speed of the vessels given; and from 800 to 1,000 feet space represents the greatest distance at which the high range lights could probably be seen from either vessel in the fog which prevailed; probably less than that, a third, or from 250 to 300 feet, would be the greatest distance at which either could see the signal lights or the hull of the other. The portion of the lake they were traversing was the regular track of a large number of vessels under sail and steam, bound from Lake Michigan and the Upper Lakes to Lake Erie or from Lake Erie to Lake Michigan and the Upper Lakes. The master of the *Hiawatha*, his wheelman and look-out, admit that they had heard a number of fog-signals from other vessels in their immediate vicinity for some hours before the collision

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had occurred. Under these conditions I must hold that the speed of the *Hiawatha* at seven or seven and a half miles an hour, and that of the *J. F. Card* at six and a half miles an hour, were immoderate under the rules of navigation applicable to these waters. The expert witnesses called by the defendant, Captains Ivors, Doner and Donelly, all agree that the speed of the *J. F. Card* was immoderate, but on cross-examination they admit that if the fog was as thick as it was stated the speed of the *Hiawatha* was also greater than it ought to have been. They say that three or four miles an hour would not have been immoderate for the *J. F. Card*, and three or four miles an hour for the *Hiawatha*. Both vessels were therefore in fault for moving at too rapid a rate of speed in the fog. It was the duty of the *J. F. Card*, as a sailing vessel, when approached by a steamer to keep on her course (1); it was equally the duty of the *Hiawatha* to keep clear of the schooner.—(2) These rules, of course, presuppose that the vessels see each other; any departure from these rules by either vessel, after sighting the other, would be held to be a fault on the part of the vessel breaking the rules, and would prevent her recovering damages resulting from the collision, providing always that the other vessel's conduct had been free from blame. A vessel going at too great a rate of speed on a dark night or in foggy weather cannot be heard to say that a collision was the result of inevitable accident. (The *Juliet Erskine* (3). With such conditions of weather and light it was the duty of all vessels proceeding to adopt a rate of speed which would enable them upon meeting or sighting another vessel to avoid a collision; if a steamer, by stopping and reversing her engine (the *Smyrna* (4);

(1) American Rule 20.
(2) Rule 19.
(3) 6 Not. of Cases, 633.
(4) 2 Mar. Law Cas. O. S. 93.

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if a sailing vessel, by shortening sail or letting go sheets and braces and so manœuvering her sails as to assist the helm at the first moment the approaching ship was seen (the *Zadoc* (1). If the speed of either vessel in a fog exceed what the court on the evidence deems moderate, within the rule, then the vessel offending will not be allowed to recover damages occasioned by the collision even though she may do her utmost upon discovering the ship to avoid a collision. (*The Samphire* v. *The Fanny Beck* (2). If both vessels are in fault by reason of approaching each other at too high a rate of speed, then in such a case the damages will be divided.

Upon the evidence in this case I find that both the *Hiawatha* and the *J. F. Card* were proceeding in a fog at an immoderate rate of speed, and that such immoderate rate of speed was the chief, if not the sole, cause of collision. The rate was so immoderate and the fog so thick that it prevented either vessel, in the brief space of time which elapsed after sighting the other, from taking any effective steps to avoid the other. The evidence establishes to my satisfaction that prior to the collision both vessels had proper signal lights burning, look-outs in proper positions, and were sounding fog-signals at intervals. It is claimed that the *J. F. Card* should have displayed a torch when she heard the fog-signals from the *Hiawatha*. If the master and and crew of the *J. F. Card* are to be believed the only fog-signal they heard from the *Hiawatha* was some five or six minutes before actual collision. This would mean at a time when the vessels were more than a mile apart (5 x 1200 = 6000 ft.; 6 x 1200 = 7200 ft.); and although such a precaution as burning a torch would have been a wise one, the high rate of speed of each vessel minimized the value of such a signal.

(1) L. R. 9 P. D. 114 & 117. (2) Holt, 193.

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Lord Blackburn in the case of the *Cayzer* v. *Carron Co.* (1), thus discusses the rule of the division of the loss where both vessels are in fault. "Until the case of *Hay* v. *LeNeve* (2) there was a question in the Admiralty Court whether you were not to apportion it (the loss) according to the degree in which they (the two ships) were to blame. But now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is that if there is blame causing the accident on both sides, they are to divide the loss equally, just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls."

As a consequence of the foregoing conclusions, upon the evidence I find the plaintiff is entitled to recover half of his loss only. There is no cross action or counterclaim made by the *Hiawatha*, so that upon the ascertainment and assessment of the plaintiff's damages he will be entitled to a judgment against the *Hiawatha* and her bail for one half thereof.

If the amount of such damages is not agreed upon between the parties an appointment can be taken out to hear the evidence to enable the same to be determined by the court.

*Judgment accordingly.*

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(1) 9 App. Cas. 873.

(2) 2 Shaw (Sco. App.) 395.

# INDEX-DIGEST.

# INDEX.


**ACTION**—*Action for return of moneys paid by mistake—Legal process—Recovery—Demurer.*—The suppliant brought his petition of right to recover from the Crown the sum of $190 which he alleged he had paid under mistake to the Crown in settlement of an information of intrusion in respect of certain lands occupied by him. He also claimed $500.00 for damages for the loss he alleged resulted to him on the sale of said lands by reason of the proceedings taken against him by the Crown. Upon demurrer to the petition: *Held*, that the suppliant's petition disclosed no right of action against the Crown, and that the demurrer should be allowed. *Moore* v. *The Vestry of Fulham* ([1895] 1 Q. B. 399) followed. PAGET *v.* THE KING. — — — — — — 50.

2——*Action for necessaries.*

*See* SHIPPING, 2.

**ACTIONS**—*Actions for wage — Equality — Priority—Costs—Pro rata payment of subsequent claims.* 330.

*See* SHIPPING, 5.

**ADMIRALTY LAW.**

*See* SHIPPING.

**BANKS AND BANKING**—*Insolvent bank—Winding-up Act—Sale of unrealized assets—Set-off—Funds in hands of Receiver-General—Estoppel.*—Where moneys belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General, as unadministered assets in the case of the insolvency of a Bank in proceedings under *The Winding-up Act*, (R. S. C. c. 129), and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund, *Held*, that if it was clear that the matter had been really determined, effect should be given to the estoppel; but that where to give effect to it would work injustice, the court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision.

In this case there was no estoppel, and a reference to the registrar was directed to ascertain what proportion of the fund in the hands of the minister properly belonged to the suppliants. The rule as to estoppel stated by

**BANKS AND BANKING**—*Continued*

King J in *Farwell* v. *The Queen* (22 S. C. R. 558) referred to. (2.) One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount which he had at his credit in the Bank at the date of its insolvency. It appeared that at the time of the Bank's insolvency certain of its debtors had at their credit in the Bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General. *Held*, that the suppliants were not entitled to such indemnity. HOGABOOM *v.* THE KING. — — 292.

**CANAL**

*See* CONTRACT, 1.

**COLLISION**—*Collision between Steamer and Sailing Vessel—Undue speed—Rule 16—Liability* — — — — — — 390

*See* SHIPPING, 6.

**CONTRACT**—*Contract for public work—Delay in executing same—Notice by engineer—Withdrawing work from contractor—Damages—Plant—Interest.*—(1.) There may be some question as to whether *Walker* v. *The London and North-western Railway Company* (L. R. 1 C. P. D. 518) should be accepted as establishing a general proposition that if in contracts creating a forfeiture for not proceeding with work at the rate required, a time is fixed for its completion, the forfeiture cannot be enforced on the ground of delay after that date. But at all events any notice given after such date to determine the contract and enforce the forfeiture must give the contractor a reasonable time in which to complete the work, and the contractor must, with reference to such reasonable time for completion, make default or delay in diligently continuing to execute or advance the work to the satisfaction of the engineer. The engineer is to decide, having regard to a time that in the opinion of the court is reasonable, and the contractor is to have notice of his decision. (2.) Where there is a breach of contract the damages are to be measured as near as may be by the profits the contractor would have made by

completing the contract in a reasonable time. (3.) In this case the contractor claimed for loss of profits in respect of certain extra work not covered by the contract. *Held*, that inasmuch as it was not possible to say either that the engineer would have directed it to be done by him had the work remained in the suppliant's hands, or that in case the engineer had done so, that he would have fixed a price for it from which a profit would have been derived, it could not be taken into consideration. (4.) Where in such a case the Crown dispossessed the contractor of his plant and used it for the purposes of the completion of the work, the contractor was held entitled to recover the value of such plant as a going concern, that is, its value to anyone situated as the contractor himself was at the time of the taking of the plant. Where the contractor was not allowed interest upon the value of such plant, it was held that he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid. STEWART *v.* THE KING. — — — 55

2—*Contract for grant of part of public domain—Breach of—Remedy—Jurisdiction—Declaration of right.* The Exchequer Court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain made under the authority of an Act of Parliament (2.) Such a claim may be prosecuted by a petition of right. (3.) Where the court has jurisdiction in respect of the subject matter of a petition of right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. If on the other hand, there is no jurisdiction, no such declaration should be made. CLARK *v.* THE QUEEN (1 Ex. C. R. 182) considered. THE QU'APPELLE, LONG LAKE AND SASKATCHEWAN RAILROAD AND STEAMBOAT COMPANY *v.* THE KING. — — — 105

3—*Contract for Inland Revenue stamps—Production by method different from that specified—Recovery of money paid—Quantum meruit—Set-off against Crown—"Fair cost of production."*—A contract between the Crown and the defendant company called for the production of certain inland revenue stamps printed from steel plates. The company delivered in lieu thereof stamps produced from steel transferred to stone. They were accepted, paid for and used by an officer of the Crown under the belief that they were produced by the process specified in the contract. The way in which the stamps were produced was subsequently ascertained, and the Crown sought to recover back the money paid therefor. *Held*, that as the company had agreed to print the stamps from steel plates but printed them from stone, it did not produce the thing bargained for but another and different thing, and the Crown was entitled to recover back the money paid. *Semble*: That in such a case the company could not recover from the Crown on a *quantum meruit* the fair value of the stamp produced from stone. *Wood* v. *The Queen* (7 S. C. R. 375); *Hall* v. *The Queen* (3 Ex. C. R. 377); *Henderson* v. *The Queen* (6 Ex. C. R. 39; 28 S. C. R. 425) referred to. (2.) Revenue stamps are not articles of merchandise, and have no commercial value. (3) The company's right, if any, to an allowance for the stamps in question depended upon a right to set-off against the price paid for the stamps by Crown the value thereof, ascertained, as they have no commercial value, by reference to the cost of production. But no such right of set-off exists against the Crown. (4.) The Crown was not bound by the acceptance of the stamps by its officer. Whether in accepting them he knew or did not know how they were produced, was immaterial. In neither case could any request or any authority for the production and delivery of the stamps be implied against the Crown. (5.) The Crown having consented to allow the company the fair cost of production of the stamps, without any profit to the company: *Held*, that as the company had no right of set-off, it must accept the allowance proposed by the Crown or nothing, and that the "fair cost of production" was not necessarily the cost to the company or to any particular person; but the fair cost to a competent person with the necessary capital, skill, means and appliances for producing such stamps. THE KING *v.* THE BRITISH AMERICAN BANK NOTE COMPANY. — — — — — 119

4—*Public work—Contract—Branch of—Contractor's duty to pass claims—Extra work—Loss of profits—Damages.*—By a clause common to the several contracts of the suppliants with the Crown for the construction of a public work, it was, in substance, stipulated that if the contractors had any claims which they considered were not included in the progress certificates it would be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of the certificate in which such claims are alleged to have been omitted; and by another clause it was stipulated that the contractors in presenting claims of this kind should accompany them with satisfactory evidence of their accuracy, and the reasons why in their opinion they should be allowed; and unless such claims were so made during the progress of the work and within the fourteen days mentioned, and repeated in writing every month until finally adjusted or rejected, it should be clearly understood that the contractors would be shut out and have no claim against the Crown in respect

**CONTRACT**—*Continued.*

thereof. The suppliants did not comply with these provisions. *Held,* that a petition of right for moneys claimed to be so due to contractors could not be sustained. (2.) By one of the clauses of the contracts it was provided that the engineer might, in his discretion, require the contractor to do certain work outside of his contract. *Held,* that there was no implied contract on the part of the Crown that work outside of the contract which the engineer might, under the authority so vested in him, have required the contractor to do, should be given to the contractor; and where this was not done by the engineer, and such outside work was given to others, the contractor is not entitled to the profits that he would have made on the performance of such work. (3.) Where, by a change in the plan of the works, certain works were abandoned and others substituted therefor, and the contractor was paid the loss of profits in respect of such abandoned works, he is not entitled to profits upon the substituted works. The Gilbert Blasting and Dredging Co. *v.* The King, — — 221

5—*Contract for improvement of Government Canal—Change in works—Breach of contract—Spoil grounds—Cost of—Allowance for.*—The suppliants were contractors for certain works of improvement on the Rapide Plat Division of the Williamsburg Canals. For their own use and benefit, and without notice to or request of the Crown in such behalf, they obtained certain grounds upon which to waste the material excavated by them. *Held,* that the Crown was not bound to indemify them for money expended in obtaining the said spoil grounds. (2.) In order to carry on the works in the way contemplated by the contract and specification the contractors changed certain dump scows into deck scows. Thereafter a change was made by the Crown in the manner of carrying out the work, which required the contractors to convert the deck scows into dump scows. *Held,* that the contractors were not entitled to recover from the Crown the expense they were put to in respect to the scows, because the change in the works being provided for in the contract, there was no breach; but that such expense might be taken into account in considering the increased cost of doing the work under the circumstances in which it was done as compared with the cost of doing it in the way contemplated by the contract. Weddell *v.* The King. — — — — 323

3—*Demurrer to petition of right—Claim for services rendered as Commissioner—R.S.C., c. 115—Payment—Contract—Public Office.*—A person appointed under the provisions of chapter 115, *Revised Statutes of Canada,* as a Commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown cannot recover against the Crown payment for his services as such Commissioner, there being no provision for such payment in the said enactment or otherwise. (2.) The service in such a case is not rendered in virtue of any contract but merely by virtue of appointment under the statute. (3.) The appointment partakes more of the character of a public office than of a mere employment to render a service under a contract express or implied. Tucker *v.* The King. — — — — 351

**CORPORATE NAME**—*Infringement by use of corporate name.* — — — 187

*See* Trade-Mark, 2.

**COSTS**—*Security for costs—Order for—Practice.*—Under the present practice of the court an order for security for costs may be given at any stage of the proceedings in a cause. Wood *v.* The Queen (7 S.C.R., 634) referred to. The Boston Rubber Shoe Company *v.* The Boston Rubber Company of Montreal. — 47

*And See* Practice, 3.

**CROWN**—*Crown's servant—Wrongful Act by—Liability.*—In the absence of statutory provision in such behalf, the Crown is not liable to answer for the wrongful act of its officer or servant. Algoma Central Railway Company *v.* The King. — — — — 239

2—*Right of Crown to garnishee—Writ of extent.* — — — — — — 32

*See* Writ of Extent.

3—*Right of way over Crown property—Easement—C.S. U.C. c. 88, secs. 37, 40 and 44.* 309

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4—*Payment of interest by the Crown.*

*See* Interest.

**CROWN'S OFFICER**—*Claim for services rendered as Commissioner under R.S.C., c. 115—Payment—Public Officer.* — — 351

*See* Public Officer.

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**DAMAGES**—*Measure of damages on breach of contract for public work—Profits.* — 55

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**DEMURRER**—*Action for return of moneys paid by mistake—Legal process—Recovery—Demurrer*—The suppliant brought his petition of right to recover from the Crown the sum of $190 which he alleged he had paid under mis-

**DEMURRER**—*Continued.*

take to the Crown in settlement of an information of intrusion in respect of certain lands occupied by him. He also claimed $500.00 for damages for the loss he alleged resulted to him on the sale of said lands by reason of the proceedings taken against him by the Crown. Upon demurrer to the petition; *Held*, that suppliant's petition disclosed no right of action against the Crown, and that the demurrer should be allowed. Moore *v.* The Vestry of Fulham ([1895] 1 Q. B. 399) followed. Paget *v.* The King. — — — — 50

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**DESIGN.**

*See* Industrial Design.

**DISCRETION**—*Discretion of Minister to repair a public work—Money voted by Parliament —Liability of Crown.* — — — 150

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**EASEMENT**—*Right of way over Crown property—Easement—Prescription C. S. U. C., c.* 88, secs. 37, 40 *and* 44—*Possession—Predecessors in title.*—The provisions of chapter 88 of the Consolidated Statutes of Upper Canada, sections 37, 40 and 44, were in force at the time of Confederation and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada. (2.) Under such provisions, where in Ontario one enjoys an easement as against the Crown and over Crown property, within the limits of some town or township, or other parcel or tract of land duly surveyed, and laid out by proper authority, for a period of twenty years he thereby establishes a right by prescription in such easement; and if the Crown interfere with the enjoyment of it by expropriation proceedings the owner is entitled to compensation. (3.) To establish the easement by prescription it is not necessary to show that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription. McGee *v.* The King. — — — — 309

**ENGINEER**—*Contract for public work—Forfeiture—Notice by engineer withdrawing work from contractor.* — — — — 55

*See* Contract, 1.

**ESTOPPEL**—*Res judicata—Funds paid into hands of Receiver-General — Unadministered assets.* — — — — — 292

*See* Winding-up Act.

**EVIDENCE**—*Conflict between rules of evidence under Provincial and Dominion Statutes.*—In a proceeding in the Exchequer Court of Canada, if a conflict arises between the rules of evidence established by a provincial statute and those subsisting by virtue of a Dominion statute, the latter will prevail. The Queen *v.* O'Bryan. — — — — — — — 19

**EXPROPRIATION**—*Damages to land—Public work*—50-51 *Vict. c.* 16, *sec.* 16 (*c.*)—*Liability.*—It is the owner of the land at the time a public work is constructed that is entitled to damages for lands taken for, or injuriously affected by, such construction, and not his successor in title. *Held*, in view of the opinions in *The City of Quebec* v. *The Queen* (24 S. C. R. 420) that where the injury to property does not occur on a public work the suppliant has no remedy under 50-51 Vict. c. 16 s. 16, (*c*), which provides that the Exchequer Court shall have jurisdiction in respect of: "Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment." Where in the division of his land the owner dedicates a portion thereof to the public for a street or highway, a part of which is subsequently taken by the Crown for a public work, the owner is not entitled to compensation for the part so taken. *Stebbing* v. *The Metropolitan Board of Works* (L. R. 6 Q. B. 37), and *Paint* v. *The Queen* (2 Ex. C. R. 149; 18 S. C. R. 718) followed. Letourneux *v.* The Queen. — — — — — — — 1

2—— *Will—Construction—Gift over in the event of death—Life estate—Interest on compensation money.*—A testatrix made the following disposition of a certain portion of her estate:—"I give, devise and bequeath unto my niece M. W. of H., spinster daughter of my eldest sister M., all that dwelling-house and lot of land now occupied by me (describing it) together with all and singular the appurtenances thereunto belonging, and all fixtures, furniture, bedding and clothing, and all sum and sums of money and other things that may be remaining and found in my said dwelling-house at the time of my decease, and all debts due me, save except as hereinbefore mentioned, to have and to hold the said dwelling-house, lot of land and premises aforesaid unto her my said niece M. W., her heirs, executors, administrators and assigns, forever. But in case she should die without leaving lawful issue, then to my nieces hereinafter mentioned, and their children being females." Following this there was a residuary gift or bequest to "the daughters of my sisters M. and H., and to the daughters or daughter of my late brother J., and to their children if any being daughters." *Held*, that

**EXPROPRIATION**—*Continued.*

there was nothing in the will to indicate any intention on the part of the testatrix that the gift over should not take effect unless in her lifetime her niece M. W. died without leaving lawful issue; but on the contrary it was to be inferred from the terms of the will that it was the intention of the testatrix that in the case of the death at any time of the said M. W. without leaving lawful issue, the other nieces to whom she left the residue of her estate should take the property. *Cowen* v. *Allen* (25 S.C.R. 292); *Fraser* v. *Fraser* (26 S.C.R. 316); *Olivant* v. *Wright* (1 Chan. Div. 348) referred to. (2.) The property in question had been expropriated by the Crown for the purposes of a public work. *Held*, that the suppliant M. T., the devisee under the will, *sub nomine* M. W., was in any event entitled to a life interest in the compensation money, and that she might be paid the interest thereon during the pendency of proceedings to determine the respective rights of all parties interested therein. TRAIL *v.* THE QUEEN. — — — — — 98

3——*Public work—Compulsory taking—Value to be considered—Compensation.*—It is the value of the land at the time of the expropriation that the court has to consider in assessing compensation. If the property has depreciated in value between the time it was acquired by the person seeking compensation and the time of the expropriation by the Crown, the former has to bear the loss. (2.) Where the property is occupied by the owner as his home, and he has no need or wish to sell, the compensation ought to be assessed upon a liberal basis. THE KING *v.* SEDGER. — — — — 274

4——*Possession by officers of the Crown of lands not expropriated—Taking of highway—Rifle range—Damages.*—Defendants complained that possession of certain lands, not covered by the plan and description filed by the Crown in an expropriation proceeding, had been taken by the officers of the Crown, and claimed compensation therefor. *Held*, that the right to recover compensation must be limited to lands actually mentioned in the plan and description filed, and to the injurious affection of other lands held therewith. (2.) The defendants' predecessor in title in laying off into lots the land of which a portion was taken from the defendants by the Crown, left a roadway between the land so divided and the top of the land adjacent to the sea. This roadway had been used by the public, and work had been done upon it by the municipal authorities. The land between that so taken and the sea was not included in the plan and description filed; but the Crown closed up the roadway and from the land taken from the defendants opened another in lieu thereof. *Held*, that the defendants were not

**EXPROPRIATION**—*Continued.*

entitled to compensation in respect of the taking of such roadway. (3.) Where property adjoins a rifle range, the site of which has been expropriated from the lands of the owner of such adjacent property, he is entitled to compensation for the damages arising from the use of such rifle range. THE KING *v.* HARRIS *et al.* 277

5——*Lessor and lessee—Covenant to build on demised premises—Compensation.*—When a lessee is under covenant to build upon the demised premises, and a part of the said premises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from his covenant, and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the court in fixing the amount of compensation to be paid to such lessee. THE KING *v.* YOUNG *et al.* 282

6——*Public work—Injurious affection of property—Deprivation of access—Street—Damages.*—By the construction of a public work a public highway was closed up at a point two hundred and fifty feet distant from the suppliant's property, which fronted on the highway. In the first expropriation of land in the neighbourhood for the public work no part of the suppliant's property was taken. Afterwards, and during the construction of the public work, a portion of his property was taken for the public work, and on the trial of a petition of right for compensation the question arose as to whether or not the depreciation of the property by reason of the closing of the street or highway should be taken into account as one of the elements of damage. *Held*, that it should be so taken into account, first, because it appeared that the depreciation from this cause in fact occurred subsequent to the taking of the land; and, secondly, it was a case in which the suppliant was entitled to compensation for the injurious affection of his property by reason of the obstruction of the highway, which was proximate and not remote. *Metropolitan Board of Works* v. *McCarthy* (L. R. 7 H. L. 243); *Caledonian Railway Co.* v. *Walker's Trustees* (7 App. Cas. 259); *Barry* v. *The Queen* (2 Ex. C. R. 333) referred to. MCQUADE *v.* THE KING. — 318

*And see* PUBLIC WORK.

**FRAUD**—*Infringement of trade-mark.* — 187

*See* TRADE-MARK, 2.

**GARNISHEE** — *Garnishee process — Crown seeking same—English Order 45, Rule 1—Practice.*—Order 45 of the English rules respecting garnishee process is not applicable to a proceeding by Information by the Crown. The Crown's remedy is by Writ of Extent. THE QUEEN *v.* CONNOLLY *et al.* — — — — 32

**IMPORTATION.**

*See* Patents for Invention.

**INDUSTRIAL DESIGN**—*Cook stove—Imitation—Infringement—Injunction—Cancellation of conflicting design.*—The plaintiffs were registered owners of an industrial design for a cook stove called "The Royal Favourite, 9-25," which, as a special article of their manufacture, had become well known to the trade. The defendants procured one of the said stoves, caused a model to be made of it, and with some minor alterations, chiefly in the ornamentation, manufactured a stove called the "Royal National, 9-25," and subsequently registered it as an industrial design. In an action by the plaintiffs for infringement and for an order to expunge defendants' design from the register, the weight of evidence established that the defendants' design was an obvious imitation of that of the plaintiffs. *Held*, that the defendants should be enjoined from infringing the plaintiffs' design, and that the registration of that of the defendants should be expunged from the register. Findlay *v.* Ottawa Furnace and Foundry Company. 338

**INJUNCTION** — *Industrial design — Cook stove—Imitation—Infringement—Injunction to restrain.*

*See* Industrial Design.

**INTEREST.** — *Contract for public work — Delay in proceeding with work—Forfeiture—Interest on value of plant taken.*—In a case of forfeiture under a contract for the construction of a public work, where the contractor was not allowed interest upon the value of the plant taken, it was held that he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid. Stewart *v.* The Queen. — — 55

2—*Devisee under will—Life estate—Expropriation—Interest on compensation money.*—Where a devisee under a will was entitled to a life interest in certain property expropriated. *Held*, that such devisee might be paid the interest thereon during the pendency of proceedings to determine the respective rights of all parties interested therein. Trail *v.* The Queen. 98

3—*Payment of interest by Crown*—The Crown is not liable to pay interest except upon contract therefor, or where its liability therefor is fixed by statute. Algoma Central Railway Company *v.* The King. — — — 239

4—*Customs duties—Importation of steel rails—Return of duties paid under protest—Interest—Law of Province of Quebec.*—The suppliants had imported at different times during the years 1892-1893 large quantities of steel rails into the port of Montreal to be used by them as contractors for the construction of the Montreal Street Railway. The Customs authorities claimed that the rails were subject to duty, and refused to allow them to be taken out of bond until duties amounting in the aggregate to the sum of $53,213.54 were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council of the case of *The Toronto Railway Company* v. *The Queen* ([1896] A. C. 55), and some time in the year 1897, the Customs authorities returned the amount of the said duties to the suppliants. The suppliants claimed that they were entitled to interest on the same during the time it was in the hands of the Crown, and they filed their petition of right therefor. *Held*, that as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec. (2.) That on the particular question as to interest at issue in this case the law of the Province of Quebec is the same as the laws of the other provinces of the Dominion. (3.) That as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed it could not be made liable by the institution or commencement of an action. *Lainé* v. *The Queen* (5 Ex. C. R. 128), and *Henderson* v. *The Queen* (6 Ex. R.C. 39), distinguished. *Algoma Central Railway Co.* v. *The King* (7 Ex. C. R. 239), referred to. Ross, et al *v.* The King. — — — 287

**JURISDICTION.**

*See* Action.

— Petition of Right.

— Practice.

**LAND**—*Title to land—Prescription—Easement—Crown property—C.S. U.C., c. 88, secs. 37, 40 and 44.* — — — — 309

*See* Easement.

**LANDLORD AND TENANT**—*Expropriation—Lessor and lessee—Covenant to build on demised premises—Compensation.*—When a lessee is under covenant to build upon the demised premises, and a part of the said promises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from the covenant, and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the court in fixing the amount of compensation to be paid to such lessee. The King *v.* Young et al. 282

**LESSOR AND LESSEE.**

*See* Lanlord and Tenant.

**MINES AND MINERALS**—*Gold mining in Yukon District—R. S. C. c.* 54, *sec.* 91—*Interpretation*—61 *Vict. c.* 62-63 *Vict. c.* 11—*Royalty—Imposition of tax—Powers of Governor in Council.*—The provisions of section 91 of *The Dominion Lands Act* (R. S. C. c. 54) requiring that all orders or regulations made under the Act by the Governor in Council shall be laid before the Houses of Parliament within the first fifteen days of the session next after the date thereof, is directory only, and the failure to comply with such provision does not invalidate any such order or regulation. (2.) The effect of the provision of the said section requiring that any order or regulation made under the Act shall, unless otherwise specially provided in the Act, have force and effect only after the same has been published for four successive weeks in the *Canada Gazette*, is that such order or regulation does not come into force until one week after the fourth publication of the same. (3.) There is no authority to be found in *The Yukon Territory Act* (61 Vict. c. 6, as amended by 62-63 Vict. c. 11) enabling the Governor in Council to change or alter the date upon which an order or regulation made, under the provisions of *The Dominion Lands Act*, shall come into force. (4.) The suppliant by right of discovery, under the provisions of *The Dominion Lands Act* and *The Dominion Mining Regulations* of 1889 made thereunder, obtained a grant of a certain gold mining claim in the Yukon District in December, 1896. His grant, *inter alia*, gave him, for the term of one year from its date, the exclusive right to all the proceeds realized therefrom; and the rights which it conferred upon him were, it was declared, those laid down in the *Dominion Mining Regulations*, and no more, and were subject to all the provisions thereof whether the same were expressed in the grant or not. During the currency of the original grant an order in council was passed making grants of gold mining claims in the district generally subject to a royalty. Afterwards, namely, on the 7th December, 1897, the suppliants' grant was renewed in the same terms as those expressed in the original grant. *Held*, that the terms of renewal should be construed by reference to their meaning in their original grant; and that the renewal was not subject to the royalty imposed by the order in council. (5.) The operative words of the order in council imposing the royalty were "a royalty shall be levied and collected." *Held*, that the expression quoted contained apt words for the imposition of a tax, but that such a tax could not be levied without legislative authority therefor. (6.) The evidence showed that the suppliant had paid the amount of the royalty claimed by the Crown under protest, and in the belief that payment was necessary to protect his rights. *Held*, that he was entitled to recover it back. Chapelle *v.* The King. — — — — 414

**MISTAKE.**—*Action for return of moneys paid by mistake — Legal process — Recovery — Demurrer.*—The suppliant brought his petition of right to recover from the Crown the sum of $190 which he alleges he had paid under mistake to the Crown in settlement of an information of intrusion in respect of certain lands occupied by him. He also claimed $500.00 for damages for the loss he alleged resulted to him on the sale of said lands by reason of the proceedings taken against him by the Crown. Upon demurrer to the petition. *Held*, that the suppliant's petition disclosed no right of action against the Crown, and that the demurrer should be allowed. *Moore* v. *The Vestry of Fulham* ([1895] 1 Q. B. 399) followed. Paget *v.* The King. — — — — 50

**NECESSARIES**—*Action for, when owner of ship is domiciled in Canada.* — 34 and 94

*See* Shipping, 1 and 2.

**NEGLIGENCE**—*Negligence of Crown's servants.*

*See* Crown.
— Public Work.
— Railways.

**OFFICER**—*Wrongful act by Crown's officer.*

*See* Crown
— Public Work.

**PATENTS FOR INVENTION**—*Cleansing pickled eggs—Claim—Patentability.*—The application of well-known things to a new analogous use is not properly the subject of a patent. The defendants employed a solution of hydrochloric acid to remove from pickled eggs the deposit of carbonate of lime that forms upon them while being preserved in a pickle of lime-water. From the known properties of the acid and its use for analogous purposes it was to be expected that it would accomplish the purpose to which it was put. The purpose was new, and the defendants were the first to use the process and to discover that it could be practised safely and with advantage in the business of preserving and marketing eggs; but there was nothing in the mode of employing such solution demanding the exercise of the inventive faculties. *Held*, that there was no invention, and that a patent for the process should not be sustained. Meldrum *v.* Wilson. 198

2——*Infringement—Lantern—Want of element of inventiveness.*—This was an action for infringement of letters patent No. 69,088 for an improvement in lanterns, the globes of which could be lifted vertically for the purpose of lighting the lanterns. One question in issue was as to whether or not in the idea or conception that if the bail of the lantern was made of the right length to drop under the guard or

**PATENTS FOR INVENTION**—*Continued.*

plate of the globe the bail would hold up the globe while the lantern was being lighted, or in the working out of this idea or conception there was invention to sustain a patent. *Held*, that there was no invention. Kemp *v.* Chown. — — — — — — — — 306

3——*Process for manufacturing phosphorus—Importation and non-manufacture—The Patent Act, sec. 37—Interpretation.*—A patentee is not in default for not manufacturing his invention unless or until there is some demand for it with which he has failed to comply, or unless some person has desired to use or obtain it and has been unable to do so at a reasonable price; and where the invention is a process only, the patentee satisfies the statute and the condition of his patent by being ready to allow the process to be used by anyone for a reasonable sum. *The Anderson Tire Co. of Toronto* v. *The American Dunlop Tire Co.* (5 Ex. C. R. 100) referred to. (2.) The effect of sec. 37 of *The Patent Act* is to make the patent void only as to the interest of the person importing or causing to be imported the article made according to the process patented; and importation by a licensee will not void the patent so far as the interest of the owner is concerned. (3.) *Semble:* That the importation of an invention made in accordance with a process protected by a patent is an importation of the invention. *Sed quære* whether the provisions of sec. 37 of *The Patent Act* requiring the manufacture in Canada of the invention patented, after the expiry of two years from the date of the patent, applies to the case of a patent for an art or process? Hambly *v.* Albright & Wilson. 363

4——*Infringement—Improvements in truing up car wheels—Combination—Invention—Utility.*—The plaintiffs were owners of Canadian letters patent numbered 63,608 for improved abrading shoes for truing up car wheels. The improvement consisted in the use of an abrading shoe in which there were a number of pockets filled with abrading material. Between the pockets were spaces or cavities to receive the material worn from the wheel, the spaces having openings in them to facilitate the discharge of such material. Prior to the alleged invention abrading shoes had been used in which there were similar pockets filled with abrading material; and other shoes had been used in which there were similar spaces or cavities. The plaintiffs' abrading shoe, however, was the first in which these two features were combined or used together. *Held*, that there was invention in the idea or conception of combining these two features for the purpose of truing up car wheels. (2.) That the invention was useful. Griffin *v.* Toronto Railway Co. *et al.* — — 411

**PETITION OF RIGHT**—*Contract for grant of part of public domain—Breach of—Remedy—Jurisdiction—Declaration of right.*—The Exchequer Court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain made under the authority of an Act of Parliament. (2.) Such a claim may be prosecuted by a petition of right. (3.) Where the court has jurisdiction in respect of the subject-matter of a petition of right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. If on the other hand there is no jurisdiction, no such declaration should be made. *Clark* v. *The Queen* (1 Ex. C. R. 182) considered. The Qu'Appelle, Long Lake and Saskatchewan Railroad and Steamboat Co. *v.* The King. — — — — — — 105

*And see* Practice.

**PHOSPHORUS**—*Process for manufacturing—Importation and non-manufacture—The Patent Act, sec. 37—Interpretation.* — — 363

*See* Patents for Invention, 3.

**PRACTICE**—*Security for costs—Order for—Practice.*—Under the present practice of the court an order for security for costs may be given at any stage of the proceedings in a cause. *Wood* v. *The Queen* (7 S. C. R. 634) referred to. The Boston Rubber Shoe Company *v.* The Boston Rubber Company of Montreal. 47

2——*Contract for grant of part of public domain—Breach of—Remedy—Jurisdiction—Declaration of right.*—The Exchequer Court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain made under the authority of an Act of Parliament. (2.) Such a claim may be prosecuted by a petition of right. (3.) Where the court has jurisdiction in respect of the subject-matter of a petition of right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. If on the other hand there is no jurisdiction, no such declaration should be made. *Clark* v. *The Queen* (1 Ex. C. R. 182) considered. The Qu'Appelle, Long Lake and Saskatchewan Railroad and Steamboat Co. *v.* The King. — — — — — 105

3——*Maritime law—Actions in rem—Wages—Equality—Priority—Costs—Pro rata payment of subsequent claims—Held*, following the *Saracen* (6 Moo P. C. 56), that when claimants against a fund in the registry are of equal degree, the court will give priority to the diligent creditor. (2.) Where the parties are not of equal degree, and one claiming subsequently has a legal priority over another, such priority will be protected if he make his claim befor

**PRACTICE**—*Continued.*

a decree has passed for distributing the fund, but not afterwards. (3.) Where two claims for seamen's wages were prosecuted to judgment before two similar claims were allowed by the court, the costs of the prosecution of the first two claims were ordered to be paid out of the fund in the registry in full in preference to the last two claims. In respect of the latter it was directed that they should be paid in full if the balance of the fund permitted it, if not they were to be paid *pro rata.* MUNSEN ET AL *v.* THE "COMRADE". — — — 330

4——*Conflict between rules of evidence under Dominion and Provincial statutes in proceedings in Exchequer Court.* — — — 19

*See* EVIDENCE.

5——*Garnishee process at suit of Crown—Writ of extent—Appropriate remedy.* — — 32

*See* WRIT OF EXTENT.

6——*Contract — Breach — Set-off against the Crown.* — — — — — 119

*See* SET-OFF.

**PUBLIC OFFICER**—*Demurrer to petition of right—Claim for services rendered as Commissioner under R. S. C. c. 115—Payment—Public Office.*—A person appointed under the provisions of chapter 115, Revised Statutes of Canada, as a Commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown cannot recover against the Crown payment for his services as such Commissioner, there being no provision for such payment in the said enactment or otherwise. (2.) The service in such a case is not rendered in virtue of any contract, but merely by virtue of appointment under the statute. (3.) The appointment partakes more of the character of a public office than of a mere employment to render a service under a contract express or implied. TUCKER *v.* THE KING. — — — — — 351

*And see* CROWN.

**PUBLIC WORK**—*Damages to land—Public work*—50-51 *Vict. c. 16 sec. 16 (c)—Liability.*—It is the owner of the land at the time a public work is constructed that is entitled to damages for lands taken for, or injuriously affected by, such construction, and not his successor in title. *Held,* in view of the opinions in *The City of Quebec* v. *The Queen* (24 S. C. R. 420) that where the injury to property does not occur on a public work the suppliant has no remedy under 50-51 Vict. c. 16 s. 16 (*c*), which provides that the Exchequer Court shall have jurisdiction in respect of: "Every claim against the Crown arising out of any death or injury

**PUBLIC WORK**—*Continued.*

to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment." Where in the division of his land the owner dedicates a portion thereof to the public for a street or highway, a part of which is subsequently taken by the Crown for a public work, the owner is not entitled to compensation for the part so taken. *Stebbing* v. *The Metropolitan Board of Works* (L. R. 6 Q. B. 37), and *Paint* v. *The Queen* (2 Ex. C. R. 149; 18 S. C. R. 718) followed. LÉTOURNEUX *v.* THE QUEEN. — — — — — — — 1

2——*Non-repair—Liability of Crown—Money voted by Parliament—Discretion of Minister.*—There is no law in Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failure to use in its repair money voted by Parliament for the purposes of such public work. (2.) In such case whether the repair should be made or the money expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the courts. *Semble:* Although the channel of a river may be considered a public work under the management, charge and direction of the Minister of Public Works during the time that he is engaged in improving the navigation of such channel under the authority of sec. 7 of *The Public Works Act* (R. S. C. c. 36), it does not follow that once the Minister has expended public money for such purpose the Crown is for all time bound to keep such channel clear and safe for navigation, or that for any failure to do so it must answer in damages. HAMBURG AMERICAN PACKET COMPANY *v.* THE KING. 150

3——*Contract—Breach of—Contractor's duty to press claims—Extra work—Loss of profits—Damages.*—By a clause common to the several contracts of the suppliants with the Crown for the construction of a public work it was, in substance, stipulated that if the contractors had any claims which they considered were not included in the progress certificates it would be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of the certificate in which such claims are alleged to have been omitted; and by another clause it was stipulated that the contractors in presenting claims of this kind should accompany them with satisfactory evidence of their accuracy, and the reasons why, in their opinion, they should be allowed; and unless such claims were so made during the progress of the work and

**PUBLIC WORK**—*Continued.*

within the fourteen days mentioned, and repeated in writing every month until finally adjusted or rejected, it should be clearly understood that the contractors would be shut out and have no claim against the Crown in respect thereof. The suppliants did not comply with these provisions. *Held*, that a petition of right for moneys claimed to be so due to contractors could not be sustained. (2.) By one of the clauses of the contracts it was provided that the engineer might, in his discretion, require the contractor to do certain work outside of his contract. *Held*, that there was no implied contract on the part of the Crown that work outside of the contract which the engineer might, under the authority so vested in him, have required the contractor to do, should be given to the contractor; and where this was not done by the engineer, and such outside work was given to others, the contractor is not entitled to the profits that he would have made on the performance of such work. (3.) Where by a change in the plan of the works certain works were abandoned and others substituted therefor, and the contractor was paid the loss of profits in respect of such abandoned works, he is not entitled to profits upon the substituted works. The Gilbert Blasting and Dredging Company *v.* The King. — 221

4——*Injurious affection of property by public work—Access to street—Damages.* — — 318

*See* Expropriation, 6.

**RAILWAYS.**—*Government railway — Accident to the person—Negligence of the Crown's servants—Action by parent of deceased—Pecuniary benefit—Damages.*—In the case of death resulting from negligence, and an action taken by the party entitled to bring the same under the provisions of *Revised Statutes of Nova Scotia*, 1900, c. 178, s. 5, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. (2.) Such party is not to be compensated for any pain or suffering arising from the loss of the deceased, or for the expenses of medical treatment of the deceased, or for his burial expenses, or for family mourning. *Osborn* v. *Gillet* (L. R. 8 Ex. 88) distinguished. McDonald *v.* The King. — — — 216

**RIFLE RANGE.**—*Injury to property adjoining—Damages.* — — — — 277

*See* Expropriation, 4.

**REVENUE.**—*Revenue stamps — Commercial value.*—Revenue stamps are not articles of merchandise, and have no commercial value. The King *v.* The British American Bank Note Company. — — — — — 119

**REVENUE**—*Continued.*

2——*Customs legislation—Legislative authority of Canadian Parliament—Duty upon foreign-built ship — Construction of statutes—Interest —Payment by Crown—Tort—Crown's servant —Damages.*—The Parliament of Canada has legislative authority to impose a Customs duty upon a foreign-built ship to be paid upon application by her in Canada for registration as a British ship. (2.) The provision in item 409 of *The Customs Tariff Act*, 1897, which purports to impose a duty upon a foreign-built ship upon application by her for a Canadian register, is not a clear and unambigious imposition of the duty such as would support the right of the Crown to exact the payment of such duty. (3.) The Crown is not liable to pay interest except upon contract therefor, or where its liability therefor is fixed by statute. (4.) In the absence of statutory provision in such behalf, the Crown is not liable to answer for the wrongful act of its officer or servant. Algoma Central Railway Company *v.* The King. — — — — — 239

3——*Customs duties—Importation of steel rails —Return of duties paid under protest—Interest —Law of Province of Quebec.*—The suppliants had imported at different times during the years 1892-1893 large quantities of steel rails into the port of Montreal to be used by them as contractors for the construction of the Montreal Street Railway The Customs authorities claimed that the rails were subject to duty, and refused to allow them to be taken out of bond until duties, amounting in the aggregate to the sum of $53,213.54, were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council in the case of *The Toronto Railway Company* v. *The Queen* ([1896] A. C. 551), and some time in the year 1897 the Customs authorities returned the amount of the said duties to the suppliants. The suppliants claimed that they were entitled to interest on the same during the time it was in the hands of the Crown, and they filed their petition of right therefor. *Held*, that as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec. (2.) That on the particular question as to the interest at issue in this case the law of the Province of Quebec is the same as the laws of the other Provinces of the Dominion. (3.) That as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed it could not be made liable by the institution or commencement of an action. *Lainé* v. *The Queen* (5 Ex. C. R. 128), and *Henderson* v.

**REVENUE**—*Continued.*

*The Queen* (6 Ex. C. R. 39) distinguished. *Algoma Central Railway Co.* v. *The King* (7 Ex. C. R. 239) referred to. Ross et al *v.* The King. — — — — — 87

4——*Gold mining — Imposition of royalty— Tax.* — — — — — 414

*See* Mines and Minerals.

**RIGHT**—*Declaration of Right where no Jurisdiction in Court* — — — — 105

*See* Practice, 2.

**ROYALTY**—*Gold mining in Yukon district— R.S.C. c. 54, sec. 91—Imposition of royalty— Tax—Powers of Governor in Council.* — 414

*See* Mines and Minerals.

**SERVANT**—*Wrongful act by Crown's servant.*

*See* Crown.

— Public Work.

**SET-OFF**—*Contract for Inland Revenue stamps —Production by method different from that specified—Recovery of money paid—Quantum meruit—Set-off against Crown—"Fair cost of production."*—A contract between the Crown and the defendant company called for the production of certain inland revenue stamps printed from steel plates. The company delivered in lieu thereof stamps produced from steel transferred to stone. They were accepted, paid for and used by an officer of the Crown under the belief that they were produced by the process specified in the contract. The way in which the stamps were produced was subsequently ascertained and the Crown sought to recover back the money paid therefor. *Held*, that as the company had agreed to print the stamps from steel plates but printed from stone, it did not produce the thing bargained for but another and different thing, and the Crown was entitled to recover back the money paid. *Semble:* That in such a case the company could not recover from the Crown on a *quantum meruit* the fair value of the stamps produced from stone. *Wood* v. *The Queen* (7 S. C. R. 375); *Hall* v. *The Queen* (3 Ex. C. R. 377); *Henderson* v. *The Queen* (6 Ex. C. R. 39; 28 S. C. R. 425) referred to. (2.) Revenue stamps are not articles of merchandise, and have no commercial value. (3.) The company's right, if any, to an allowance for the stamps in question depended upon a right to set-off against the price paid for the stamps by the Crown the value thereof, ascertained, as they have no commercial value, by reference to the cost of production. But no such right of set-off exists against the Crown. (4.) The Crown was not bound by the acceptance of the stamps by its officer. Whether in accepting them he knew or did not know how they were produced, was immaterial. In neither case could any request or authority for the production and delivery of the stamps be implied against the Crown. (5.) The Crown having consented to allow the company the fair cost of production of the stamps, without any profit to the company. *Held*, that as the company had no right of set-off, it must accept the allowance proposed by the Crown or nothing, and that the "fair cost of production" was not necessarily the cost to the company or to any particular person; but the fair cost to a competent person with the necessary capital, skill, means and appliances for producing such stamps. The King *v.* The British American Bank Note Company. — — — 119

2——*Insolvent bank—Winding-up Act—Sale of unrealized assets—Set-off—Funds in hands of Receiver General.* — — — — 292

*And see* Winding-up Act.

**SHIPPING**—*Action for necessaries—Meaning of words 'owner'—'Domicile.'*—An action *in rem* for necessaries will not lie against a ship if supplied to a charterer, who also engages the crew, in a port other than her home port, if it is shown at the time the writ issued an owner or part owner was domiciled in Canada. The Admiralty Act of 1861, sec. 5 (Imp.) enacts: That the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." By the *Colonial Courts of Admiralty Act*, 1890, and the Canada Admiralty Act, 1891, the Admiralty Act of 1861 (Imp.) is brought into force into Canada. *Held*, That the word 'owner' used in sec. 5 of the Admiralty Act of 1861, means 'registered owner' or a person entitled to be registered as owner, and not a *pro hâc vice* owner. The word 'Canada' is to be read in place of 'England and Wales.' The word 'domicile' must be understood in the ordinary legal sense. *Semble*, That wherever a maritime lien is created in favour of any one against the ship, it is not essential to further establish personal liability against the owner. The Rochester and Pittsburg Coal and Iron Co. *v.* The Ship "Garden City." — 34

2——*Admiralty law—Necessaries—Owner domiciled in Canada—Jurisdiction.—Held*, (affirming the judgment appealed from) that no action will lie on the Admiralty side of the Exchequer Court against a ship for necessaries when the owner of the ship at the time of the institution of the action is domiciled in Canada. The

**SHIPPING**—*Continued.*

Rochester and Pittsburg Coal and Iron Co. *v.* The Ship "Garden City." — — 94

3——*Maritime law — Collision — Overtaken vessel.*—A collision occurred between a sailing vessel and a steamship on the open sea at night. At the time of the collision the sailing vessel was close-hauled on the starboard tack and was proceeding within six to seven points of the wind, the direction of the wind being north-east true. The course of the steamship when the ships first sighted each other was north 72 degrees west true, and her speed about 14 knots. The weather was comparatively clear, with the moon nearly full, but obscured by passing clouds. The sailing vessel was showing her regulation side lights, but no stern light. *Held*, following *Inchmaree Steamship Company* v. *The Astrid* (6 Ex. C. R. 178, 218), that the steamship was an overtaking ship within the meaning of Art. 24 of the Rules for Preventing Collisions at Sea, and as such was obliged to keep clear of the overtaken vessel. *The Main* (11 P. D. 130) distinguished. Smith *v.* "Empress of Japan." — — — — — — 143

4——*Admiralty law—Collision—Fishing vessels—Sufficiency of anchor light—Careless navigation.*—The *C. E. S.*, a fishing schooner, while lying at anchor on Bank Quero, was run into and sunk by another fishing vessel the *R.*, which was changing her berth in the night time. The weather was fine and the sea smooth. The *C. E. S.* was displaying a light in order to comply with the regulations; but it was claimed by the crew of the *R.* that they did not see the light until it was too late to avoid a collision. It was shown that the *R.* had been fishing in a berth four or five miles distant from the *C. E. S.*, that her crew knew that there were a number of vessels fishing in their vicinity, and that the master of the *R.* took no extra precautions in sailing at night over the closely crowded fishing grounds, but on the contrary went below himself, leaving the ship under full sail to the charge of those on deck. *Held*, that the *R.* was solely to blame for the collision. Conwell v. The Schooner "Reliance." — 181

5——*Maritime law—Actions in rem—Wages—Equality—Priority—Costs—Pro rata payment of subsequent claims.—Held*, following the *Saracen* (6 Moo. P. C. 56), that when claimants against a fund in the registry are of equal degree, the court will give priority to the diligent creditor. (2.) Where the parties are not of equal degree, and one claiming subsequently has a legal priority over another, such priority will be protected if he make his claim before a decree has passed for distributing the fund, but not afterwards. (3.) Where two claims for seamen's wages were prosecuted to judgment before two similar claims were allowed by the court, the cost of the prosecution of the first two claims were ordered to be paid out of the fund in the registry in full in preference to the last two claims. In respect of the latter it was directed that they should be paid in full if the balance of the fund permitted it, if not they were to be paid *pro rata*. Munsen et al *v.* The "Comrade." — — — — — 330

6——*Admiralty law—Collision between steamer and sailing vessel—Undue speed—Rule 16—Liability.*—Two vessels, a steamer and a sailing schooner, were making for the harbour of St. John, N.B., at noon, on a certain day. The steamer had passed the whistling buoy, off Partridge Island, and was sailing a N.W. by N. course. The schooner was running about N. with a fair wind, which was very light. A thick fog prevailed. The steamer's speed was between four and five knots, when those on board heard three blasts from a fog-horn on the schooner for the first time. This indicated to those on board the steamer that the schooner was about four points off their bow, and that she was sailing free in a northerly direction. Upon hearing the blasts the steamer continued upon her course at the same speed. Ten minutes after she first heard the blasts the steamer struck the schooner on the starboard side, with her bow about midships, and stove her in, the schooner sinking in a few minutes. *Held*, that under rule 16 of the Regulations for Preventing Collisions at Sea, it was the duty of the steamer upon hearing the fog-signals to stop her engines, so far as the circumstances of the case would permit, and then navigate with caution until the danger of collision was over. The steamer was, therefore, wholly responsible for the collision. Roberts *v.* The "Pawnee." — — 390

7——*Admiralty law—Collision—Ship at Anchor—Anchor-Light—Look-out—Weight of Evidence—Credibility.*—A collision occurred between the *A. L. T.*, a ship at anchor, and a steamship, the *L. O.*, proceeding in charge of a pilot to her dock, within the harbour of Halifax, N. S., at night in the month of January. The weather was blustering, and intermittently clear and cloudy. On arriving at the quarantine grounds the *L. O.* had signalled, by guns and whistles, for the medical officer of the port, and then proceeded up the harbour on the east side of George's Island. After passing the northern line of George's Island the *L. O.* changed her course westerly toward her berth, and in proceeding thereon passed between the lights of two vessels anchored on the northern side of that island. While doing so she suddenly came upon the *A. L. T.* lying at anchor, collided with and sank her. The only person on board of the *A. L. T.* was a caretaker, and

**SHIPPING**—*Continued.*

while admitting that he was not on deck at the time, he swore that a proper anchor-light was burning on his ship. His statement as to the anchor-light was corroborated by the captain of a fishing schooner lying close by, and that of some boatmen and labourers on the wharves. On the other hand the pilot of the *L. O.*, the captain and first and third officers, boatswain and boatswain's mate, and four of the seamen, all swore positively that there was no light on the *A. L. T.* while they were approaching her, and that she was not seen by any one until their look-out called that there was something ahead. The evidence further showed that both the officers and crew were alert at the time of the accident, and anxiously working the ship through anchored vessels in the darkness and blustering weather. *Held*, that the state of facts as substantiated by the evidence for the owners of the *L. O.*, must be accepted as correct, and that being so, the collision and subsequent loss were wholly attributable to the *A. L. T.* in not keeping a proper light and look-out. Dominion Coal Company *v.* The "Lake Ontario." — — — — — — — 403

8——*Collision—Fog—Immoderate Speed—Mutual fault—Damages.*—In an action for collision where the court found both vessels in fault for moving at an immoderate rate of speed in foggy weather, and that such immoderate speed was the chief if not the sole cause of the collision, the owner of the damaged ship was allowed to recover only half his loss. Wineman *v.* The "Hiawatha" — — — — — 446

9——*Duty payable on foreign-built ship.* — 239

*See* Revenue, 2.

**SPEED**—*Under speed—Collision between steamer and sailing vessel in fog.*

*See* Shipping, 6 and 8.

**STAMPS.**

*See* Revenue, 1.

**STATUTES, CONSTRUCTION OF**—*Demurrer to petition of right—Claim for services rendered as Commissioner under R.S.C., c. 115—Payment—Public office.*—A person appointed under the provisions of Chapter 115, *Revised Statutes of Canada*, as a Commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown, cannot recover against the Crown payment for his services as such Commissioner, there being no provision for such payment in the said enactment or otherwise. (2.) The service in such a case is not rendered in virtue of any contract but merely by virtue of appointment under the statute. (3.) The appointment partakes more

**STATUTES, CONSTRUCTION OF**—*Con.*

of the character of a public office than of a mere employment to render a service under a contract express or implied. Tucker *v.* The King. 351

2——*Customs legislation—Legislative authority of Canadian Parliament—Duty upon foreign-built ship—Construction of statutes—Interest—Payment by Crown—Tort—Crown's servant—Damages.*—The Parliament of Canada has legislative authority to impose a Customs duty upon a foreign-built ship to be paid upon application by her in Canada for registration as a British ship. (2.) The provision in item 409 of *The Customs Tariff Act*, 1897, which purports to impose a duty upon a foreign-built ship upon application by her for a Canadian register, is not a clear and unambigious imposition of the duty such as would support the right of the Crown to exact the payment of such duty. (3.) The Crown is not liable to pay interest except upon contract therefor, or where its liability therefor is fixed by statute. (4.) In the absence of statutory provision in such behalf, the Crown is not liable to answer for the wrongful act of its officer or servant. Algoma Central Railway Company *v.* The King. — — 239

3——*Patent of invention—Illegal importation—The Patent Act, sec. 37.*—The effect of section 37 of *The Patent Act* is to make the patent void only as to the interest of the person importing or causing to be imported the articles made according to the process patented; and importation by a licensee will not avoid the patents so far as the interest of the owner is concerned. Hambly *v.* Allright & Wilson. — 363

4——*Damages to land—Public Work, 50—51 Vict. c. 16, sec. 16 (c.)—Liability.* — — 1

*See* Public Work, 1.

5——*Gold mining in Yukon District—R.S.C., c. 54, sec. 91—Interpretation—Royalty—Tax.* 414

*See* Mines and Minerals.

**SUBROGATION.**—*Essentials of—Volunteer—Evidence.*—The doctrine of subrogation is part of the law of the province of Nova Scotia. (2.) Subrogation arises either upon convention or by law, but in the Province of Nova Scotia the creditor must be a party to the convention. It is not sufficient that it be with the debtor only. (3.) Subrogation by operation of law is recognised not only by the civil law, but it has been adopted and followed by courts administering the law of England. (4.) It is an incident of the doctrine of subrogation that an obligation extinguished by a payment made by a third party is treated as still subsisting for his benefit. (5.) Where one is entitled to be subrogated to the rights of a judgment-creditor he is to be subrogated to all and not to part

**SUBROGATION**—*Continued.*

only of the latter's rights in such judgment. *Semble*, a mere stranger, or volunteer, who pays the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own, cannot invoke the benefit of the doctrine of subrogation. THE QUEEN *v.* O'BRYAN — 19

**TAX.**

*See* REVENUE.

**TRADE-MARK**—*Trade-mark—Infringement—Trade-name—Statement of claim—Sufficiency of—Demurrer.*—In an action for infringement of a trade-mark, it is a sufficient allegation that the trade-mark used by the defendant is the registered trade-mark of the plaintiff to charge in the statement of claim that the registered trade-mark of the, and the mark used by the defendant are in their essential features the same. (2.) It is not necessary in such statement of claim to allege that the imitation by the defendant of the plaintiff's trade-mark is a fraudulent imitation. (3.) It is not necessary to allege that defendant used the mark with intent to deceive, and to induce a belief that the goods on which their mark was used were made by the plaintiff.—THE BOSTON RUBBER SHOE COMPANY *v.* THE BOSTON RUBBER COMPANY OF MONTREAL (Limited). — 9

2——*Infringement — Corporate name — Use of when conflicting with trade-mark — Fraud—Intent to deceive.*—In the absence of fraud or bad faith, a body corporate may use its own name on goods of its own manufacture, although such use may tend to confuse its goods with goods of the same kind bearing the trade-mark of another manufacturer. (2.) Where the defendants, a body corporate, had obtained their name before a trade-mark with which such name was said to conflict had been registered in Canada by the plaintiffs, a foreign corporation and it was not shown that the defendants had adopted such name with intent to deceive the public, nor to sell their goods as those of the plaintiffs, the court refused to restrain defendants from using their corporate name upon goods manufactured by them. BOSTON RUBBER SHOE CO. *v.* BOSTON RUBBER CO. OF MONTREAL (Ltd.) — — — — 187

*See* INDUSTRIAL DESIGN.

**TRADE-NAME** — *Trade-mark — Infringement—Trade-Name—Statement of claim—Sufficiency of—Demurrer.* — — — 9

*See* TRADE-MARK, 1.

**WAY**—*Right of way over Crown property* 309

*See* EASEMENT.

**WILL**—*Expropriation — Will—Construction—Gift over in the event of death—Life estate—Interest on compensation money.*—A testatrix made the following disposition of a certain portion of her estate: "I give, devise and bequeath unto my niece M. W. of H., spinster, daughter of my eldest sister of M., all that dwelling-house and lot of land now occupied by me (describing it), together with all and singular the appurtenances thereunto belonging, and all fixtures, furniture, bedding and clothing, and all sum and sums of money and other things that may be remaining and found in my said dwelling-house at the time of my decease, and all debts due me, save except as hereinafter mentioned, to have and to hold the said dwelling-house, lot of land and premises aforesaid unto her my said niece M. W., her heirs, executors, administrators and assigns, forever. But in case she should die without leaving lawful issue, then to my nieces hereinafter mentioned and their children, being females." Following this there was a residuary gift or bequest to "the daughters of my sisters M. and H., and to the daughters or daughter of my late brother J. and to their children, if any, being daughters." *Held*, that there was nothing in the will to indicate any intention on the part of the testatrix that the gift over should not take effect unless in her lifetime her niece M. W. died without leaving lawful issue, but on the contrary it was to be inferred from the terms of the will that it was the intention of the testatrix that in the case of the death at any time of the said M. W. without leaving lawful issue the other nieces to whom she left the residue of her estate should take the property. *Cowen* v. *Allen* (25 S. C. R. 292); *Fraser* v. *Fraser* (26 S. C. R. 316); *Olivant* v. *Wright* (1 Chan. Div. 348) referred to. (2.) The property in question had been expropriated by the Crown for the purposes of a public work. *Held*, that the suppliant M. T., the devisee under the will, *sub nomine* M. W., was in any event entitled to a life interest in the compensation money, and that she might be paid the interest thereon during the pendency of proceedings to determine the respective rights of all parties interested therein. TRAIL *v.* THE QUEEN. — 98

**WINDING-UP ACT**—*Insolvent bank—Winding up Act—Sale of unrealized assets—Set-off—Funds in hands of Receiver General—Estoppel.*—Where moneys, belonging to the suppliants, had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver General, as unadministered assets in the case of the insolvency of a bank in proceedings under the *The Winding-up Act* (R. S. C. c. 129), and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in

**WINDING-UP ACT**—*Continued.*

respect to the fund :—*Held*, that if it was clear that the matter had been really determined, effect should be given to the estoppel; but that where to give effect to it would work injustice the court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision. In this case there was no estoppel, and a reference to the Registrar was directed to ascertain what proportion of the fund in the hands of the Minister properly belonged to the suppliants. The rule as to estoppel stated by King J. in *Farwell* v. *The Queen* (22 S. C. R. 558) referred to. (2.) One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount which he had at his credit in the bank at the date of its insolvency. It appeared that at the time of the bank's insolvency certain of its debtors had at their credit in the bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands

**WINDING-UP ACT**—*Continued.*

of the Receiver General. *Held*, that the suppliants were not entitled to such indemnity. Hogaboom *v.* The King. — — — — 292

**WORDS AND TERMS**—"*Domicile.*"]

*See* The Rochester and Pittsburg Coal and Iron Co. *v.* "The Garden City." — 34

2——"*Fair cost of production.*"]

*See* The King *v.* British American Bank Note Company. — — — 119

3——"*Owner.*"]

*See* The Rochester and Pittsburg Coal and Iron Co. *v.* "The Garden City." — 34

**WRIT OF EXTENT**—*Garnishee process, Crown seeking same—English Order* 45, *Rule* 1 —*Practice.*—Order 45 of the English Rules respecting garnishee process is not applicable to a proceeding by Information by the Crown. The Crown's remedy is by Writ of Extent. The Queen *v.* Connolly, et al. — — 32

# APPENDIX

## IN THE EXCHEQUER COURT OF CANADA.

### GENERAL ORDER.

In pursuance of the provisions of "The Colonial Courts of Admiralty Act, 1890," and of "The Admiralty Act, 1891" (Canada), it is ordered that the following rule of Court for regulating the practice and procedure (including fees and costs) of the Exchequer Court of Canada in the exercise of its jurisdiction, powers and authority as a Court of Admiralty, shall be in force in the said Court:—

1. Part II of the Appendix to the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, subdivision V, respecting the fees to be taken by the Marshall or Sheriff is hereby amended by adding thereto the following paragraph:—

"Provided always that in the Yukon Territory the Marshal shall be entitled to take the same fees as those from time to time authorized to be taken for similar services by the Sheriff in civil cases in the Yukon Territorial Court, subject in any case of doubt to the direction of the Local Judge in Admiralty for the Yukon Territory Admiralty District."

Dated at Ottawa, this 27th day of January, A.D. 1902.

(Sgd.) GEO. W. BURBIDGE,
*J.E.C.*

## IN THE EXCHEQUER COURT OF CANADA.

### GENERAL ORDER.

In pursuance of the provisions contained in the 25th Section of "The Exchequer Court Act" as amended by 52 Vict. ch. 38, Sec. 2, it is hereby ordered that the

following Rule in respect of the matter hereinafter mentioned shall be in force in the Exchequer Court of Canada.

1. Schedule "Z" to the Rules and Orders of the Exchequer Court of Canada, made and published on the 12th day of December, 1899, respecting the fees to Acting Registrars, is hereby repealed and the following substituted therefor:—

## SCHEDULE Z.

### FEES TO ACTING REGISTRARS.

| | |
|---|---|
| 1. Entering any cause or matter for hearing or trial (to be paid by the Plaintiff or Applicant) | $1.00 |
| 2. For attendance at any hearing or trial, when hearing or trial does not exceed one hour (to be paid by the Plaintiff) | 1.00 |
| And for every hour additional occupied on such hearing or trial (to be paid by the party whose case or motion is proceeding) | 1.00 |
| 3. Fee on order of reference to special referee or referees | 1.00 |
| 4. Administering oath to special referees | 50 |
| 5. Swearing each witness (to be paid by party producing witness) | 20 |
| 6. Marking each Exhibit (to be paid by party filing same) | 10 |
| 7. On issuing each writ of subpoena | 1.00 |
| 8. For copy of any document, per folio of 100 words | 10 |
| 9. Each certificate required from the Acting Registrar (The certificate required under Rule 125 to be paid by Plaintiff) | 1.00 |

Dated at Ottawa, this twelfth day of March A.D. 1902.

(Sgd.) GEO. W. BURBIDGE,
*J.E.C.*